

FILED

No. 30011-1-III

APR 13 2012

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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In re the Marriage of:

STEPHEN HARRISON,

Appellant,

and

KAREN MACKICHAN (f/k/a HARRISON),

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR YAKIMA COUNTY
THE HONORABLE C. JAMES LUST

BRIEF OF RESPONDENT

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

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Attorneys for Respondent

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RESTATEMENT OF FACTS	1
A.	Background.....	1
B.	The Husband Is A Dentist. The Wife Is A Doctor. Both Own Their Own Practices. The Husband Works Less Than Full Time And Earns Less Than The Wife, Who Works More Than Full Time.....	2
C.	Both Parties Were Involved Parents During The Marriage.....	4
D.	After Several Attempts At Counseling, The Parties Filed A Joint Petition For Dissolution In 2006.....	6
	1. The Husband Was Verbally Abusive, Controlling, And Financially Reckless.	6
	2. The Husband Complained That The Wife Was Depressed And Drank Excessively.	7
E.	The Husband Alienated The Children From The Wife. The Guardian Ad Litem Recommended That The Husband And Wife Be Designated As The Primary Residential Parent Of The Younger Son And Daughter, Respectively.....	8
F.	After A Four-Day Trial, The Trial Court Divided The Parties' Assets Equally, Denied The Husband's Request For Spousal Maintenance, And Adopted The Guardian Ad Litem's Recommendations On Parenting.....	12

III.	ARGUMENT	14
	A. The Trial Court Did Not Abuse Its Discretion In Dividing The Property Equally Between Parties Who Both Earn Substantial Incomes.	14
	B. The Trial Court Did Not Abuse Its Discretion In Its Valuation Of Certain Assets Awarded To The Wife.....	16
	1. The Trial Court Did Not Abuse Its Discretion In Finding That The Wife's Bank Accounts Had No Value When There Is No Evidence That The Community Funds Allegedly Held In Those Accounts More Than Four Years Earlier Had Ever Existed Or Existed At The Time Of Trial.	17
	2. The Trial Court Did Not Abuse Its Discretion In Valuing The Wife's Medical Practice Based On Evidence Presented Prior To The Court's Ruling.....	24
	C. The Trial Court Did Not Abuse Its Discretion In Not Awarding Maintenance To The Husband, A Dentist, Who Earns More Than \$160,000 Annually.	28
	D. The Trial Court's Designation Of The Mother As The Primary Residential Parent Of The Parties' Daughter Was Within Its Discretion.....	33
	1. The Trial Court Did Not Abuse Its Discretion In Designating The Mother As The Primary Residential Parent Of The Younger Daughter.....	34

a.	The Trial Court Properly Considered The Guardian Ad Litem's Recommendations And Based Its Decision On Its Own Consideration Of The Evidence And Observation Of The Parties.....	35
b.	The Trial Court Was Not Bound To Designate The Father As The Primary Residential Parent Because He Allegedly Engaged In More Day To Day Parenting Tasks During The Marriage.	37
2.	The Trial Court Did Not Abuse Its Discretion In Declining To Interview The Children.....	39
E.	The Father's Challenge To The Trial Court's Award Of Post-Secondary Support Is Waived, And In Any Event The Decision Was Well Within The Court's Discretion In Light Of The Evidence Presented.....	42
IV.	CONCLUSION.....	45

TABLE OF AUTHORITIES

STATE CASES

<i>Christopher v. Christopher</i> , 62 Wn. 2d 82, 381 P.2d 115 (1963)	39
<i>Custody of Brown</i> , 153 Wn.2d 646, 105 P.3d 991 (2005).....	36
<i>Demelash v. Ross Stores, Inc.</i> , 105 Wn. App. 508, 20 P.3d 447, <i>rev. denied</i> , 145 Wn.2d 1004 (2001).....	44
<i>Dependency of K.R.</i> , 128 Wn.2d 129, 904 P.2d 1132 (1995)	23
<i>Edwards v. Edwards</i> , 47 Wn.2d 224, 287 P.2d 139 (1955)	30
<i>Fernando v. Nieswandt</i> , 87 Wn. App. 103, 940 P.2d 1380, <i>rev. denied</i> , 133 Wn.2d 1014 (1997).....	36
<i>Ghaffari v. Dep't of Licensing</i> , 62 Wn. App. 870, 816 P.2d 66 (1991), <i>rev. denied</i> , 118 Wn.2d 1019 (1992)	26-27
<i>Lindblad v. Boeing Co.</i> , 108 Wn. App. 198, 31 P.3d 1 (2001)	44
<i>Marriage of Brewer</i> , 137 Wn.2d 756, 976 P.2d 102 (1999).....	15
<i>Marriage of Burrill</i> , 113 Wn. App. 863, 56 P.3d 993 (2002), <i>rev. denied</i> , 149 Wn.2d 1007 (2003).....	36
<i>Marriage of Daubert and Johnson</i> , 124 Wn. App. 483, 99 P.3d 401 (2004)	43

Marriage of Foley , 84 Wn. App. 839, 930 P.2d 929 (1997).....	29, 31
Marriage of Gillespie , 89 Wn. App. 390, 948 P.2d 1338 (1997)	16-17
Marriage of Kaseburg , 126 Wn. App. 546, 108 P.3d 1278 (2005)	21
Marriage of Luckey , 73 Wn. App. 201, 868 P.2d 189 (1994)	31
Marriage of Mathews , 70 Wn. App. 116, 853 P.2d 462, <i>rev. denied</i> , 122 Wn.2d 1021 (1993).....	16
Marriage of Schweitzer , 81 Wn. App. 589, 915 P.2d 575, <i>rev. granted</i> , 130 Wn.2d 1001 (1996).....	15
Marriage of Studebaker , 36 Wn. App. 815, 677 P.2d 789 (1984)	44
Marriage of Swanson , 88 Wn. App. 128, 944 P.2d 6 (1997), <i>rev. denied</i> , 134 Wn.2d 1004 (1998).....	35
Marriage of Thomas , 63 Wn. App. 658, 821 P.2d 1227 (1991)	21-23, 26
Marriage of White , 105 Wn. App. 545, 20 P.3d 481 (2001).....	20-22
Marriage of Woffinden , 33 Wn. App. 326, 654 P.2d 1219 (1982), <i>rev. denied</i> , 99 Wn.2d 1001 (1983).....	34
Marriage of Wright , 78 Wn. App. 230, 896 P.2d 735 (1995)	31
Matter of Guardianship of Atkins , 57 Wn. App. 771, 790 P.2d 210 (1990)	43

<i>McCausland v. McCausland</i> , 159 Wn.2d 607, 152 P.3d 1013 (2007)	43
<i>Parentage of Schroeder</i> , 106 Wn. App. 343, 22 P.3d 1280 (2001)	34
<i>Thomas v. Wilfac, Inc.</i> , 65 Wn. App. 255, 828 P.2d 597, <i>rev. denied</i> , 119 Wn.2d 1020 (1992).....	25
<i>Washburn v. Washburn</i> , 101 Wn.2d 168, 677 P.2d 152 (1984)	33
<i>Worthington v. Worthington</i> , 73 Wn.2d 759, 440 P.2d 478 (1968)	16

STATUTES

RCW 26.09.080	15, 17
RCW 26.09.090	29, 30, 31
RCW 26.09.187	34, 37, 38, 39

RULES AND REGULATIONS

RAP 2.5	44
RAP 10.3	42

OTHER AUTHORITIES

4 L. Orland and K. Tegland, Wash. Prac., <i>Rules Practice</i> (5 th ed., 2006).....	27
2SSB 5470 Bill Analysis	37

I. INTRODUCTION

The appellant is a dentist who earns \$162,000 annually working four days a week. He complains on appeal that he was not awarded a disproportionate division of property and spousal maintenance from the wife, a physician. The husband also complains that he was not designated the primary residential parent of the parties' remaining minor child, their 14-year-old daughter.

These discretionary decisions were made after a four-day trial in which the trial court heard testimony from the parties, their witnesses, and the court-appointed guardian ad litem who recommended that the daughter reside primarily with her mother, with whom she is primarily bonded. These decisions were wholly within the discretion of the trial court, and are supported by both the law and the facts of this case. This court should affirm the trial court's decision in its entirety.

II. RESTATEMENT OF FACTS

A. Background.

Respondent Karen Harrison (n/k/a MacKichan), now age 51, and appellant Stephen Harrison, now age 61, began living together in 1984, and married in 1986. (CP 1, 5; RP 56, 201) The parties physically separated on October 31, 2007, and filed a joint petition

for dissolution less than a year earlier, on November 13, 2006. (CP 1; RP 72) The Decree of Dissolution was entered over 4½ years later, on May 16, 2011, after a four-day trial. (CP 217)

The parties have three adult children: Sarah, born in 1986, William, born in 1990, and Josiah, born in 1993. (RP 58) Only their daughter Hannah, born in 1998, is still a minor. (RP 58) Stephen also has two older sons from an earlier marriage. (See RP 266)

B. The Husband Is A Dentist. The Wife Is A Doctor. Both Own Their Own Practices. The Husband Works Less Than Full Time And Earns Less Than The Wife, Who Works More Than Full Time.

The parties met in 1979 at the University of North Dakota. (RP 55) Among other degrees, Stephen earned a Doctorate in Dental Science from the University of Washington in 1984, shortly before the parties began living together. (CP 229; RP 56) Karen graduated from the University of Washington School of Medicine in 1987, a year after the parties married. (CP 5, 230; RP 55) Karen is a nephrologist, or what she describes as a “kidney doctor.” (RP 484)

Stephen owns a dental practice in Zillah that the parties acquired in 1997. (See CP 229; RP 82, 269) He has eight employees. (RP 273) Stephen sees patients only four days per

week, and spends two hours on the fifth day doing "office work." (RP 272-73, 467-68, 469) Stephen testified that his practice has gross receipts of nearly \$750,000, and provides him with an "officer's salary" of \$108,000. (CP 233; RP 226, 288)

The trial court questioned Stephen's income from his practice, noting that it was "unusual," and "assume[d] that the husband has a good accountant." (CP 233) Stephen's dental practice pays rent of approximately \$54,000 annually to the Harrison Family Trust, a trust created by the parties that owns the land where Stephen has his office and a lot next to the office. (RP 206, 209, 226, 283) The trial court found that Stephen's income from all sources, including the trust, was \$162,230. (CP 233)

Karen has been in private practice since 1994, and owns a medical practice in Yakima that the parties acquired in 1997. (RP 57, 225) Karen is the only employee. (RP 485) Karen's three sources of income are her medical practice, a contract with Pacific Vascular, for which she interprets vascular studies, and a contract with DaVita, for which she acts as medical director in their dialysis unit. (RP 484-85) Karen works a full five days per week in her practice and spends four evenings a week reading studies for

Pacific Vascular. (RP 491, 493) Karen spends an additional two to four hours a week in meetings with staff and the facility administrator for DaVita's dialysis unit. (RP 492)

The trial court found Karen's gross annual income was \$321,000 from all sources. (CP 233) At trial, Karen expressed concern that her income would drop in the near future because a new "kidney doctor" had relocated to Yakima, reducing her private practice. (RP 64) Karen also predicted that another doctor who was scheduled to arrive in Yakima two months after trial would take over some of her contract with Pacific Vascular, further reducing her income. (RP 491)

Neither party testified to any significant health issues. Both parties testified that they had no plans on retiring in the near future. (CP 229; RP 126, 201)

C. Both Parties Were Involved Parents During The Marriage.

Both parties worked throughout the marriage. Nevertheless, both were involved parents. (RP 84-85, 326) Karen generally had the "morning shift" for the children, preparing breakfast, staying with them until their home school teacher arrived, and often returning home to have lunch with the children. (RP 326) Karen attended

the children's events and participated in their activities. (RP 84-85, 326)

Since he started work earlier in the morning, Stephen had the "afternoon shift" with the children. (RP 84, 326) Stephen did most of the transportation for the children's activities in the afternoon, and often cooked dinner for the children. (RP 84, 326) Stephen also attended the children's events and participated in their activities. (RP 84, 326)

The trial court found that "the children's relationship with both parents before the separation was a healthy one." (CP 231) The trial court acknowledged that the children "loved both parents and were comfortable in their presence and with one another." (CP 231) The trial court found because the "mother has always been the primary breadwinner [] she was not always available to the children. The father took care of many of the everyday tasks – getting the children to their activities, cooking the evening meals, doing the grocery shopping, and being primarily responsible for their schedules." (CP 231) Nevertheless, the trial court found that "the time [the mother] spent with the children was productive." (CP 231)

D. After Several Attempts At Counseling, The Parties Filed A Joint Petition For Dissolution In 2006.

1. The Husband Was Verbally Abusive, Controlling, And Financially Reckless.

The parties struggled in their marriage. Stephen was verbally abusive and demeaned Karen as a parent. (RP 317) Karen felt that after she set limits for the children, Stephen would ignore or “push over” those limits. (RP 317) One of the parties’ marriage counselors agreed with Karen’s assessment, describing Stephen as a “boundary basher” who could be a “manipulative smothering controlling person when he wanted something.” (RP 334) The guardian ad litem appointed to investigate parenting issues also agreed with Karen’s assessment, testifying that at one point in her investigation she felt threatened by Stephen after he told her that she “had brought great harm to [his] home and that [he] was going to make her accountable for that.” (RP 338-39)

Karen also expressed concern with Stephen’s handling of their finances. (RP 134, 147-48, 317, 516) During the marriage Stephen made several unsuccessful investments without Karen’s involvement. (RP 150-51, 414-16, 494-95, 496-97, 516) Karen resisted what she perceived as a waste of community assets, but Stephen proceeded with these “investments” anyway. (See RP

494-95, 496-97) The trial court declined to find that Stephen had been “wasteful” during the marriage, but it did find that “these investments have been unwise and produced very little, if any, return.” (CP 233)

Karen’s income paid for all of the family’s expenses. (RP 520) She did not know what Stephen did with his income. (RP 134) During one of the parties’ last counseling sessions, Stephen agreed that he would not spend more than \$200 without first advising Karen. (RP 134) Soon after, Stephen loaned \$5,000 to their pastor without discussing it with Karen. (RP 134) Karen stopped counseling at that point. (RP 134)

2. The Husband Complained That The Wife Was Depressed And Drank Excessively.

Stephen blamed Karen for the troubles with the marriage, claiming that she had “psychiatric problems” and drank excessively. (RP 253-54, 318) Karen admitted to depressive episodes during the marriage, and to occasional panic attacks. (RP 75-77, 91, 93, 481) Karen associated her depression with periods of high stress – usually caused by financial issues generated by Stephen. (RP 76, 91) Karen denied that her depression impacted the children. (RP 461) The guardian ad litem acknowledged that Karen’s depression

could have affected her relationship with the children, but did not think it was a "major thing." (RP 392) Karen testified that she was "happier" after the parties separated in 2007, which has been good for the children, especially for Hannah, to see. (RP 135, 392) The guardian ad litem investigated the drinking allegations but could find no one to verify Stephen's claim. (RP 332-33)

After realizing that the marriage could not be reconciled, the parties filed a joint Petition for Dissolution on November 13, 2006. (CP 1-4)

E. The Husband Alienated The Children From The Wife. The Guardian Ad Litem Recommended That The Husband And Wife Be Designated As The Primary Residential Parent Of The Younger Son And Daughter, Respectively.

After the petition was filed on November 13, 2006, the family continued to live together, with each party taking over a section of the family home. (CP 26-27) Three of the parties' four children were dependent when the petition was filed. (See CP 1-2) Marcia Suko was appointed as guardian ad litem on May 4, 2007 to investigate parenting issues for William, then age 16, Josiah, age 13, and Hannah, age 8. (CP 1-2, 16; RP 58)

Although the parties had agreed to reside together during the investigation to lessen the impact on the children, the stress of the situation proved unbearable. (CP 26) Stephen actively involved the children in the parties' divorce. He was focused on alienating the children, particularly the parties' sons, against their mother. (CP 27)

The guardian ad litem issued her first report on September 14, 2007. (RP 316) The guardian ad litem recommended that all three minor children reside primarily with Karen. (RP 345) The guardian ad litem recommended that Stephen "stop making demeaning comments and attempting to undermine [Karen's] attachment with the children." (RP 345) The guardian ad litem expressed concern that Stephen was "very angry" with Karen and wanted "revenge." (RP 348) Stephen sought to have the children withdraw from Karen, which he knew was a way to hurt her. (RP 348) Finally, the guardian ad litem recommended that the parties wait to disclose to the children that Karen was now romantically involved with a female family friend. (RP 345)

William, then four months shy of his 18th birthday, stated his preference to reside with his father by the time of the hearing on the

temporary residential schedule in October 2007. (RP 346) On October 9, 2007, a temporary residential schedule was entered ordering William to reside with the father and the younger two children to reside with the mother. (CP 37) The court ordered Stephen to vacate the family residence by October 31, 2007. (CP 37) The court ordered the parties to not discuss residential issues or the parties' third party relationships with the children. (CP 37)

The parties were eventually allowed to disclose the mother's new relationship to the children through a counselor. (RP 350) The disclosure caused stress for the children, particularly Josiah, in part because the parties had raised the children in a conservative Christian church that taught that homosexuality was a sin. (RP 86, 87, 249, 349, 386)

The guardian ad litem acknowledged that "from a teenage boy's perspective," it was difficult for Josiah to understand the mother's new relationship. (RP 348) The guardian ad litem eventually recommended that Josiah, then age 15, reside primarily with the father – a decision she described as "one of the hardest" she has ever made. (RP 349) The guardian ad litem described Stephen as being "very manipulative and continues to engage in

activities which are designed to demean and alienate [the children] from their mother.” (CP 101) Nevertheless, because of Josiah’s age and his strong feelings, the guardian ad litem believed that Josiah would leave the mother’s home without the court’s permission if he were not placed with the father. (CP 102)

By the time of trial, Josiah was 17 years old. (RP 352) Although Karen testified that she believed that she was the better parent for Josiah, she understood that Josiah now “identifies more with his father.” (RP 525) Accordingly, Karen agreed with the guardian ad litem’s recommendation that Josiah reside primarily in Stephen’s home. (RP 530)

The younger daughter Hannah resided primarily with Karen throughout the four-year divorce proceedings. (See CP 37, 54) By all accounts, Hannah is a happy and mature child. (RP 175,191, 261) The guardian ad litem testified that while Hannah has had a “difficult time with the concept of her mother in a same sex relationship,” she liked doing things with her mother and her partner. (RP 365-66) The guardian ad litem reported that Hannah “feels pressure to not accept [the mother’s partner] and so that’s kind of a tug and a pull.” (RP 373) At trial, the guardian ad litem

recommend that Hannah reside primarily with Karen, with whom she has her primary attachment. (RP 360-61)

The guardian ad litem recommended that Hannah reside with the father on alternating weekends from Friday to Monday, and alternating Wednesday overnights. (RP 361-62) The guardian ad litem resisted recommending any more residential time with Stephen, because she was concerned that Hannah feels pressure to “conform to her father’s wishes.” (RP 361) “The more time the children get with the father the more alienated from their mother they become and the more marginalized.” (RP 376) The guardian ad litem noted that “in order to become [] a part of the family unit that Stephen Harrison heads, he demands loyalty and if they aren’t loyal to him, then they are not included.” (RP 376; *see also* RP 532)

F. After A Four-Day Trial, The Trial Court Divided The Parties’ Assets Equally, Denied The Husband’s Request For Spousal Maintenance, And Adopted The Guardian Ad Litem’s Recommendations On Parenting.

Nearly four years after the parties filed their joint petition for dissolution, the parties appeared for a four-day trial before Yakima County Superior Court Judge James Lust on September 7, 2010. The trial court issued its letter ruling on February 9, 2011. (CP 229)

The trial court divided the parties' assets equally, denied Stephen's request for spousal maintenance, designated Stephen as the primary residential parent of Josiah, then age 17, and designated Karen as the primary residential parent of Hannah, then age 13. (CP 171-86, 217-37) The court ordered the older son, William, to be responsible for one-third of his post-secondary education, and ordered the parents to be equally responsible for the remaining cost. (CP 232; Sub no. 394, Supp. CP 402)

With regard to parenting, the trial court found that the guardian ad litem "is very experienced in this field and the court places great weight on her opinions." (CP 209) The trial court noted that the guardian ad litem "believes and has testified that the father has demonstrated an inability to control his behavior around the children and has been manipulative and controlling in an effort to influence residential placement. It is apparent from Ms. Suko's testimony at trial and from the testimony of both parties that her opinion is essentially correct." (CP 209) Although the trial court acknowledged that because of the mother's work schedule the father during the marriage was the "primary parent", who "took care of many of the everyday [parenting] tasks," it accorded that factor

little weight due to his conduct during the litigation. (RP 209-10) Accordingly, the trial court adopted the guardian ad litem's recommendations on placement of the children.

The trial court divided the parties' \$900,000 net estate equally. The trial court awarded the family residence to the mother, with whom the parties' two daughters reside. (RP 500, 515; CP 226) The trial court awarded the husband the parties' other real property interests, including the property and lot next door to his practice and all of the parties' time shares. (CP 223-24)

The husband appeals.

III. ARGUMENT

A. **The Trial Court Did Not Abuse Its Discretion In Dividing The Property Equally Between Parties Who Both Earn Substantial Incomes.**

A trial court's distribution of property must be just and equitable after consideration of all relevant factors, including but not limited to:

1. The nature and extent of the community property;
2. The nature and extent of the separate property;
3. The duration of the marriage; and
4. The economic circumstances of each spouse at the time the division of property is to become effective.

RCW 26.09.080. “The trial court is in the best position to assess the assets and liabilities of the parties and determine what is ‘fair, just and equitable under all the circumstances.’” **Marriage of Brewer**, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). In light of the trial court’s broad discretion, a trial court’s property distribution will not be reversed on appeal absent a showing of manifest abuse of discretion. **Brewer**, 137 Wn.2d at 769.

Here, the trial court did not abuse its discretion in dividing the parties’ assets equally. In support of his claim that the trial court should have made a disproportionate award of the community property to him, the husband argues: “Where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in order[ing] an unequal division of community property.” (App. Br. 25-26, *citing Marriage of Schweitzer*, 81 Wn. App. 589, 915 P.2d 575, *rev. granted*, 130 Wn.2d 1001 (1996)). But while the husband is older than the wife, there was no evidence that he was in “ill health,” both parties were self-employed in practices earning six-figure incomes, and the husband testified that he had no plans to retire any time in the near future.

Under these circumstances, the trial court did not abuse its discretion in dividing the community property equally. The trial court considered the “ages and earning power of the parties,” and concluded that in “exercis[ing] its discretion on division of assets and liabilities [it] finds that they should be divided equally between the parties.” (CP 165, 166) The court also concluded that “the distribution of property and liabilities as set forth in the decree is fair and equitable.” (Conclusion of Law (CL 3.4, CP 198) Nothing more is required.

B. The Trial Court Did Not Abuse Its Discretion In Its Valuation Of Certain Assets Awarded To The Wife.

The trial court’s valuation of property in a marital dissolution is wholly within its discretion. *Marriage of Gillespie*, 89 Wn. App. 390, 403, 948 P.2d 1338 (1997). The trial court’s valuation of property will be upheld if the valuation is within the “scope of the evidence.” *Marriage of Mathews*, 70 Wn. App. 116, 122, 853 P.2d 462, rev. denied, 122 Wn.2d 1021 (1993)). “An owner may testify as to the value of his property and the weight to be given to it is left to the trier of fact.” *Worthington v. Worthington*, 73 Wn.2d 759, 762-763, 440 P.2d 478 (1968).

In determining whether substantial evidence exists to support the trial court's valuation, "the record is reviewed in the light most favorable to the party in whose favor the findings were entered." *Gillespie*, 89 Wn. App. at 404. The trial court did not abuse its discretion here in finding that the wife's accounts had no value, and in valuing the wife's practice based on her testimony of the value of the practice's equipment and information presented regarding her accounts receivables at the time of separation.

1. The Trial Court Did Not Abuse Its Discretion In Finding That The Wife's Bank Accounts Had No Value When There Is No Evidence That The Community Funds Allegedly Held In Those Accounts More Than Four Years Earlier Had Ever Existed Or Existed At The Time Of Trial.

The trial court did not abuse its discretion in refusing the husband's demand to value the wife's accounts at \$147,800, and ordering a payment of one-half that value to him. (App. Br. 22-23) It is undisputed that there was no evidence that these funds existed by the time of trial. It would have been inappropriate for the trial court to award these "phantom" funds to the wife, as RCW 26.09.080 requires the trial court to consider the "economic circumstances of the parties at the time the division of property is to become effective" in dividing the marital estate. RCW

26.09.080(4). The wife's "economic circumstances" at trial did not include having nearly \$150,000 cash in her possession.

In any event, the only "evidence" of the existence of these funds at the time of separation was a financial declaration filed five months after the parties jointly petitioned for dissolution, six months before the parties physically separated, and over three years before trial, stating that the wife had \$147,800 "on deposit in banks." (See Ex. P.E. 5.75) The husband presented no evidence that the wife had this amount of money in her accounts at the time of separation or at time of trial. The husband admitted that he knew nothing about these alleged funds except for what was stated in the wife's 3½ year old financial declaration, made while the parties still resided together. (RP 240) Although during trial the husband appeared to complain that the wife did not produce adequate bank records to prove the existence of these funds, the husband never moved to compel the production of any discovery that he claimed was lacking. (See RP 96-101, 476, 536)

At trial, the wife testified that she did not know why her 3½ year old financial declaration listed her as having \$147,800 "on deposit" in her accounts. (RP 65, 113) The attorney who assisted

the wife in preparing her 2007 declaration no longer represented her. (See Ex. P.E. 5.75) The wife testified she was unsure whether funds described in this financial declaration were for accounts from which the funds have since been spent. (RP 113) The wife testified that she deposited her income and paid the family's bills, including roof and other repairs on the family residence¹ from the accounts she held at separation. (RP 96, 499-500) The wife testified that the accounts she had at the time of separation no longer existed, and that she had very little savings by the time of trial. (RP 102, 536) And in a financial declaration filed two years after her initial financial declaration, the wife stated she had no funds "on deposit in banks," and no "cash on hand," so any funds that had existed in April 2007 had been exhausted. (See Ex. P.E. 5.76)

Based on what little evidence was presented regarding these alleged funds, the trial court "found there was insufficient evidence based only on the April 20, 2007 financial declaration to support a finding that these assets existed." (CP 166; *see also* CP 236) The

¹ These house repairs were taken into consideration in the value of the family residence that was awarded to the wife because they occurred prior to the appraisal used by the trial court to value the home in its division of the marital estate. (RP 499-500)

trial court held “it was the court’s feeling at the time [of trial], it’s the court’s feeling today that the court simply does not have enough credible evidence that indicates, other than the initial statement at the very beginning, that the money even exists... I cannot see on a more probable than not basis that that money ever existed.” (4/14/11 RP 9) The trial court stated that based on the evidence presented at trial, the \$147,800 number in the wife’s 2007 declaration was a “phantom figure” that did not warrant making a fictitious award to the wife. (4/29/2011 RP 18)

The trial court’s valuation of these accounts at zero was well within its discretion in light of the lack of evidence from either party regarding these funds. If these funds ever existed, the wife testified that they no longer did, likely exhausted on “family bills” that were paid after separation. (See RP 96, 102, 113, 499-500, 536) Under these circumstances, the trial court did not abuse its discretion in valuing these accounts at zero and in not awarding them to either party. See *Marriage of White*, 105 Wn. App. 545, 20 P.3d 481 (2001).

The court held that “if one or both parties disposed of an asset before trial, the court simply has no ability to distribute that

asset at trial” in **White**. 105 Wn. App. at 549. There, the trial court erred in awarding the wife \$30,511 that had been her separate property but was spent before trial. 105 Wn. App. at 552. The **White** court held that these funds, which no longer existed, could not be distributed at trial. 105 Wn. App. at 553 (“The \$30,511 had no character after it was spent, and it could not be awarded as a separate-property asset on hand at trial.”); see also **Marriage of Kaseburg**, 126 Wn. App. 546, 559, ¶ 34, 108 P.3d 1278 (2005) (the value of real property foreclosed prior to trial was not before the trial court for valuation or distribution in the dissolution proceeding). Likewise here, to the extent these funds existed at separation they no longer existed at trial and the trial court did not abuse its discretion in not awarding it to the wife at any value.

The husband misplaces his reliance on **Marriage of Thomas**, 63 Wn. App. 658, 821 P.2d 1227 (1991) to argue that the trial court should have resolved any uncertainty about the value of these accounts against the wife. (App. Br. 21) In **Thomas**, the husband received rental income from community real property during separation, and maintained control and use of those receipts throughout the separation. The husband was twice ordered to

provide an accounting of these receipts, but refused to do so each time. The court held that since the husband “had total control of the real estate income, he should have been required to account for it.” **Thomas**, 63 Wn. App. at 664. Accordingly, the court remanded for an accounting of the rental proceeds received by the husband during separation.

Unlike in this case and in **White**, there was no dispute in **Thomas** that the rental proceeds still existed at the time of trial and that they were still available to be distributed. Further, contrary to the husband’s claim, **Thomas** does not stand for the proposition that the court must adopt the value presented by the other spouse if the controlling spouse fails to prove the value of an asset. Instead, the court’s concern in **Thomas** was the husband’s utter failure to provide an accounting of the rental proceeds, despite two court orders requiring him to do so. Here, there was no order compelling the wife to account for funds that she testified she was unsure even existed at the time of separation, and that certainly no longer existed at the time of trial. Accordingly, **Thomas** does not support the husband’s claim that the trial court should “have placed the \$147,800 from the bank accounts in Karen’s column,” and ordered

the wife to pay one-half of that amount to the husband. (App. Br. 22-23)

The husband's reliance on **Thomas** is particularly misplaced when he objected to the wife's attempt to provide an accounting of the funds in her possession at separation. (CP 372)² After trial on January 7, 2011, but before the trial court issued its letter ruling on February 11, 2011, the wife filed a declaration attempting to reconstruct why she had previously signed a financial declaration stating that she had \$147,800 in bank accounts in April 2007. (CP 116) The husband moved to strike this declaration. (CP 372) The trial court stated that it did "not consider the sworn declaration," and based its determination regarding these funds on the testimony presented at trial. (CP 165-66) Accordingly, there is no basis for the husband's argument on appeal that "the trial court should not

² Although not argued in the Argument section of his brief, in the husband's "Issues on Appeal," he claims that the trial court should have at least found that the wife had \$108,000 in her accounts based on her post-trial declaration. (*Compare* App. Br. 21-23 *with* App. Br. 3; *see also* App. Br. 37 (Conclusion)) However, because the husband objected, the trial court did not consider the declaration, including any purported evidence within that declaration that the wife had \$108,000 in her possession at separation. (See CP 165) Thus, any error in the trial court not finding that the wife held this smaller amount was invited, and the husband cannot challenge it on appeal. **Dependency of K.R.**, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (under the doctrine of invited error, a party cannot complain about an alleged error at trial that he set up himself).

have allowed Karen's declaration as evidence or in the alternative should have reopened the case to allow Stephen to cross-examine Karen regarding the declaration." (App. Br. 23-24)

2. The Trial Court Did Not Abuse Its Discretion In Valuing The Wife's Medical Practice Based On Evidence Presented Prior To The Court's Ruling.

Neither party valued their professional practices or presented evidence of the value of the other party's practice at trial. The wife's position at trial was that each party should be awarded their practice and each practice would "cancel out" the other. (RP 544) The wife also asserted that each practice owned equipment but that the "value" of the businesses was the labor that each party put into their practice. (RP 512-13)

For the first time at trial, husband's counsel inquired about the wife's accounts receivable. (See RP 544-46) The wife testified that she did not have that information, but would have provided it had she understood that it was needed. (RP 544-45) The wife offered to present information regarding her accounts receivables, which had never previously been sought, "next week." (RP 544) This testimony was elicited on the last day of trial.

Closing arguments were heard after the close of testimony on a different day. Prior to closing arguments, the wife moved to introduce information from her accountant setting forth the amount of the accounts receivables at the time of separation. (CP 144) Over the husband's objection, the trial court admitted this evidence. (CP 144) Based on this evidence, the trial court valued the husband's practice at \$58,800 (equipment \$18,800 and accounts receivables \$40,000) and the wife's practice at \$82,879 (equipment \$5,000 and accounts receivables \$77,879). (CP 234)

On appeal, the husband does not deny that the trial court's finding on the value of the wife's medical practice, including her accounts receivables, is supported by evidence.³ Instead, the husband's challenge is solely to the timing of the court's acceptance of this evidence. (See App. Br. 24) The trial court did not abuse its discretion in admitting this evidence. The husband acknowledges that the "admission of evidence lies within the sound discretion of the trial court." (App. Br. 23, citing *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 262, 828 P.2d 597, rev. denied, 119 Wn.2d

³ The trial court apparently considered evidence of the wife's accounts receivables in the form of a letter from her accountant prior to closing arguments. (See CP 144, 247) While this letter was considered by the trial court, it was not admitted as an exhibit.

1020 (1992)). As this court stated in **Thomas**, “an abuse of discretion occurs if no reasonable person would take the position adopted by the trial court.” 65 Wn. App. at 262.

The husband cites no authority for the proposition that it is an abuse of the trial court's broad discretion to consider evidence presented after the parties rest, but before closing argument, and before the court issues its ruling. The only case cited by the husband, **Ghaffari v. Dep't of Licensing**, 62 Wn. App. 870, 875-76, 816 P.2d 66 (1991), *rev. denied*, 118 Wn.2d 1019 (1992). (App. Br. 23), does not support this proposition, and in fact supports the trial court's exercise of discretion in this case.

In **Ghaffari**, the plaintiff challenged the Department's revocation of his driving privileges for refusing to submit to a breath test after being pulled over for suspected drunk driving. During trial, the plaintiff's attorney questioned the Renton police officer who had stopped the plaintiff as to whether he had prior written consent from the Black Diamond police department to make stops in its jurisdiction. The officer testified that there was a reciprocal agreement between the Renton and Black Diamond police departments but he did not have the consent letter with him during

trial. After the trial court ruled in favor of the Department, the plaintiff filed a motion for reconsideration. In response, the Department produced certified copies of the consent letters.

On appeal, the driver challenged the trial court's consideration of the two consent letters submitted after trial. The court affirmed, holding that the trial court had discretion to take additional evidence after a bench trial under CR 59(g). **Ghaffari**, 62 Wn. App. 875-76.

Trial courts also have discretion to accept new evidence after issuing an oral ruling, but before entering final judgment. “[I]t has long been recognized that in a bench trial, the court has the authority to change its own findings of fact. Prior to the entry of judgment, the court may change its findings, or reopen the case for further testimony to clear up uncertainties and make new findings.” 4 L. Orland and K. Tegland, *Wash. Prac., Rules Practice*, 500-01 (5th ed., 2006)

In this case, the court had not issued its ruling either orally or in a final judgment when the wife presented evidence regarding her practice's accounts receivable. Since the trial court would have discretion to consider this evidence after making its ruling, nothing

should prevent the trial court from also considering additional evidence before ruling.

Trial courts should be encouraged to consider all relevant evidence offered before entering findings and a judgment. In this case, because the trial court expressed concern that valuing the practices would be a “guessing game” without additional evidence (RP 545), it did not abuse its discretion in considering the evidence of the wife’s accounts receivables before making its decision.⁴

C. The Trial Court Did Not Abuse Its Discretion In Not Awarding Maintenance To The Husband, A Dentist, Who Earns More Than \$160,000 Annually.

The parties’ joint petition for dissolution “reserved” the issue of spousal maintenance. (CP 2) On the afternoon of the last day of trial, the husband for the first time sought to amend his petition to include a request for spousal maintenance. (See RP 483) The trial court denied the amendment, stating: “I think that under the circumstances and based upon all the evidence I’ve got now, there’s not sufficient evidence that’s come in that would allow an amendment.” (RP 483-84) Nevertheless, the trial court addressed

⁴ To the extent that the husband complains that the timing of the trial court’s acceptance of this evidence prevented him from cross-examining the accountant (App. Br. 24), the trial court in a post-judgment ruling, allowed the husband “to obtain information in regards to [the wife]’s accounts by taking the deposition of Ms. Greninger.” (CP 255)

the issue of spousal maintenance in its final ruling, denying the husband's request. (CP 233) This court should affirm.

In deciding whether to award spousal maintenance the court considers:

1. The financial resources of the party seeking maintenance;
2. The time necessary for the party seeking maintenance to acquire education and training to find employment;
3. The standard of living during the marriage;
4. The duration of the marriage;
5. The age, physical and emotional condition, and the financial obligations of the party seeking maintenance; and
6. The ability of the party against whom maintenance is being sought to pay support.

RCW 26.09.090. "Spousal maintenance is within the discretion of the trial court. The trial court abuses that discretion if it bases a denial of maintenance on untenable grounds or for untenable reasons. Spousal maintenance is not a matter of right. [] In determining spousal maintenance, the court is governed strongly by the need of one party and the ability of the other party to pay an award." ***Marriage of Foley***, 84 Wn. App. 839, 845-46, 930 P.2d 929, 932 (1997) (*citations omitted*).

Here, the trial court did not abuse its discretion in declining to award spousal maintenance to the husband, a self-employed dentist earning more than \$160,000 annually. Contrary to the husband's assertion, it is not "impossible" to determine whether the trial court considered the statutory factors in deciding to not award spousal maintenance to the husband. (See App. Br. 28) The memorandum decision clearly shows that the trial court had the statutory factors "in mind" when denying spousal maintenance. ***Edwards v. Edwards***, 47 Wn.2d 224, 227, 287 P.2d 139 (1955) (trial court does not abuse its discretion when findings reflect that it had statutory factors "in mind" when making its decision).

In its memorandum decision, the trial court noted that the parties had been married for twenty years when the parties separated. RCW 26.09.090(1)(d); (CP 230). The trial court also acknowledged that the husband was 60 years old, in "reasonably good" health, well-educated, and self-employed, earning \$162,230 net annually. RCW 26.09.090(1)(a), (b), (e); (CP 229, 233). The trial court acknowledged that the wife made more than the husband, but also found that if the husband focused exclusively on his dental practice, instead of other outside investments, "he should

be able to maintain his standard of living adequately.” RCW 26.09.090(1)(c),(f); (CP 233).

The husband appears to assert that the fact the wife has greater income alone is a basis for awarding him spousal maintenance. (App. Br. 29-30) But that is not the test for whether the trial court abuses its discretion in its maintenance decision. Instead, it is whether the decision to award or not award maintenance is “just” in light of the relevant factors. **Marriage of Luckey**, 73 Wn. App. 201, 209-210, 868 P.2d 189 (1994).

The husband claims that because the wife’s income “doubles” his income he is entitled to maintenance. (App. Br. 29) But appellate courts have affirmed a trial court’s “wide” discretion to not award spousal maintenance under more disparate circumstances than present here. See **Luckey**, 73 Wn. App. 201 (affirming denial of spousal maintenance to the wife after divorce when husband earned \$85,000 annually and the wife earned \$18,000 annually); **Marriage of Wright**, 78 Wn. App. 230, 896 P.2d 735 (1995) (affirming denial of spousal maintenance to wife when husband’s monthly income was \$4,950 and wife’s monthly income was \$1,400); **Foley**, 84 Wn. App. 839 (affirming denial of spousal

maintenance to the husband when wife earned \$2,646 monthly income and husband earned \$1,350 monthly income). In any event, the husband testified he “did not care” whether he received spousal maintenance thus the trial court properly recognized that the husband did not have the need for spousal maintenance. (See RP 460-61)

Finally, without citing any authority, the husband claims that because the wife purportedly “received a substantial portion of her education after the parties were married” the trial court abused its discretion in not awarding him spousal maintenance. (App. Br. 30) But the wife in fact, graduated from medical school within a year of the parties’ marriage, which then endured another 19 years. (See RP 55; CP 5, 230) There is no basis for an award of maintenance under these circumstances. Where “a marriage endures for some time after the professional degree is obtained, the supporting spouse may already have benefitted financially from the spouse’s increased earning capacity to an extent that would make extra compensation [in the form of spousal maintenance] inappropriate. For example, he or she may have enjoyed a high standard of living for several years. Or perhaps the professional degree made

possible the accumulation of substantial community assets, which may be equitably divided.” *Washburn v. Washburn*, 101 Wn.2d 168, 181, 677 P.2d 152 (1984).

This is exactly the type of situation contemplated in *Washburn* where “extra compensation” is not warranted. The parties had nearly 19 years of benefits from the wife’s higher income during the marriage. The husband was able to work less than five days per week at his dental practice because the wife’s income subsidized it. The husband was able to invest as he pleased, albeit in losing, ill-advised ventures. The parties were also able to acquire substantial community property, half of which was awarded to the husband at the end of the marriage. The trial court did not abuse its discretion in denying spousal maintenance under these circumstances.

D. The Trial Court’s Designation Of The Mother As The Primary Residential Parent Of The Parties’ Daughter Was Within Its Discretion.

As the father recognizes, “trial courts have broad discretion” in its parenting decision. (App. Br. 31) This broad discretion is necessary “because of a trial court’s unique opportunity to observe the parties to determine their credibility and to sort out conflicting

evidence.” See *Marriage of Woffinden*, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982), *rev. denied*, 99 Wn.2d 1001 (1983). Accordingly, appellate courts are “extremely reluctant” to disturb child placement decisions. *Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001) (citations omitted).

Here, the trial court did not abuse its discretion in designating the mother as the primary residential parent for the parties' younger daughter. The trial court properly considered the statutory factors under RCW 26.09.187 and designed a parenting plan in the child's best interests. This court should affirm.

1. The Trial Court Did Not Abuse Its Discretion In Designating The Mother As The Primary Residential Parent Of The Younger Daughter.

The father's challenge to the trial court's placement of Hannah primarily with the mother is two-fold. First, the father complains that the trial court based its decision on the recommendation of the alleged “biased” guardian ad litem. (App. Br. 33) Second, the father complains that because he was purportedly the “primary parent” during the marriage he was entitled to be designated as the primary residential parent. (App. Br. 33) Neither of these contentions have merit.

a. **The Trial Court Properly Considered The Guardian Ad Litem's Recommendations And Based Its Decision On Its Own Consideration Of The Evidence And Observation Of The Parties.**

The trial court did not abuse its discretion in adopting the guardian ad litem's parenting recommendations after considering her testimony, as well as the testimony of the parties and their witnesses. The father complains that the "trial court did not award primary custody of Hannah to Steve because of the GAL's concern about his conduct toward the children." (App. Br. 33) But the trial court stated that it formed a similar opinion that "the father has demonstrated an inability to control his behavior around the children and has been manipulative and controlling in an effort to influence residential placement" from his own observation and consideration of "the testimony of both parents." (CP 231)

The trial court is not "bound" by the parenting evaluator's recommendations. **Marriage of Swanson**, 88 Wn. App. 128, 138, 944 P.2d 6 (1997), *rev. denied*, 134 Wn.2d 1004 (1998). But the court is entitled to rely on the parenting evaluator's recommendations as well as other evidence in fashioning a parenting plan in the best interests of the child. **Swanson**, 88 Wn.

App. at 137-38; see also **Custody of Brown**, 153 Wn.2d 646, 655, 105 P.3d 991 (2005) (affirming parenting decision because the trial court did not consider the parenting evaluator's report in a vacuum, but as part of an extended trial with other witnesses and testimony); **Marriage of Burrill**, 113 Wn. App. 863, 872-73, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003)(rejecting the mother's assertion that the trial court adopted wholesale the parenting plan recommendations of the father's expert when the trial court referenced other evidence to support the final parenting plan); **Fernando v. Nieswandt**, 87 Wn. App. 103, 108-09, 940 P.2d 1380, *rev. denied*, 133 Wn.2d 1014 (1997) (rejecting mother's assertion that the trial court improperly gave greater weight to the parenting evaluator's recommendations than those of her own witnesses, holding that the trial court's findings on parenting decisions are given great weight because it is in a "unique position to observe the parties and their demeanor"). It was appropriate for the trial court to consider the parenting evaluator's report and her recommendations in making its decision.

b. The Trial Court Was Not Bound To Designate The Father As The Primary Residential Parent Because He Allegedly Engaged In More Day To Day Parenting Tasks During The Marriage.

The trial court was not required to designate the father as the primary residential parent simply because it found that the father took care of many of the “everyday [parenting] tasks” and was the “primary parent” during the marriage. (App. Br. 33, *citing* CP 210) In weighing the statutory factors under RCW 26.09.187, the court must place the greatest weight on the “relative strength, nature, and stability of the child’s relationship with each parent.” RCW 26.09.187(3)(a)(i). This factor is given greater weight than which parent “has taken greater responsibility for performing parenting functions relating to the daily needs of the child.” RCW 26.09.187(3)(a)(iii).

In 2007, the Legislature specifically eliminated “whether a parent has taken greater responsibility for performing parenting functions” as the factor that should be given primary weight by the trial court. See 2SSB 5470 Bill Analysis (“Whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child is removed from the first

factor and must still be considered, but not given the greatest weight”). Instead, the Legislature required that the trial court give the “greatest weight” to consideration of “the relative strength, nature, and stability of the child’s relationship with each parent.” RCW 26.09.187(3)(a)(i). This change to the statute was intended to remove the “thumb on the scale” that stay-at-home parents were given under the former statute, shifting the trial court’s focus instead to the parent with whom the child has the stronger and more stable relationship.

Here, the trial court considered evidence that Hannah was more closely bonded with the mother than the father. Hannah “indicated that she felt safe and protected with her mom and that she feels protected by her father but she described her mother as her security blanket and worried that she would lose her emotionally and physically.” (RP 344; see *also* RP 524) The guardian ad litem reported that the mother was Hannah’s “primary attachment.” (RP 361)

The guardian ad litem also reported that Hannah’s attachment was less secure with the father. Hannah believed that her father viewed her as a “prize for her father to win.” (RP 343)

Hannah felt that the father would try to “bribe” her to spend time with him because he recognized that “she does not feel closeness with him.” (RP 344) The guardian ad litem reported that the “more her father engaged in those behaviors the more [Hannah] withdrew.” (RP 344)

Based on this evidence and the trial court’s consideration of the statutory factors under RCW 26.09.187 the trial court properly designated the mother as the primary residential parent for Hannah.

2. The Trial Court Did Not Abuse Its Discretion In Declining To Interview The Children.

The trial court did not abuse its discretion in declining to interview the children. “That the court may examine children at chambers in a divorce action, with the agreement of parties, is entirely discretionary.” *Christopher v. Christopher*, 62 Wn. 2d 82, 88, 381 P.2d 115 (1963) (App. Br. 34-35). Other than asserting that the father was “adamant” that the children be interviewed, and the “children in question are very bright and mature,” the father fails to show how the trial court’s decision to not interview the children was an abuse of discretion. (See App. Br. 35)

The father claims that because the “Harrison children have always been a part of establishing family rules and lifestyles,” the court should have interviewed the children. (App. Br. 35) But the guardian ad litem testified that this “parentification” of the children was a (negative) result of the father’s parenting style. (RP 347) The father encouraged the children’s “parentification,” which in turn caused the children to resent the mother when she tried to act as the parent. (RP 347)

As the children became “parentified, they did not treat their mother respectfully. They were allowed to make decisions and assume that they could make adult decisions and in essence they become adults.” (RP 346) The children are thus empowered to “think they have the right to become involved in making adult decisions.” (RP 347) For example, the guardian ad litem described how Hannah, then age 13, was “mad at her mother because her mother didn’t confer with her about the purchase of [a] travel trailer,” and “upset because [the mother] hadn’t consulted her about [a] furniture purchase.” (RP 347) The guardian ad litem viewed this “parentification” of the children as bad for them, because “the more parentified they become the more marginalized and alienated

they become from the mother because she becomes the bad guy.”
(RP 348)

The trial court did not abuse its discretion in refusing to further “parentify” the children by interviewing them. Further, the only child at issue was the younger daughter Hannah. The father does not challenge the trial court’s decision regarding placement of Josiah, who in any event is now age 19. While neither party was opposed to having the trial court interview Hannah, the guardian ad litem testified that it was not necessary. (RP 170, 264, 364)⁵ The guardian ad litem stated: “I think I’ve accurately reflected Hannah’s wishes. I’ve told you what she said, and I told you what I think, and I told you about [Hannah’s recent] phone call.” (RP 364) Because the trial court was already aware of Hannah’s preferences, it was both unnecessary and not an abuse of discretion for it not to interview her.

⁵ Although the mother did not object to the trial court interviewing Hannah, she testified that she did not think it was appropriate for the children to make the parenting decisions. (RP 169)

E. The Father's Challenge To The Trial Court's Award Of Post-Secondary Support Is Waived, And In Any Event The Decision Was Well Within The Court's Discretion In Light Of The Evidence Presented.

Neither party challenged the trial court's award of post-secondary support for the parties' older son William. Under a temporary order, the parties shared the cost of post-secondary support equally. (RP 252, 258-59) The mother testified, without challenge, that the parties had previously discussed that William should be responsible for one-third of the cost for his post-secondary education and the parents should be responsible for the remaining two-thirds of the expense. (RP 532) Accordingly, the trial court ordered William to pay one-third of the cost, and ordered the parents to be equally responsible for the remaining two-thirds. (CP 232; Sub no. 394, Supp. CP 402)

On appeal, the father assigns error to the division of post-secondary support between the parents. (See App. Br. 4) But the father has waived his challenge in this court by presenting no reasoned argument for his challenge within the Argument section of his brief, as RAP 10.3(a)(6) requires. Instead, the father's challenge is mentioned only in passing in the Conclusion of his brief. (App. Br. 37) This court should decline to consider this

inadequately briefed challenge. **Matter of Guardianship of Atkins**, 57 Wn. App. 771, 775, 790 P.2d 210 (1990) (“An assignment of error not supported by argument or authority is waived.”).

This court should also decline to consider the father’s argument on appeal because he did not adequately preserve the issue below. Generally, post-secondary support should be apportioned between the parents based on their proportionate share of income. See **Marriage of Daubert and Johnson**, 124 Wn. App. 483, 505, 99 P.3d 401 (2004), *abrogated by McCausland v. McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007). But the father never cited **Daubert** to the trial court to argue that the trial court was required to apportion post-secondary support based on the parties’ net income. (See 4/14 RP 8: “I haven’t been provided with any case law or any statute that mandates this court to divide it pro rata to income and I have some concerns about that because one of the issues that we raised at the time of trial dealt with how do you figure out what Mr. Harrison is making.”)

Absent any indication in the record that appellant advanced this particular claim in any substantive fashion at trial, it cannot be

considered on appeal. **Marriage of Studebaker**, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); see also RAP 2.5(a); **Lindblad v. Boeing Co.**, 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (declining to review issue, theory, argument, or claim of error not presented at the trial court level). The purpose of this rule is to afford the trial court an opportunity to correct alleged errors, thereby avoiding unnecessary appeals and retrials. **Demelash v. Ross Stores, Inc.**, 105 Wn. App. 508, 527, 20 P.3d 447, *rev. denied*, 145 Wn.2d 1004 (2001). Had the father provided the appropriate authority to the trial court, the trial court very well may have modified its decision. Instead, the parties are forced to litigate this issue at great expense in this court.

Even if the father did not waive his challenge on appeal, this court should nevertheless affirm the trial court's decision as a proper exercise of its discretion. The trial stated that it "use[d] its discretion" to apportion the cost differently than in proportion to their incomes because it was not confident that the husband had accurately stated his income. (4/14 RP 9) The court stated: "it seemed to me that there were a number of things that were done that would indicate that Mr. Harrison had a very good accountant

telling him what he could write off because by the time he got through with his income there was very little left. The court appreciates that but it seems to me that the court's entitled to take that into consideration." (4/15 RP 9) Because the trial court recognized that the father's income figures lacked credibility, the trial court did not abuse its discretion in apportioning post-secondary support equally.

IV. CONCLUSION

The trial court's decisions on property, spousal maintenance, parenting, and child support were well within its discretion. This court should affirm.

Dated this 11th day of April, 2012.

SMITH GOODFRIEND, P.S.

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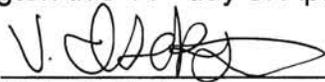
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 11, 2012, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division III 500 N. Cedar St. Spokane, WA 99201	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Howard N. Schwartz Law Office of Howard N. Schwartz, P.S. 413 No. 2nd Street Yakima, WA 98901-2336	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
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DATED at Seattle, Washington this 11th day of April, 2012.



Victoria K. Isaksen