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No. 52385-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MITCHELL EDWARD WHITE,

Appellant,

v.

LINDSAY MARIE SPUCK,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iv-v
A. INTRODUCTION	1
B. STATEMENT OF THE CASE.....	2
(1) <u>White’s Statement of the Case Is a Renewal of His Attacks on Spuck that the Trial Court Largely Discredited, in Violation of RAP 10.3(a)(5)</u>	2
(2) <u>Spuck’s Statement of the Case</u>	4
C. ARGUMENT	10
(1) <u>Standard of Review</u>	10
(2) <u>This Court Should Uphold the Trial Court’s Designation of Spuck as Primary Residential Parent and Decision-maker Because Substantial Evidence Supports the Trial Court’s Findings of Fact, and that It Faithfully Applied those Facts to the Law</u>	11
(a) <u>The Trial Court’s Isolated Reference to the “Friendly Parent Concept” at Trial Was Invited and Harmless Error</u>	12
(i) <u>White Explicitly Invoked the “Friendly Parent Concept” During Closing Argument; Any Error on this Point Was Invited</u>	13
(ii) <u>The “Friendly Parent Concept” Was Not the Primary Basis for the Trial Court’s Decision; Even if the Statement Regarding Spuck’s Ability to Foster a Good Relationship with White Was Error, the Error Was Harmless</u>	14

(b)	<u>Substantial Evidence Supports the Findings of Fact that White Engaged in Abusive Use of Conflict and Lied About Spuck to Disrupt the Parties’ Co-Parenting in an Attempt to Gain Sole Parenting and Decision-making Power</u>	17
(i)	<u>White Concedes that the Trial Court’s Findings Are Supported by Substantial Evidence, Which Should End this Court’s Inquiry</u>	18
(ii)	<u>Even Without White’s Concession, Substantial Evidence Supports the Trial Court’s Finding that White Engaged in Abusive Use of Conflict by Alienating the Child from Spuck with False Statements Made in His Petitions</u>	19
(c)	<u>White’s Legal Arguments Regarding Abusive Use of Conflict Are Without Merit</u>	21
(i)	<u>The Trial Court Was Not Required to Find Actual Harm to the Child, Only the Danger of Harm; Alienation of a Child from a Parent Risks Harm</u>	22
(ii)	<u>Making False and Exaggerated Allegations to a Court in Order to Alienate a Child from a Parent Is Abusive Use of Conflict, Not “Litigation Tactics”</u>	24
(d)	<u>Finding One Party More Credible Is Not Evidence of Bias; Credibility Determinations Are the Purview of the Trial Court</u>	25
(3)	<u>White Should Pay Spuck’s Reasonable Attorney Fees on Appeal</u>	28

(a)	<u>This Court Should Award Fees to Spuck on the Same Grounds as the Trial Court</u>	28
(b)	<u>White’s Intransigence Justifies a Reasonable Attorney Fee Award to Spuck</u>	29
(c)	<u>A Reasonable Attorney Fee Award to Spuck Is Also Warranted Because White’s Appeal Is Frivolous</u>	31
E.	CONCLUSION.....	32

TABLE OF AUTHORITIES

<u>Table of Cases</u>	<u>Page</u>
<u>Washington Cases</u>	
<i>Burrill v. Burrill</i> , 113 Wn. App. 863, 56 P.3d 993 (2002), review denied, 149 Wn.2d 1007 (2003).....	20, 22, 23
<i>Chapman v. Perera</i> , 41 Wn. App. 444, 704 P.2d 1224, review denied, 104 Wn.2d 1020 (1985).....	29, 30, 31
<i>Eide v. Eide</i> , 1 Wn. App. 440, 462 P.2d 562 (1969).....	30
<i>In Matter of Parentage of A.R.</i> , 197 Wn. App. 1080, 2017 WL 714042 (2017).....	26
<i>In re Custody of Stell</i> , 56 Wn. App. 356, 783 P.2d 615 (1989).....	26, 27, 28
<i>In re Marriage of Black</i> , 188 Wn.2d 114, 392 P.3d 1041 (2017).....	26, 27
<i>In re Marriage of Chandola</i> , 180 Wn.2d 632, 327 P.3d 644 (2014), as corrected (Sept. 9, 2014).....	21
<i>In re Marriage of Coy</i> , 160 Wn. App. 797, 248 P.3d 1101 (2011)	11
<i>In re Marriage of Landauer</i> , 95 Wn. App. 579, 975 P.2d 577, review denied, 139 Wn.2d 1002 (1999).....	19, 20, 21
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	10, 11, 13
<i>In re Marriage of Mekuria & Menfesu</i> , 180 Wn. App. 1016, 2014 WL 1289577 (2014).....	26
<i>In re Marriage of Morrow</i> , 53 Wn. App. 579, 770 P.2d 197 (1989).....	29
<i>In re Marriage of Nelson</i> , 62 Wn. App. 515, 814 P.2d 1208 (1991).....	11
<i>In re Marriage of Wendy M.</i> , 92 Wn. App. 430, 962 P.2d 130 (1998).....	29
<i>In re O.E.D.</i> , 189 Wn. App. 1007, 2015 WL 4533848 (2015).....	15
<i>In re Parentage of Schroeder</i> , 106 Wn. App. 343, 22 P.3d 1280 (2001).....	11
<i>Lawrence v. Lawrence</i> , 105 Wn. App. 683, 20 P.3d 972 (2001).....	13, 15
<i>Lindgren v. Lindgren</i> , 58 Wn. App. 588, 794 P.2d 526 (1990), review denied, 116 Wn.2d 1009 (1991).....	29
<i>Matter of Marriage of Farrell-Milosavljevic & Milosavljevic</i> , 4 Wn. App. 2d 1046, 2018 WL 3434706 (2018)	15, 16
<i>Matter of A.F.M.B.</i> , 1 Wn. App. 2d 882, 407 P.3d 1161 (2017)	24
<i>Matter of Marriage of Alexander</i> , 6 Wn. App. 2d 1025, 2018 WL 6181761 (2018).....	26

<i>Matter of Marriage of Greenlee</i> , 65 Wn. App. 703, 829 P.2d 1120, review denied, 120 Wn.2d 1002 (1992).....	29, 31
<i>Matter of Marriage of Langford</i> , 6 Wn. App. 2d 1030, 2018 WL 6333858 (2018).....	26
<i>Matter of Marriage of Rounds</i> , 4 Wn. App. 2d 801, 423 P.3d 895 (2018).....	27
<i>Matter of Marriage of Schneider</i> , 82 Wn. App. 471, 918 P.2d 543, review granted, 130 Wn.2d 1001 (1996).....	11
<i>Mattson v. Mattson</i> , 95 Wn. App. 592, 976 P.2d 157 (1999).....	29
<i>Santos v. Dean</i> , 96 Wn. App. 849, 982 P.2d 632 (1999), review denied, 139 Wn.2d 1026 (2000).....	27
<i>Shibley v. Shibley</i> , 197 Wn. App. 1020, 2016 WL 7490906 (2016), review denied, 188 Wn.2d 1006 (2017).....	25
<i>State v. Barnett</i> , 104 Wn. App. 191, 16 P.3d 74 (2001).....	14
<i>State v. Henderson</i> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	14
<i>State v. Marks</i> , 90 Wn. App. 980, 955 P.2d 406, review denied, 136 Wn.2d 1024 (1998).....	14
<i>Tatham v. Rogers</i> , 170 Wn. App. 76, 283 P.3d 583 (2012).....	26

Statutes

RCW 26.09	<i>passim</i>
RCW 26.09.140	29
RCW 26.09.187(3).....	9, 15, 16
RCW 26.09.191	9, 19, 24
RCW 26.09.191(3)	24
RCW 26.09.191(3)(e)	19
RCW 26.26.140	10, 28, 29
RCW 26.26B.060.....	28

Rules and Regulations

GR 14.1	15, 25, 26
RAP 10.3(a)(5).....	2, 4
RAP 18.1	28
RAP 18.9.....	29, 31, 32

A. INTRODUCTION

Making false allegations to a family law judge to separate a mother from her child is bad enough. Wasting this Court's time and the mother's limited resources by attempting to relitigate those falsehoods on appeal is unconscionable.

In 2017, after almost two years of co-parenting her daughter with her former boyfriend Mitchell White, Lindsay Spuck faced the most terrifying prospect a parent could face: permanent, almost complete separation from her child.

This nightmare was not Spuck's doing. Tired of the difficulties of co-parenting, the father sought to supplant Spuck as a mother with his new wife. To that end, he went to court and made deliberately false, terrible, demeaning, and cruel allegations to a court.

At first, White's deception was successful: he obtained *ex parte* and temporary court orders restraining Spuck from her daughter and giving him almost sole custody. He convinced a guardian ad litem ("GAL") and a mental health evaluator that Spuck was unfit to co-parent, and that he should have primary custody of the child.

However, when Spuck was finally able to present her evidence and testimony to a court of law, White's deception was laid bare. The trial court acknowledged each party's past struggles, but evaluated them based

on their actions and statement in the present. Having viewed every witness and piece of evidence, the trial court concluded that White had exaggerated, stretched the truth, and otherwise used conflict abusively to try to alienate their child from her mother.

Despite having been largely vindicated by the trial court, Spuck's pain was not over. On appeal, White reiterates *the exact same discredited allegations* he made below. He complains that the trial court made a statement that he himself argued it should make. He complains that the trial court was biased against him, and that it should have found Spuck to be less credible than he.

However, tellingly, White no longer claims that he should have almost sole custody. Now, he claims that the trial court abused its discretion by not acknowledging his prior cooperation agreement – an agreement he shattered when he tried to destroy Spuck in false court filings.

This Court should not accept White's invitation to re-try this case. It should uphold the trial court's decision, and award Spuck attorney fees for having to defend his appeal.

B. STATEMENT OF THE CASE

- (1) White's Statement of the Case Is a Renewal of His Attacks on Spuck that the Trial Court Largely Discredited, in Violation of RAP 10.3(a)(5)

Unsurprisingly, White's factual presentation to this Court is heavily tilted toward his own version of events, citing mostly to his own testimony about Spuck's past actions. Br. of App. at 3-9. Throughout his brief he renews his attacks on Spuck. Br. of App. at 3-9, 11-14.

For example, his brief has a section titled "Suicide Attempts", where he repeats his accusations that Spuck repeatedly attempted suicide between January 2014 and May 2015. Br. of App. at 4. Spuck takes responsibility for a suicide attempt in 2015, but the trial court *discredited* White's other claims, that he now makes a central focus of his appeal. CP 297; Br. of App. at 4-8. White also relies on assertions in the GAL report. Br. of App. at 11-14. The trial court considered but rejected that report after weighing all of the evidence at trial: "I have considered the guardian ad litem report and disagree with the findings." CP 298.

Rather than expend time and precious resources re-litigating each of White's renewed attacks, Spuck simply points out that White's allegations were largely found not credible by the trial court. CP 298-99. That court reviewed his accusations in detail and explained how they were not supported by corroborating evidence. *Id.* The trial court specifically found White's trial testimony not credible. *Id.*

Also, White's vicious attacks on Spuck's character should

particularly ring hollow to this Court, given that his legal argument on appeal is that the trial court should have ordered them to continue their historic pattern of cooperative parenting. Br. of App. at 23. If Spuck were so dangerous and unhinged as White paints her, why would his argument be to revert to the cooperative parenting agreement that the parties had previously?

White should not have used his statement of the case to this Court as a vehicle to renew the cruel, false, and discredited attacks he made below. He should have complied with RAP 10.3(a)(5), which requires a “fair” statement of the facts.

(2) Spuck’s Statement of the Case¹

Spuck and White dated beginning in August 2012. CP 292. Their relationship was marked by jealousy, allegations of domestic violence, and issues relating to Spuck’s mental health. *Id.* Their child, A.W., was born in October 2014. In March 2015, they ended their relationship. *Id.* In May of 2015, Spuck had suicidal ideations. CP 294; RP 497-98. She climbed over a railing and sat on the ledge of the Tacoma Narrows Bridge. *Id.* She eventually climbed back over and walked to her car, where she was met by a Washington State Patrol officer. *Id.* She was transported to

¹ Spuck’s statement of the case is taken largely from the trial transcript and the court’s letter decision. The dual citations will hopefully assist the Court in ascertaining the substantial evidence upon which the findings of fact are based.

the hospital and evaluated for mental health concerns. RP 500. She received treatment in the form of group therapy and one-on-one counseling that continued through trial. RP 513, 567, 570, 573.

Despite their initially turbulent interactions, Spuck and White had co-parented their child by agreement from May 2015 through February 2017. CP 292-93; RP 152, 202, 528-31. They struggled with respect to their arrangement, with White accusing Spuck of trying to deny him time and parenting in a way the other did not like, and Spuck frustrated with White's unpredictable work schedule. RP 220-27, 554.

In the second half of 2016, White began dating a woman whom he would later marry, Leslie Swope. CP 292; RP 247-48. Spuck eventually began dating her current significant other, Richard Fujita. CP 293.

Sometime in early 2017, White concluded that Spuck was dangerous and a bad parent, so much so that the situation was an "emergency." CP 93. On February 3, 2017, he petitioned for permanent protection and restraining orders, sole decision-making and only highly restricted time for Spuck. CP 83-87, 92, 121-23.

White made a number of serious allegations to get the trial court to grant his "emergency" petition. He painted her as an out-of-control, mentally unstable, spurned woman who was jealous of his new relationship. CP 92-97. In his account, Spuck was constantly on the verge

of suicide and he was the innocent victim of her mania. *Id.* He accused Spuck of subjecting the child to “emotional abuse.” CP 93. He alleged that Spuck was suicidal, a stalker, “manic,” and a threat to the child. CP 83-87, 92-97, 121-23, 293. He painted Spuck as out-of-control and dangerous. CP 92-97.

He also filed a “supplemental declaration” chronologically listing the allegations upon which his petition was based. CP 121-23. There was a marked difference in his allegations from before May 2015 and after. *Id.* Before May 2015, he listed a number of incidents that he claimed were suicide attempts. CP 121-22. From May 2015 to February 2016, he lists no incidents. CP 122. Beginning in February 2016, the incidents are largely about disputes over the parties’ agreed parenting plan:

In 2016, February 7, Lindsay failed to follow the parenting agreement and refused to turn over [the child] to me.

...

From March until June [2016] I was deployed. Lindsay ignored me and allowed me very little contact with [the child].

...

During Thanksgiving [2016], Lindsay grabbed [the child] out of my arms and stood behind my car demanding we talk and stating I cannot talk to her family.

...

On December 31 [2016], Lindsay stated she would not be able to watch [the child] because she was working, however my friends saw her at a nightclub that night.

CP 122-23.

Five days after White filed his supplemental declaration, a commissioner entered orders temporarily granting White's requests. CP 126-148. White was granted total custody of the child, except for every other weekend when she was with Spuck. CP 131. During the week, Spuck was allowed to see the child only from 5:00 p.m. to 7:30 p.m., and then only with White present. *Id.* Spuck was restrained, and her time with the child was supervised. CP 126-48, 293.

The parties proceeded toward trial on White's petition. Both agreed to undergo psychological evaluations by Dr. Mark Whitehill. *Id.* Although he concluded that both parties suffered from mental health issues, he was much more critical of Spuck than of White. CP 7-12, 294. Both parties underwent counseling recommended by Dr. Whitehill, although the trial court found contradictions between White's testimony about that process and his counselor's notes. CP 294.

Daria Spartan was appointed as GAL. CP 293-94. The GAL concluded that White should be the primary residential parent, based largely on Dr. Whitehill's conclusions about the mental status of each party. CP 7-14. She focused in particular on what she perceived as Spuck's "attention-seeking" behavior of taking the child to the doctor too

often. *Id.* She based her belief that Spuck was responsible for these appointments on White's representations. CP 8 (list of appointments is "as reported by father."). She recommended counseling for both parents. CP 15.

At trial, eleven witnesses testified, including the parties, the GAL, medical providers, and family members. CP 293. Spuck's counselor disagreed with Dr. Whitehill's evaluation of Spuck's mental health and fitness as a parent. CP 297; RP 296. The GAL admitted that one of the central concerns of her report – White's allegations that Spuck took the child to the doctor too often as an attention-seeking ploy – was actually false. RP 103, 127. In fact, *all but five* of the 37 medical appointments of which White complained were attended by White and his wife, not Spuck. RP 127.

The trial court found Spuck's testimony largely credible. CP 296-97. The decision pointed out a number of inconsistencies between White's testimony and other evidence, and found him largely not credible. CP 295-99. In particular, the trial court found that most of White's allegations about Spuck were "exaggerated, purposely misconstrued, or simply untrue." CP 296. In short, the trial court concluded that "Mr. White's version of events is not supported by the evidence." CP 297.

Having heard and evaluated all the witnesses, the trial court entered a written letter decision outlining the procedural history, facts adduced at trial, and conclusions. CP 292-300. The trial court recited and applied each element of RCW 26.09.187(3) to those facts. *Id.* at 295-98. The court found both parents to have good relationships with the child. CP 295.

The trial court determined that Spuck was the more candid and credible witness of the two parties. CP 295-99. The court concluded that when White sought court orders in 2017, he exaggerated his allegations about Spuck's mental health. CP 299. The court noted those supposed "emergency" concerns were largely based on incidents from almost two years prior. *Id.* The trial court inferred that White had hoped to end the parties' co-parenting arrangement and supplant Spuck with his own wife as the child's mother. *Id.*

The trial court concluded that White did not respect Spuck's role as the child's mother and had ended the parties' co-parenting arrangement through abusive use of conflict under RCW 26.09.191. *Id.* The court found that this behavior – which resulted in temporary orders severely limiting the child's time with her mother – alienated the child from Spuck. *Id.* The court concluded that due to the level of conflict and White's

“refusal to co-parent,” Spuck should be the primary residential parent and major decision-maker “until co-parenting counseling occurs.” *Id.*

Because White had instigated the litigation under false pretenses and engaged in abusive use of conflict, the trial court also ordered that White pay part of Spuck’s attorney fees at trial under RCW 26.26.140.² *Id.* at 300.

C. ARGUMENT

(1) Standard of Review

This Court reviews the trial court's rulings on residential provisions in a parenting plan for an abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 52–53, 940 P.2d 1362 (1997). A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Littlefield*, 133 Wn.2d at 46–47. A decision is manifestly unreasonable if, based on the facts and the applicable legal standard, the decision is outside the range of acceptable choices. *Littlefield*, 133 Wn.2d at 47. A decision is based on untenable grounds if the findings are not supported by the record. *Littlefield*, 133 Wn.2d at 47. Finally, a decision is based on untenable reasons if the court applies the wrong legal standard or the facts do not

² Effective January 1, 2019, RCW 26.26.140 was recodified at RCW 26.26B.060.

establish the legal requirements of the correct standard. *Littlefield*, 133 Wn.2d at 47.

Because of the trial court's unique opportunity to observe the parties, the appellate court should be "extremely reluctant to disturb child placement dispositions." *In re Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280, 1284 (2001), citing *Matter of Marriage of Schneider*, 82 Wn. App. 471, 476, 918 P.2d 543, review granted, 130 Wn.2d 1001 (1996), overruled on other grounds, *Littlefield*, 133 Wn.2d at 57.

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

- (2) This Court Should Uphold the Trial Court's Designation of Spuck as Primary Residential Parent and Decision-maker Because Substantial Evidence Supports the Trial Court's Findings of Fact, and that It Faithfully Applied those Facts to the Law

White argues that instead of the plan it entered, the trial court should have continued the parties' "historical joint custody arrangement." Br. of App. at 19, 34. He claims that the trial court would have ordered a 50/50 plan "if not for its finding" that Spuck was the "friendly parent." *Id.* at 19-21. He then (somewhat contradictorily) admits that the trial court's

true reason for its decision – his attempt to interfere with Spuck’s relationship with the child through abusive use of conflict – is not supported by substantial evidence. He relies on evidence the trial court declined to credit, to renew his attacks on Spuck’s character and mental health, attacks that failed to persuade the trial court to rule in his favor. Br. of App. at 3-9, 23, 25-26.

This Court should affirm the trial court’s considered and well-supported decision, particularly when White concedes many of the material facts the trial court found.

(a) The Trial Court’s Isolated Reference to the “Friendly Parent Concept” at Trial Was Invited and Harmless Error

White argues that the trial court’s ruling should be reversed because of a single reference to Spuck as “the parent most likely to foster a relationship” between the child and White. Br. of App. at 19-21; citing CP 299.³ He argues that this “friendly parent concept” has been rejected in Washington as a consideration for establishing a parenting plan. *Id.*

³ White cites to “Decision at 12,” Br. of App. at 19, but the decision in the record is 9 pages long. White explains that the actual decision had 14 pages, and that he was going designate it again. Br. of App. at 1. He did so, but filed the supplemental designation at the same time he filed his brief. The new clerk’s papers index has not yet issued. However, the decision that appears at CP 292-300 appears to be the whole decision, and Spuck can find no reference that White makes to pages 1-4. Spuck simply refers to the decision located at CP 292-300 using its pagination in the clerk’s papers.

Spuck acknowledges that this Court has ruled the “friendly parent concept” – which this Court has described as being the finding that one parent will foster the child’s relationship with the other – is not a proper basis to establish a parenting plan. *Lawrence v. Lawrence*, 105 Wn. App. 683, 687, 20 P.3d 972 (2001).⁴

However, the trial court’s reference to the friendly parent concept was both invited by White and did not form the basis of the trial court’s decision.

(i) White Explicitly Invoked the “Friendly Parent Concept” During Closing Argument; Any Error on this Point Was Invited

However, if reference to Spuck’s friendly parenting was error, the error was invited. White explicitly invoked the “friendly parent concept”

⁴ With great respect, this Court might want to revisit *Lawrence*, as its holding on the friendly parent concept appears contrary to *In re Littlefield*, the authority upon which *Lawrence* ostensibly relies. In *Littlefield*, our Supreme Court noted that our Legislature has declined to adopt a rule stating that “frequent and continuing contact with both parents is in the best interests of the child.” *Littlefield*, 133 Wn.2d at 48-49. In other words, the Supreme Court in *Littlefield* was acknowledging that the law has **prohibited forcing parents** to foster good relationships with non-custodial parents. *Id.* In *Lawrence*, this Court described the “friendly parent concept” to be the concept that “primary residential placement is awarded to the parent most likely to foster the child’s relationship with the other parent.” However, it did not cite to any Washington authority for this proposition. 105 Wn. App. at 687. The *Lawrence* court then cited *Littlefield* for the proposition that our Legislature has declined to adopt the “friendly parent concept” although neither the term “friendly parent concept” nor the definition of that term created in *Lawrence* appears *anywhere* in *Littlefield*.

This Court’s description of the “friendly parent concept” as awarding primary residential placement existed nowhere in Washington law before *Lawrence*, and the *Lawrence* iteration of the concept appears contrary to *Littlefield*. It certainly runs contrary to our public policy about protecting the best interests of the child, which should encourage parents to foster good relationships between the child and the other parent.

in his closing argument, advocating to the trial court that it should rule in his favor on the same grounds he now challenges on appeal:

Mitchell White has fostered the child's relationship with ... Ms. Spuck's side of the family, even after she was going through the darkest times. He was invited to family functions, and he is willing to take the child over to those. He kept an ongoing relationship with Ms. Spuck's mother, who testified. So he is watching out for the child's relationship with this other side of the family as well.

RP 883 (emphasis added).

The doctrine of invited error prohibits a party from setting up an error at trial and then challenging it on appeal. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). The Court deems a potential error waived if the party asserting error materially contributed thereto, *State v. Barnett*, 104 Wn. App. 191, 200, 16 P.3d 74 (2001). No party is allowed to complain of an error that he or she induced the trial court to commit, *State v. Marks*, 90 Wn. App. 980, 987, 955 P.2d 406, *review denied*, 136 Wn.2d 1024 (1998).

If the trial court erred, it was invited by White and any potential error is deemed waived.

- (ii) The “Friendly Parent Concept” Was Not the Primary Basis for the Trial Court’s Decision; Even if the Statement Regarding Spuck’s Ability to Foster a Good Relationship with White Was Error, the Error Was Harmless

White argues that the trial court would have ordered a continuation of the parties' joint custody arrangement "if not for its finding" that Spuck would foster the relationship between the child and White, but that White likely would not reciprocate until he learned how better to co-parent. Br. of App. at 19-21.

It is certainly true that if a trial court relies on the "friendly parent concept" as the basis for fashioning a parenting plan, that reliance is erroneous under *Lawrence*. However, most cases in which reversal has been granted tend to be those where the trial court not only invoked the concept, but failed to address the statutory factors in its decision. *See, e.g., Lawrence*, 105 Wn. App. at 687 (trial court did not recite reasons for decision in record); *In re O.E.D.*, 189 Wn. App. 1007, 2015 WL 4533848 (2015)⁵ ("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."); *Matter of Marriage of Farrell-Milosavljevic & Milosavljevic*, 4 Wn. App. 2d 1046, 2018 WL 3434706 at *8 (2018)⁶ (in addition to failing to apply RCW 26.09.187(3) factors, trial court's decision "repeatedly stating" and

⁵ Cited for the Court's consideration only under GR 14.1.

⁶ Cited for the Court's consideration only under GR 14.1.

“emphasizing” one parent’s ability to foster relationship between child and other parent was abuse of discretion).

White’s characterization – that the trial court would not have reached its decision “if not for” the friendly parent concept – is misleading. The trial court described and applied each of the RCW 26.09.187(3) factors in its decision. CP 295-98. It listed each factor and applied the relevant facts. *Id.* Nowhere in the course of applying the RCW 26.09.187(3) factors did the court make reference to the friendly parent concept. *Id.* Instead, the friendly parent language is one sentence added after the conclusion that White’s abusive use of conflict rendered co-parenting temporarily contrary to the child’s best interests. CP 299.

The trial court made clear that, after applying the statutory factors, its concern about the child’s best interests was based on White’s abusive use of conflict and alienation attempts, not the friendly parent concept:

Under different circumstances, the Court would continue the parties’ historical joint custody arrangement without question. However, Mr. White’s presentation of this case amounts to an abusive use of conflict. He manufactured an emergency using information that he had been aware of for years concerning Ms. Spuck’s mental health. He obtained ex-parte relief placing [the child] with him based upon that information, and alienated Ms. Spuck by supplanting her role in [the child’s] life with his new wife. During testimony he displayed anger, controlling behavior, disdain [sic], a lack of compassion, and a lack of credibility. The Court has no confidence that he would ever promote a

relationship between [the child] and her mother, or her mother's family.

Hence, the court finds that it is in [the child's] best interests to be placed in the primary care of her mother at this time.

CP 299 (emphasis added). The next sentence refers to the "friendly parent concept" as this Court has defined it. *Id.* But there is no indication that Spuck's ability to foster good relationships with White, rather than White's abusive use of conflict and the best interests of the child, was the basis for the trial court's decision.

The trial court's comment about Spuck's friendly parenting appears to be an afterthought included after the trial court had already reached a decision. *Id.* Nothing in the ruling indicates it was the *basis* for the trial court's decision. This Court should affirm on this ground.

(b) Substantial Evidence Supports the Findings of Fact that White Engaged in Abusive Use of Conflict and Lied About Spuck to Disrupt the Parties' Co-Parenting in an Attempt to Gain Sole Parenting and Decision-making Power

White argues that the trial court's finding that he engaged in abusive use of conflict is not based on substantial evidence. Br. of App. at 23. In fact, he claims that "[n]o such evidence exists" of his abusive use of conflict.

However, immediately after claiming that no evidence supports the trial court's decision, White *concedes* that he engaged in conflict, and cites

the trial court's decision at 3-7. Br. of App. at 23. He admits "this was *mutual combat*, as the numerous calls to police by both parties, witnesses, etc. make plain." *Id.* (emphasis added). He also concedes that the trial court's findings regarding the conflict are supported by evidence. *Id.*

White's real argument on abusive use of conflict is that both he and Spuck engaged in it, and that this Court should find Spuck was equally culpable. Br. of App. at 23. He asks this Court to re-weigh the evidence of each party's conduct and reverse the trial court's ruling to favor him. *Id.* at 22-29.

White's invitation for this Court to re-weigh the evidence and reverse the trial court's order to favor him on disputed fact issues should be declined.

(i) White Concedes that the Trial Court's Findings Are Supported by Substantial Evidence, Which Should End this Court's Inquiry

White's concession that he engaged in conflict, and his *reliance* on the trial court's factual findings supporting his abusive use of conflict, should end this Court's inquiry into whether substantial evidence supports the trial court's finding that he engaged in abusive use of conflict.

(ii) Even Without White's Concession, Substantial Evidence Supports the Trial Court's Finding that White Engaged in Abusive Use of Conflict by Alienating the Child from Spuck with False Statements Made in His Petitions

White contends that the trial court should not have made Spuck the primary residential parent, and recites a litany of factual assertions about her character, actions, and fitness. Br. of App. at 22-29. He renews his attacks – which the trial court largely rejected – on Spuck's mental health and fitness. *Id.* He cites primarily Dr. Whitehall's and the GAL's opinions about her. Br. of App. at 23-24. He denies that there is evidence that he engaged in abusive use of conflict. *Id.* White argues that it is “confusing” whether or not the trial court made Spuck the primary residential parent because of his abusive use of conflict. Br. of App. at 22. He avers that the trial court did not consider material factors in making its determination, contrary to the decision in *In re Marriage of Landauer*, 95 Wn. App. 579, 975 P.2d 577, *review denied*, 139 Wn.2d 1002 (1999).

RCW 26.09.191(3)(e) allows a trial court to consider whether a parent has engaged in “abusive use of conflict” when crafting a parenting plan. Although the Parentage Act does not specifically define the phrase “abusive use of conflict,” its meaning is illuminated by cases interpreting RCW 26.09.191(3)(e). Examples of abusive use of conflict Washington

courts have considered include: exposing children to or involving them in parental disputes, including using the child to manipulate the other parent or “coaching” the child to make a false report of abuse. *Burrill v. Burrill*, 113 Wn. App. 863, 871, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007 (2003).

Here, the trial court concluded based on substantial evidence that White abused the court system under false pretenses, creating conflict that alienated the child from Spuck. CP 299. He “manufactured an emergency using information that he had been aware of for years concerning Spuck’s mental health.” *Id.* The evidence of this was in White’s own court filings, as well as the trial court’s assessment of White’s angry, controlling, disdainful, and compassionless demeanor at trial. CP 83-87, 92-97, 121-123, 293, 299. White’s attempts at separating the child from Spuck were initially successful. CP 126-48. Spuck then had to engage in a long bout of litigation with White to exonerate herself and get back residential time with her child.

The one-sentence reference from *Landauer*, upon which White relies for the proposition that the trial court abused its discretion, is inapposite. In that case, the trial court valued land in a marital property division. *Landauer*, 95 Wn. App. at 583. It accepted the valuation of one party’s appraiser, even though it was undisputed that the appraiser did not

account for a federal restraint on alienation, which seriously decreased the property's value. *Id.* This Court reversed the valuation, stating that the restraint on alienation was an undisputed material factor that the trial court did not have "discretion" to disregard. *Id.* at 584.

Here, unlike with the appraiser's testimony in *Landauer*, the trial court was not obligated to credit White's denials. They were not undisputed material "facts" like the appraisal evidence. They were evidence that the trial court had discretion to credit or discredit.

Ultimately, White's complaint that the trial court credited Spuck and found him not credible is not a proper basis for this Court to reverse the trial court's decision.

(c) White's Legal Arguments Regarding Abusive Use of Conflict Are Without Merit

White has interwoven with his challenges to the findings of fact two legal arguments regarding the trial court's decision on abusive use of conflict. First, he argues that the trial court failed to find that his abusive use of conflict harmed the child, citing *In re Marriage of Chandola*, 180 Wn.2d 632, 327 P.3d 644 (2014), *as corrected* (Sept. 9, 2014). Br. of App. at 22. Second, he claims that his "litigation tactics" are an improper basis for the finding of abusive use of conflict. Br. of App. at 24, 28.

(i) The Trial Court Was Not Required to Find Actual Harm to the Child, Only the Danger of Harm; Alienation of a Child from a Parent Risks Harm

In order to restrict a parent's role under a parenting plan, the trial court must find, *inter alia*, that the abusive use of conflict by the restricted parent creates a danger of serious damage to the children's psychological development. *Burrill*, 113 Wn. App. at 871. However, evidence of actual damage is not required. *Id.* at 872. “Rather, the required showing is that a danger of psychological damage exists.” *Id.*

In *Burrill*, the Court found substantial evidence of alienation when the “strenuously opposed any contact by both children with their father, supervised or otherwise, despite the fact that they were well bonded and enjoyed being with him.” *Id.*

Here, the trial court found that White engaged in the same alienating behavior as the *Burrill* appellant: he strenuously opposed Spuck’s contact with the child. In fact, he succeeded in separating them temporarily by obtaining “emergency” orders. CP 126-48.

Substantial evidence supports this finding in the form of White’s court filings, in which he sought a protective order claiming that the child was in danger from Spuck and that it was “an emergency.” CP 87, 93. He accused Spuck of “emotional abuse” of the child as grounds for taking

almost sole custody of the child. CP 107-08, 111-12. However, his allegations were largely based on incidents that had occurred more than 18 months prior to the filing, Spuck's more recent behavior was described as angry behavior surrounding their attempts to communicate and follow their agreed parenting plan. CP 122 (from February-December 2016, allegations included failing to follow the parenting agreement, "demanding" communication, and "ignoring" him). The last allegation in White's declaration in support of his petition to take almost sole custody of the child supposedly occurred on December 31, 2016. CP 123. He claimed that Spuck stated she could not watch the child because she was working, "however my friends saw her at a nightclub that night." *Id.* A month later, on February 3, 2017, White filed his "emergency" petition claiming that Spuck's mental health and abuse was a danger to the child. CP 84.

It is also notable that even if these allegations might support his attempts to interfere with Spuck's relationship with the child, the trial court found that White lacked credibility, and that his representations were exaggerated or outright false, and were part of an attempt to supplant Spuck as a parent. CP 299.

In *Burrill*, this Court rejected the exact same argument White raises here: that the trial court found he and Spuck had good relationships

with the child, and that this is conclusive evidence that he did not engage in abusive use of conflict. *Id.* at 871; Br. of App. at 22. This Court should once again reject this spurious argument.

(ii) Making False and Exaggerated Allegations to a Court in Order to Alienate a Child from a Parent Is Abusive Use of Conflict, Not “Litigation Tactics”

White claims that “it is not abusive to litigate disputes with your child’s other parent.” Br. of App. at 24. He claims that there was no evidence that his success at obtaining temporary restraining and protection orders harmed the child. *Id.* at 25. He argues that “the court certainly cannot use its disapproval of [his] litigation strategy to punish him because that is a purpose at odds with the best interest of the child.” *Id.* at 28.

White’s suggestion that his abusive use of conflict is immunized because he used the judicial system was recently rejected by this Court in *Matter of A.F.M.B.*, 1 Wn. App. 2d 882, 407 P.3d 1161 (2017) (published in part). In that case, the trial court’s order granting a modification petition deleted a parenting plan restriction under RCW 26.09.191(3). That .191(3) restriction in the original parenting plan was based on a finding of abusive use of conflict “*including extraordinary litigation* over the period of a year and a half up to trial.” *Id.* at 890 (emphasis added).

This Court reversed the trial court's elimination of the .191(3) restriction, because the reason for doing so was not explained.

Although it is only persuasive unpublished authority, guidance on this very issue also comes from *Shibley v. Shibley*, 197 Wn. App. 1020, 2016 WL 7490906 (2016), *review denied*, 188 Wn.2d 1006 (2017).⁷ In that case a trial court's finding that a father's "litigation tactics" constituted abusive use of conflict were upheld by this Court. *Id.* at *3. The "litigation tactics" of concern to this Court included his attempts to "belittle[] Tina's mental health... ." *Id.*

In short, White's legal argument that his actions were nothing more than permissible "litigation tactics" that the trial court was forbidden from considering is without basis in law.

(d) Finding One Party More Credible Is Not Evidence of Bias; Credibility Determinations Are the Purview of the Trial Court

White eventually reveals his true disagreement with the trial court's decision: not a lack of substantial evidence, but perceived unfairness and bias against him. Br. of App. at 24-34. He complains that the trial court should have weighed the evidence and tilted its decision toward him instead of Spuck: "[T]he trial court tended to discount Spuck's contributions to the conflict, *some of which may fall within its fact-finding*

⁷ Cited in accordance with GR 14.1.

authority, but which overall appears unfair... .” *Id.* at 24. White notes that Spuck also engaged in conflict, and the trial court should have focused more on that fact, and less on his own conduct. *Id.* Throughout his brief, as explained *supra*, he relies largely on evidence that the trial court weighed and either found not credible or less persuasive than other evidence. *Id.* at 24-34. For supporting authority, he cites *In re Marriage of Black*, 188 Wn.2d 114, 392 P.3d 1041 (2017) and *In re Custody of Stell*, 56 Wn. App. 356, 783 P.2d 615 (1989). *Id.* at 33.

It is not unusual for litigants, particularly those in family law cases, to claim that the judge who ruled against them was unfair or biased. *See, e.g., Matter of Marriage of Langford*, 6 Wn. App. 2d 1030, 2018 WL 6333858 at *2 (2018); *Matter of Marriage of Alexander*, 6 Wn. App. 2d 1025, 2018 WL 6181761 at *2 (2018); *In Matter of Parentage of A.R.*, 197 Wn. App. 1080, 2017 WL 714042 (2017);⁸ *In re Marriage of Mekuria & Menfesu*, 180 Wn. App. 1016, 2014 WL 1289577 (2014).⁹

All litigants are guaranteed the right to an impartial judge. *Tatham v. Rogers*, 170 Wn. App. 76, 93, 283 P.3d 583 (2012). Litigants must submit proof of actual or perceived bias to support a claim of appearance

⁸ Cited in accordance with GR 14.1.

⁹ Cited in accordance with GR 14.1.

of impartiality. *Santos v. Dean*, 96 Wn. App. 849, 857, 982 P.2d 632 (1999), *review denied*, 139 Wn.2d 1026 (2000).

However, the fact that a court finds one party credible and the other not credible is not in itself evidence of bias or unfairness. *Matter of Marriage of Rounds*, 4 Wn. App. 2d 801, 808, 423 P.3d 895 (2018) (“A finding that a party lacks credibility does not mean the judge is biased.”). This Court recounted the trial court’s findings in *Rounds*, which it concluded were evidence that the judge was not biased:

Judge North's findings reflect a careful and objective assessment of the strengths and weaknesses of the two parents. He described both as “good parents” in his oral ruling and said, “They both have a real history of doing well with the kids, being engaged with them, paying a lot of attention to them, having a good, bonded relationship with them, and spending time with them.” The current record contains no indication of partiality.

Id.

Rounds resolves the issue of whether the decision here should be overturned due to judicial bias or unfairness. This Court’s description of Judge North’s decision in *Rounds* is virtually indistinguishable from the trial court’s decision here. There was no impermissible bias or unfairness.

Black and *Stell* do not mandate a different result. In *Black*, the judge explicitly considered a parent’s sexual orientation as “the primary reason for concluding” that the other parent would be better suited to address the children’s needs. *Black*, 188 Wn.2d at 127. This

impermissible bias “permeated” the ruling. *Id. Stell* involved exactly the same issue: impermissibly favoring one parent over another because of sexual orientation, and thereby favoring one particular set of religious beliefs. *Stell*, 188 Wn.2d at 136.

This Court should affirm. In order to overturn the trial court’s findings of fact, White was required to demonstrate to this Court that they are not supported by substantial evidence. He failed to do so. In order to overturn the trial court’s conclusions of law, White was required to demonstrate to this Court that the trial court erred. He failed to do so. He showed no evidence of bias or unfairness. The only part of these proceedings that were unfair were White’s false allegations against Spuck, and his attempts to alienate Spuck from her child.

(3) White Should Pay Spuck’s Reasonable Attorney Fees on Appeal

RAP 18.1 provides for an award of attorney fees if authorized by applicable law. There are three such grounds here: the common law, statutory, and court rule.

(a) This Court Should Award Fees to Spuck on the Same Grounds as the Trial Court

The trial court ordered White to pay \$30,000 of Spuck’s attorney fees at trial citing RCW 26.26B.060, which was formerly codified at RCW 26.26.140. CP 300. White has not appealed from that decision.

If a party prevails on appeal and was entitled to attorney fees at trial, the party may seek fees on appeal. *Lindgren v. Lindgren*, 58 Wn. App. 588, 599, 794 P.2d 526, 533 (1990), *review denied*, 116 Wn.2d 1009 (1991). RCW 26.26.140, unlike RCW 26.09.140, does not require consideration of need or ability to pay in making an award. Thus, there is no requirement to file an affidavit of financial need. *In re Marriage of Wendy M.*, 92 Wn. App. 430, 441, 962 P.2d 130 (1998).

This Court should award Spuck her reasonable attorney fees on appeal.

(b) White's Intransigence Justifies a Reasonable Attorney Fee Award to Spuck

Intransigence is a basis for awarding fees on appeal, separate from RCW 26.09.140 (financial need) or RAP 18.9 (frivolous appeals). *Chapman v. Perera*, 41 Wn. App. 444, 455–56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985). The financial resources of the parties need not be considered when intransigence by one party is established. *Matter of Marriage of Greenlee*, 65 Wn. App. 703, 711, 829 P.2d 1120, *review denied*, 120 Wn.2d 1002 (1992); *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). Thus, no affidavit of financial need is required to make the award. *Mattson v. Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157, 165 (1999). Moreover, a party's intransigence in

the trial court can also support an award of attorney fees on appeal. *Eide v. Eide*, 1 Wn. App. 440, 445–46, 462 P.2d 562 (1969); *Chapman*, 41 Wn. App. at 456.

Here, White was intransigent in the trial court. CP 299. His litigation tactics were assessed by the trial court as abusive use of conflict. White's arguments on appeal themselves continue that same intransigence. White's brief is mostly challenges to findings of fact that have ample support in the record. He either ignores evidence, denies that his own testimony was found to be not credible, or improperly disregards adverse evidence with no articulable legal ground for doing so. Spuck's counsel was required to answer these pointless challenges to credibility determinations which this Court is not empowered to overturn.

White's intransigence continues on appeal. Although he has the right to appeal, this Court should take note that White did not need to continue his litigious ways to get the result he seeks. He was given a much simpler, less expensive option for obtaining the same relief: attending counseling and voluntarily co-parenting. CP 312. The trial court ordered that White simply needed to participate in co-parent counseling and, on recommendation from the counselor, he could petition the trial court for 50/50 parenting and joint decision making:

If Father agrees to participate in co-parent counseling with Mother, as recommended by Dr. Whitehill, he may petition the Court to re-establish a week-on/week-off co-parenting schedule and joint decision making, upon recommendation of the co-parenting counselor.

CP 312.

Finally, White used his right of appellate review to once again torment, belittle, impugn, and deeply injure Spuck. At the same time, he faults the trial court for not acknowledging his alleged desire to cooperate with Spuck. Br. of App. at 35. He claims that he wants the parties to “move forward together to do their very best by their daughter.” *Id.*

Spuck should not be forced to pay for White’s continued intransigence and abuse of the legal process. This Court should award Spuck reasonable attorney fees on appeal.

(c) A Reasonable Attorney Fee Award to Spuck Is Also Warranted Because White’s Appeal Is Frivolous

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

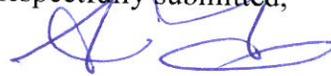
This Court should award Spuck fees based on RAP 18.9. White's appeal is frivolous. He *invited* his only even colorable legal argument – the trial court's passing reference to Spuck's superior ability to foster a good relationship with him. His brief is based on a denial of the facts in the record, and a request that this Court re-weigh the record and re-try this case, which it may not do.

E. CONCLUSION

White's appeal was used as simply another opportunity to falsely accuse and demean Spuck with discredited accusations. The trial court's findings are based on substantial evidence, and the parenting plan is well within its discretion. The plan complies with RCW 26.09 and protects the best interests of the child. This Court should award Spuck her reasonable attorney fees for defending against White's appeal.

DATED this 3rd day of March, 2019.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Brief of Respondent* in Court of Appeals, Division II Cause No. 52385-0-II to the following:

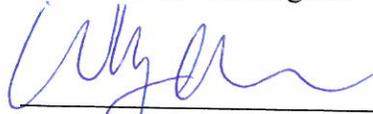
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 1, 2019, at Seattle, Washington.



Whitley Gillins, Legal Assistant
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TALMADGE/FITZPATRICK/TRIBE

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