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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

NO. 338681

IN RE:

LANE LEHMAN,

Petitioner/Appellant,

and

CYNTHIA LEHMAN (nka LINCOLN)

Respondent/Appellee.

APPELLEE'S RESPONSIVE BRIEF

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I. COUNTER STATEMENT OF THE CASE

A. PROCEDURAL FACTS RE: PROCEEDINGS

1. THE DISSOLUTION OF MARRIAGE

On 08/06/94 Lane Lehman and Cynthia Lincoln (f.k.a Lehman) were married. (CP 2). Two children were born of the union, Makayla and Levi. (CP 3).

On 05/08/14 an agreed Decree of Dissolution dissolved the Lehman marriage. (CP 10-17). The same day, an agreed Final Order of Child Support was entered concerning Makayla and Levi. (CP 18-27). The agreed Final Order of Child Support was supported by a worksheet. (CP 28-32). Again, as the Findings of Fact indicate, the final papers were by agreement. (CP 01).

According to the agreed Final Order of Child Support, Makayla was then age 16 and Levi was then age 14. (CP 19). Mr. Lehman was named the obligor for support and Ms. Lincoln was named the obligee for support. (CP 19-20). The child support transfer payment from Mr. Lehman to Ms. Lincoln was rounded to \$1,118.00 (\$588.83 for each child). (CP 20-21). Mr. Lehman's net monthly income was set at \$3,828, (CP 19), and Ms. Lincoln's net monthly income was set at \$1,593. (CP 20). No deviation was agreed to by the parties. (CP 21). Mr. Lehman was responsible for 72 percent of the combined income and Ms. Lincoln was responsible for 28 percent of the combined income. (CP 28).

According to the agreed Final Order, support was to be paid until

Makayla and Levi reached the age of 18 or as long as the children remained enrolled in high school, whichever event occurred last, except the right to request post-secondary support was reserved, provided the right was exercised before support terminated. (CP 22). The agreed Final Order of Child Support also addressed federal income tax dependency exemptions, (CP 23), uninsured medical expenses, (CP 27), back obligations, (CP 27), and expenses not included in the transfer payment. (CP 22). The agreed Order did not, however, address medical coverage, (CP 23-26), and also indicated, as concerns periodic adjustments, the provision did not apply. (CP 23). According to the agreed Order, Mr. Lehman resided in Walker, LA. (CP 19).

2. THE CHILD SUPPORT MODIFICATION

On 05/28/15, a little more than one year after the previous agreed Final Order of Child Support, Ms. Lincoln filed a Summons and Petition for Modification of Child Support. (CP 35-39). Her petition requested post-secondary support for Makayla, (CP 38), and an order (1) requiring either or both parents to maintain medical support consistent with RCW 26.09.105, including but not limited to health insurance coverage for Makayla and Levi, and requiring each parent to contribute his or her proportionate share of uninsured medical expenses. (CP 38). The petition also requested the court order child support payments based on the Washington State Child Support statutes, attorney fees and costs, and driver's education for Levi to be paid proportionally by the parents. (CP

38).

Thereafter, on 06/25/15, a copy of the Summons and Petition were served on Mr. Lehman in Gadsen, AL, (CP 41), along with a Request for Production of documents. (CP 41). On 07/24/15 a general Notice of Appearance was filed by Evan Marken on behalf of Mr. Lehman. (CP 43).

Thereafter, on 08/06/15, Mr. Lehman responded by filing financial source documents, (CP 44), and on 09/16/15, in reply, similar information was filed by Ms. Lincoln, (CP 71), including the case payment history, (CP 71), her federal income tax returns for 2013 and 2014, (CP 74-103), and her pay stubs. (CP 103-105). Ms. Lincoln also filed financial aid and post-secondary information for Makayla, (CP 106-115), proposed worksheets, (CP 119-123), and a financial declaration from Makayla. (CP 124-130). Ms. Lincoln also filed a declaration from Makayla concerning post-secondary education, (CP 131-133), as well as her own financial declaration, (CP 136-142). A copy of the aforementioned documents was provided to Mr. Lehman's counsel. (CP 143-144). As the record reflects, despite the statutory affirmative and mandatory obligation of disclosure of financial information and resources compelled by RCW 26.19.175(1), and despite outstanding Requests for Production, Mr. Lehman volunteered no additional information. It is unclear if this omission was a tactical decision or an oversight.

On 09/24/15, (more than 60 days after service of the Summons, Petition, and Requests for Production), a hearing was held. (CP 147).

Neither parent requested a continuance of the hearing. (CP 147). Counsel for Ms. Lincoln appeared in person and counsel for Mr. Lehman appeared by telephone. (CP 147). After the hearing, without objection, a presentment was set for 10/01/15, to enter final orders, (CP 145-146), a date approximately 98 days after service of the Summons, Petition and Requests for Production. Shortly before the presentment, on 09/21/15, a second attorney signed a substitution appearing for Mr. Lehman. (CP 148). The substitution was filed 09/28/15. (CP 148). No request was filed or served by the second attorney requesting a continuance of the presentment hearing. Nor, did the second attorney pose an objection.

Thereafter, on 10/01/15, Findings/Conclusions on Petition for Modification, an Order on Modification, and a Final Order of Child Support and Worksheets were entered with the trial court with the “telephonic approval” of yet a third attorney for Mr. Lehman. (CP 149-174). As the documents entered indicate, the documents were not only with the “telephonic approval” of the third attorney, Notice of Presentment was waived and no objection was registered on the documents. (CP 149-174). In fact, the documents were “approved for entry.” (CP 151; CP 154; CP 166). Thereafter, neither party filed for reconsideration, revision, or a new hearing. The clerk’s papers on appeal do not list nor contain a Notice of Appeal. RAP 9.1(c); RAP 9.6(b)(1)(A). Yet, Mr. Lehman bears the burden of providing an adequate record for review and if Mr. Lehman fails to meet this burden, the trial court’s decision stands. Story v. Shelter Bay

Co., 52 Wn. App. 334, 345; 760 P.2d 368 (1988); State v. Tracy, 158 Wn.2d 683, 691; 147 P.3d 559 (2006); RAP 2.5(a).

3. THE PROCEEDINGS TO VACATE

Subsequently, on 12/23/15, Mr. Lehman filed a Motion for an Order to Show Cause to Vacate the Final Orders entered 10/01/15, (CP 175), accompanied by a Memorandum, (CP 176-188), a Declaration of Counsel, (CP 189-191), a Declaration with proposed exhibits, (CP 192-269), and a Financial Declaration from Mr. Lehman, (CP 269-275) with proposed Worksheets, (CP 276-281), and Sealed Financial Source Documents. (CP 282-365). The same day, an Order to Show Cause issued without any Findings or Conclusions. (CP 366-368). The Order to Show Cause was served on Ms. Lincoln on 01/05/16. (CP 369-370). Although the Memorandum conceded Mr. Lehman was in fact served on 06/25/15, among other misrepresentations, the Memorandum indicated Mr. Lehman was also served with "a set of interrogatories," (CP 177), when, in fact, Mr. Lehman was actually served with "Respondent's First Requests for Production of Documents." (CP 41) As the record reflects, those requests were never answered.

In response to Mr. Lehman's filing, on 01/26/16 Ms. Lincoln filed a declaration from Makayla, (CP 372-376), a Response In Opposition To Vacation Of Order Pursuant To CR 60, (CP 377-389), a declaration of Kelli McKern, (CP 396-398), and pay information for Ms. Lincoln. (CP 399-404). In turn, Mr. Lehman filed a Memorandum In Strict Reply, (CP

405-410), with a transcript of the prior proceedings, (CP 411-429),(RP 09/24/15).

On 01/28/16, the Motion to Vacate was orally denied. (CP 436). However, before formal orders could be entered, on 02/08/16 a Motion for Revision was filed and served on Mr. Lehman's behalf, (CP 438-440), followed on 02/16/16, by a transcript of the proceedings. (CP 441-447). Thereafter, on 02/18/16, formal Findings and Order were issued by the commissioner, (CP 488-492), and on 03/02/16, the Motion for Revision was denied. (CP 495-496). Once again, the clerk's papers do not contain a Notice of Appeal. RAP 9.1(c); RAP 9.6(b)(1)(A). Yet, Mr. Lehman bears the burden of providing an adequate record for review and if Mr. Lehman fails to meet this burden, the trial court's decision stands. Story v. Shelter Bay Co., supra; State v. Tracy, supra; RAP 2.5(a).

II. SUBSTANTIVE FACTS

As best as one can fathom from Mr. Lehman's opening brief, the following erroneous issues are intertwined in Mr. Lehman's statement of facts. Ms. Lincoln's version of the substantive facts are addressed as relevant in the remainder of this response. And, Ms. Lincoln does not waive her claim Mr. Lehman has failed to provide an adequate record for review.

1. *It is erroneously contended Ms. Lincoln failed to file and serve with her petition a copy of her child support worksheets.* (Appellant's Brief at 7). However, as this Division has indicated, the statutes do not so require,

In re: Marriage of Pollard, 99 Wn. App. 48, 55; 991 P. 2d 1201 (2000), and any omission was subsequently corrected on 09/16/15, (CP 123), before the hearing on 09/24/15. See also, In re: Marriage of Sprute, 186 Wn. App. 342, 350; 344 P. 3d 730 (2015) (“Adopting the same rule in the context of the exercise of the right to request post-secondary educational support.”). Moreover, Mr. Lehman never objected to any alleged omission. (RP 9/24/15 at 2-17);(CP 414-429).

2. *It is also wrongly contended, Ms. Lincoln failed to show a substantial change of circumstances and did not request in the body of her petition a modification of support for Levi.* (Appellant’s Brief 7). However, an agreed Order of Child Support does not require a showing of a substantial change of circumstances, Schumacher v. Watson, 100 Wn. App. 208, 212; 997 P. 2d 399 (2000); Pippins v. Jankelson, 110 Wn.2d 475, 478; 754 P. 2d 105 (1988), and when any portion of a request for modification of support is granted, all issues can be resolved at the hearing. In re: Marriage of Scanlon, 109 Wn. App. 167, 178-179; 34 P. 3d 877 (2001), review denied, 147 Wn. 2d 1026 (2002); In re: Marriage of Morris, 176 Wn. App. 893, 901; 309 P. 3d767 (2013) (“A petition is ‘significant in nature and anticipates making substantial changes and/or additions to the original order of child support.’”). Moreover, at hearing, no objection was posed concerning Levi’s support and, under notice pleading, Levi’s support was clearly before the trial court by the prayer for relief, (CP 38), Champagne v. Thurston County, 163 Wn.2d 69, 85-87;

178 P. 3d 936 (2008), as well as the request for Makayla's postsecondary education. (CP 38). And, surely, upon receipt of Ms. Lincoln's proposed Child Support Worksheets regarding Levi, (CP 119-123; CP 143), any confusion should have evaporated given the totality of the circumstances. Indeed, to avoid the "tyranny of formalism," when issues are tried and ruled upon by express or implied consent, the issues will be treated in all respects as if they had been raised in the pleadings. CR 15(b); Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 766-767; 733 P. 2d 530 (1987). And, Levi's support was not in dispute in any manner at all. (CP 151; CP 154; CP 166); (RP 9/24/15 at 7, lines 19-20; at 8, lines 6-7); (CP419).

3. *It is also erroneously contended, Ms. Lincoln was required to file a motion for default, (Appellant's Brief at 10-11), rather than proceeding to hearing. Yet, as argued below, the Civil Rules and case law do not support this claim.*

4. *It is further contended Mr. Lehman had a dispute with his prior counsel and feels his prior counsel did not do a good job for him. (Appellant's Brief at 48 - 49). Yet, as argued below, this is not a basis for seeking direct review nor a basis for a motion to vacate.*

The difficulty for Mr. Lehman's statement of the case lies in the fact Mr. Lehman elected to make an argumentative statement of facts rather than simply stating the facts, without argumentative interpretation. As such, the substantive facts, already set forth in the documents referenced in both briefs, the clerk's papers, and the reports of proceedings, will be

further addressed as necessary in the substantive argument below.

II. STANDARD OF REVIEW

Mr. Lehman is generally correct in his erudition of the applicable standard of review as generally one of abuse of discretion, i.e., as this Division has described, a decision no reasonable person/judge would order. In re: Firestorm, 106 Wn. App. 217, 223; 22 P. 3d 849 (2001), review denied, 144 Wn.2d 1021 (2001). However, Mr. Lehman omits seven very important foundational corollary standards applicable to any domestic relations appeal. He also fails, as previously observed, to provide an adequate record for review.

First, Appellate Courts are loath to reverse a trial court in domestic matters due to the overarching importance of and need for finality. In re: Marriage of Landry, 103 Wn.2d 807, 809; 699 P. 2d 214 (1985). As Landry, observed:

. . . [s]uch decisions are difficult at best, Appellate Courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality . . . The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion," on any basis existent in the pleadings. . . .

As this Division has also noted, this reluctance to reverse a trial court in domestic matters equally applies to child support decisions. Pollard, 99 Wn. App. 48, 52 (2000).

Second, "substantial evidence" means evidence in the record which is sufficient to persuade a fair minded person of the truth of the declared

premise. In re: Marriage of Hall, 103 Wn.2d 236, 246; 692 P. 2d 175 (1984). And, here, as the record shows, substantial evidence exists.

Third, a failure to object below constitutes invited error or waiver which will not be reviewed on appeal. Morris, 176 Wn. App. 893, 900 (2013). And, here, as concerns many contentions, this standard applies.

Fourth, the “sins of the lawyer” absent a showing of clear, cogent, and convincing fraud, are suffered by the client. Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 679; 41 P. 3d 1175 (2002). Lane v. Brown & Haley, 81 Wn. App. 102, 107; 912 P.2d 1040 (1996), review denied 129 Wn.2d 1028; 922 P. 2d 98 (1996), (“ . . . the incompetence of a party’s own attorney is not sufficient grounds for relief from a judgment in a civil case.”); Haller v. Wallis, 89 Wn.2d 539, 547; 573 P. 2d 1302 (1978). As stated in Lane at 109, “attorney mistake or negligence does not provide an equitable basis for relief for the client . . . notice to the client of upcoming action in court is not a requirement.” See also, Graves v. P.J. Taggares Co., 25 Wn. App. 118, 124; 605 P. 2d 348 (1980),(Ability to question authority of attorney to sign in court settlement not sufficient in absence of showing of fraud); In re: Marriage of Burkey, 36 Wn. App. 489, 491; 675 P. 2d 619 (1984); Lindgren v. Lindgren, 58 Wn. App. 588, 794 P. 2d 526 (1990); In re: Marriage of Maddix, 41 Wn. App. 248; 703 P. 2d 1062 (1985). And, here, there is absolutely no showing of fraud or misrepresentation by any measure.

Fifth, a motion to vacate is not a vehicle to address errors of law.

Rather, when there is an alleged error of law, the remedy is a direct appeal not a motion to vacate. Burlingame v. Consolidated Mines & Smelting Co., 106 Wn. 2d 328, 336; 722 P. 2d 67 (1986). And, as this Division once stated, a review from a denial of a motion to vacate does not include review of the propriety of the underlying judgment. Bjurstrum v. Campbell, 27 Wn. App. 449, 450-451; 618 P. 2d 533 (1980).

Sixth, a trial court considering a motion for modification of child support has broad equitable powers. Morris, supra. at 903 (2013). And, as evident below, the trial court in this never-ending case filed May 2015, (CP 35), involving the support of two dependent children, (CP 37-40), did not entertain an erroneous view of the law nor rule with less than substantial evidence. Moreover, many of the alleged errors complained of were never raised below.

Seventh, on revision the commissioner's Findings and Conclusions, if affirmed by the Superior Court Judge, become the Findings and Conclusions of the Superior Court Judge. State Ex. Rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 423; 154 P. 3d 243 (2007). And, here, the commissioner's Findings, Conclusions, and Order, (CP 488- 492), were affirmed by Judge Monasmith. (CP 495-496).

III. ARGUMENT

A. The Trial Court Did Not Require A Showing Of A Substantial Change of Circumstances To Proceed With Modification Of An Agreed Order of Child Support And Had Full Authority To Modify The Entire Order.

It is surprising, and verges on frivolous, to fail to cite and to ignore well established authority that a trial court does not require a showing of a substantial change of circumstances to proceed with a modification action involving an agreed Order of Child Support previously entered in an uncontested proceeding. Schumacher v. Watson, 100 Wn. App. 208, 213 (2000), (“Just because the parties have an agreement on child support does not mean the court cannot revise it.”); Pippins v. Jankelson, 110 Wn.2d 475, 478 (1988). Ironically, Morris, supra, cited by Mr. Lehman, did not require a substantial change of circumstances to proceed. Morris at 902. For, as concerns postsecondary educational expenses not subject to a fully contested prior proceeding, a substantial change of circumstances is not required for reasons similar to the lack of such a requirement for an agreed Decree.

As stated in Jankelson at 481, as concerns agreed Orders of Child Support outside a fully contested hearing, a subsequent court, exercising traditional equitable powers, may evaluate the reasonableness of the original amount and modify child support payments accordingly. In other words, the entire May 2014 agreed Final Order of Child Support, never the subject of a fully contested proceeding, was fully subject to review and “revision” in its entirety. Schumacher, 100 Wn. App. 213 (2000) (“Just because the parties have an agreement on child support does not mean that the courts cannot revise it.”); See also, In re: Marriage of Lee, 57 Wn. App. 268; 788 P. 2d 564 (1990) (Allowing the court to modify an escalation

clause of an agreed order without a showing of a substantial change of circumstances.).

1. The Trial Court Did Not Err When It Modified Child Support For The Parties' Minor Child.

As Mr. Lehman's own citation to Scanlon, supra. at 171 (2001), makes clear, "once a basis for modification has been established, a court may modify the original order in any respect." (Emphasis added). As such, once the trial court concluded there was a basis for any award, all relief was available, even if not plead, although support for Levi was surely before the trial court in the prayer for relief. (CP 38); Champagne, 163 Wn.2d 69, 85-87 (2008). And, as noted above, under Pippins supra, and its progeny, the entire May 2014 order was subject to "revision" or modification. Clearly, there was a basis for modification.

Moreover, when the orders subject to this appeal were presented for entry, the orders were "telephonically agreed" and "approved for entry." (CP 151; CP 154; CP 166). There was no error, but assuming error once existed, it was not preserved by the failure to object at the presentment. Morris, at 900 (2013). In fact, at the hearing on modification, Mr. Lehman's attorney even conceded the support transfer payment for Levi should be \$834.88 and Levi's support was not at issue. As counsel indicated, "[t]his isn't an issue about child support. This is obviously the issue about post-secondary support. . . . I don't see how any way when you go with their child support worksheets of \$800 that he should be on

the hook . . . for Makayla's college." (RP 9/24/15 at 7, lines 19-20; at 8, lines 6-12) (CP 419; CP 420).

2. The Trial Court Did Not Err When It Modified Mr. Lehman's Payment Schedule.

Similar to the above, it is wrongfully claimed, yet again, the trial court had no legal basis for modifying the payment schedule from two payments in a month to one payment a month. However, as Pippins and its progeny make clear, this is a fallacious argument. Indeed, as Marriage of Lee, supra, illustrates, all portions of the Order of Support are subject to "revision" as the trial court deems equitable. And, as regards the allegation the new child support transfer payment accounts for 43 percent of Mr. Lehman's income, (Appellant's Brief at 35), assuming arguendo such an allegation is true, a support order of 43 percent of a parent's net income is allowed without a showing of good cause. In re: Marriage of Cota, 177 Wn. App. 527, 542; 312 P. 3d 695 (2013).

3. The Trial Court Did Not Err When It Modified The Order of Child Support To Add An Automatic Adjustment Of Support.

Again, as Lee, supra, establishes, the trial court was fully authorized to revise the May 2014 order to provide automatic adjustment. More particularly, at the presentment the orders were "agreed" and "approved for entry" as written. (CP 151; CP 154; CP 166). There was no error, but assuming error once existed, it was not preserved by the failure to object at the presentment or the hearing. Morris, at 900 (2013). There also has

been no showing of any prejudice. Morris, at 903-904 (2013). Thus, if there was any error, the error was harmless and not subject to review. *Id.*

4. The Trial Court Did Not Err When It Modified The Parties' Obligation To Pay Their Proportional Share Of Educational Expenses.

Once again, Mr. Lehman erroneously claims, “[s]upport orders may be modified only upon an unanticipated change in circumstances occurring since the former decree.” He cites Wagner v. Wagner, 95 Wn.2d 94, 98; 621 P. 2d 1279 (1980) for his erroneous contention. However, as demonstrated above, Pippins and its progeny indicate, as in the case at bar, when the prior Order of Support was entered by agreement and not subject to a fully contested prior proceeding, a showing of a substantial change of circumstances to secure a modification or revision was unnecessary. Moreover, as illustrated by the petition itself, the request for an order regarding “driver’s education for Levi Lehman to be paid proportionally by the parties” was fully before the trial court and known to Mr. Lehman. (CP 38). And again, when the orders subject to this appeal were presented for entry, the orders were “telephonically agreed” and “approved for entry.” (CP 151; CP 154; CP 166). There was no error, but assuming error once existed, it was not preserved by the failure to object at the presentment or during the hearing. Morris, at 900 (2013). And, there also has been no showing of any prejudice. Morris, at 903-904 (2013). Thus, if there was any error, the error was harmless and not subject to review. *Id.*

B. The Trial Court Did Not Err Nor Violate Substantive And Procedural Statutory Requirements And Substantial Evidence Exists In The Record To Order Post-Secondary Support.

1. The Trial Court Considered All Elements of RCW 26.19.090(2).

Here, as the clerk's papers, (CP 455-462), and report of proceedings (RP 9/24/15 at 10-12), (CP 422 – 424), ("that's what's reflected in the pay stubs that they submitted . . . I'm going to turn back very quickly to Makayla and her financial declaration . . . I appreciate all the information that the parties have given to the court. It's a lot for the court to work with and that's always better than not having enough . . ."), clearly indicate, the trial court stated it considered all of the postsecondary support factors set forth in the statute. And, although the trial court did not make extensive findings of each factor on the record, as made clear in Cota, 177 Wn. App. 537 (2013), RCW 26.09.090 sets forth no requirement the trial court explicitly consider the factors on the record. Moreover, this Court must presume the trial court considered all of the evidence before it in fashioning an order on postsecondary educational expenses. In re: Marriage of Kelly, 85 Wn. App. 785, 793; 934 P. 2d 1218 (1997).

In fact, in support of the presumption, here, the evidence without objection, showed:

01.) Makayla was a dependent child, (CP 92; CP 97; CP 124; CP 131-132);

02.) Makayla's age, (CP 124);

03.) Makayla was intending to attend Spokane Falls Community College, (CP 111);

04.) Makayla's needs, (CP 124-130; CP 131-133);

05.) Makayla applied for financial aid, (CP 111-115);

06.) Makayla's prospects, (CP 111-115);

07.) Makayla's aptitudes, (CP 111-115);

08.) The nature of the postsecondary education sought, (CP 111-115);

09.) The parent's current and future resources, (CP 116-118; CP 136-142; CP 44-69).

(See also, RP 9/24/15 at 10-16);(CP 422-428).

As this Division has stated, only those RCW 26.19.090 factors which are relevant must the trial court consider. In re: Parentage of Goude, 152 Wn. App. 784, 791; 219 P. 3d 717 (2009).

Additionally, as the subsequent findings, "approved for entry" by Mr. Lehman's third attorney, indicate, "Makayla Lehman is in need of post-secondary support because the child is in fact dependent and is relying upon the parents for the reasonable necessities of life. . . Makayla Lehman will be attending school full time and will require assistance as a dependent from her parents for the necessities of life due to the inability to earn income as a full time student." (CP 150).

And, the above findings were entered even though Mr. Lehman's counsel was granted the opportunity to exchange and present his own proposed orders beforehand. (RP 9/24/15 at 16, lines 13-19); (CP 428).

Yet, perhaps this was not done as Mr. Lehman's third attorney indicates in a subsequent declaration, "the proposed orders accurately reflected the Court's oral ruling from the bench. As a result, we authorized Mr. Webster to present the orders he had prepared." (CP 187).

Moreover, if there was any doubt, as the commissioner subsequently indicated in colloquy with Mr. Lehman's counsel, "but it was a full-fledged hearing. There were declarations, the Court read them." (CP 455 lines 18-19). Further, as the commissioner also subsequently indicated, "Okay. In terms of RCW 26.19.090, it – the argument from Mr. Lehman is that the Court couldn't have done what it did, because it didn't have the necessary information in front of it, and as I read the statute and read through the transcript, the Court did have the information it needed." (CP 457 lines 9-12). See also the colloquy between the commissioner below and counsel at (CP 457-460); and (CP 474) wherein the commissioner states, "the Court had the information to make a fair decision, ..., and did so, and that the factors the Court relied on to establish postsecondary support were supported by substantial evidence from the court file and the declarations filed for that motion." See also, Findings and Order Re: Petitioner's Motion To Vacate filed 02/18/16, (CP 488-491), upheld on revision 03/02/16 (CP 495-496).

Substantial evidence is defined as evidence in the record which is sufficient to persuade a fair minded person of the truth of the declared premise. In re: Marriage of Hall, 103 Wn.2d 236, 246; 692 P. 2d 175

(1984). This Court, in all respect, may not disturb Findings of Fact supported by substantial evidence even if there is conflicting evidence. In re: Marriage of Lutz, 74 Wn. App. 356, 370; 873 P. 2d 566 (1994) (quoting Henry v. Robinson, 67 Wn. App. 277, 289; 834 P. 2d 1091(1992)). Here not only is there substantial evidence to support the trial court's findings, there was no conflicting evidence.

2. The Trial Court Did Not Err In Ordering Postsecondary Support Paid To Ms. Lincoln.

Assuming arguendo the child support transfer payment was to be sent to Makayla rather than Ms. Lincoln, as Makayla's preferred agent, so what? Any error in this regard would be harmless and thus not worthy of consideration on appeal. Morris, at 903-904 (2013). As stated in Morris, supra, "[i]t is well established that errors in civil cases are rarely grounds for relief without a showing of prejudice to the losing party. This is true even when the statute, as in Morris, uses the word "shall" and is not followed. And, in fact, counsel for Mr. Lehman even conceded to the request to have the transfer payment directly to the mother stating, "I just ask that in the order there be an allowable accounting of proof that the mother is paying the daughter via check or what other form. I don't expect it to be any type of (inaudible) every month but if we could get a quarterly accounting that the money's going to Makayla, that would be great." (RP 9/24/15 at 15, lines 17-20), (CP 427). In any event, RCW 26.19.090(6)

does not preclude payment as agreed below between counsel and the trial court.

3. The Trial Court Conducted A Proper Trial On The Documentary Submissions. Mr. Lehman's Failure To File A Formal Answer Did Not Preclude A Hearing Or Mandate A Default.

When issues are tried by express or implied consent, they will be treated in all respects as if they had been raised in the pleadings. CR 15(b); Reichelt, 107 Wn.2d 761, 766-767 (1987). Moreover, as concerns the applicability of Stevens County LCR 40, a trial court has the express authority to ignore and not apply its own local rules, Raymond v. Ingram, 47 Wn. App. 781, 784; 737 P. 3d 314 (1987), and a trial court may, for good reason, relax and suspend, its own special rules of procedure as observation of local rules by a trial court is largely discretionary. Snyder v. State, 19 Wn. App. 631, 637; 577 P. 2d 160 (1978). As indicated in Snyder, this Court “will presume that the Superior Court disregarded the rule (if it did) for sufficient cause” absent an injustice.

And, to repeat the unrebutted fact once again, assuming error once existed, it was not preserved by the failure to object at the presentment, Morris, 176 Wn. App. 893 (2013), as when the orders subject to this appeal were presented for entry, the orders were “telephonically agreed” and “approved for entry.” (CP 151; CP 154; CP 166). And, any error in this regard would be harmless and thus not worthy of consideration on appeal. Morris, at 903-904 (2013).

Further, as previously illustrated, it is not correct to argue an action “begins by filing a petition, along with financial worksheets and serving the other party.” (Appellant’s Brief 43). This Division in Pollard, supra, stated otherwise. Further, while RCW 26.09.175 states that if a responding party fails to answer within the time required, such a failure shall result in entry of a default judgment for the petitioner, such language does not preclude a hearing. CR 15(b); Reichelt, supra, RCW 26.09.175 must be read consistent with CR 55(a). And, CR 55(a) states “[w]hen a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules, and that fact is made to appear by motion and affidavit, a motion for default may be made.” (Emphasis added). In any conflict between RCW 26.19.175 and CR 55(a), CR 55(a) controls. CR 81; State ex. Rel. Dept of Ecology v. Anderson, 94 Wn.2d 727, 731, 732; 620 P. 2d 76 (1980). Notwithstanding, a response was actually filed by Mr. Lehman. (CP 44-70).

Lastly, as to the claim the trial court could not consider postsecondary support without a complete worksheet from Ms. Lincoln, (Appellant’s Brief at 44), as the Court is aware, although postsecondary support is child support, the worksheets are not mandatory for such decisions. Morris, at nt 1. And, “[f]ailure to base postsecondary support on this non mandatory calculation is not an abuse of discretion.” Moreover, In re: Marriage of Rausch, 124 Wn. App. 226, 234; 98 P. 3d 12116

(2004), abrogated in part on other grounds, In re: Marriage of McCausland, 159 Wn.2d 607; 152 P. 3d 1013 (2007), held that where the evidence supports the trial court's order, the trial court's failure to complete worksheets is not reversible error. And, as previously noted, the worksheets signed by the trial court were submitted with the approval of Mr. Lehman's counsel. (CP 172). As such, there is no room to complain. Morris, at 900.

Indeed, at the hearing concerning support, Mr. Lehman's counsel, strategically accepted Ms. Lincoln's worksheets to his advantage to posit that postsecondary support should not be ordered stating, "I don't see how any way when you go with their child support worksheets of \$800 that he should be on the hook for . . . Makayla's college." (RP 9/24/15 at 8, lines 8-10), (CP 420). Counsel for Mr. Lehman further had no quarrel with the incomes in the worksheets attributed to each parent. (RP 9/24/15 at 10, lines 1-16), (CP 422). And when counsel was asked if there was anything else for the trial court, counsel declined the invitation. (RP 9/24/15 at 12, lines 16-17), (CP 424).

C. The Trial Court Did Not Err In Denying The Motion To Vacate

The motion to vacate, as framed on appeal, is brought pursuant to Civil Rule 60(b)(1) and CR 60(b)(11). Surprisingly, despite Mr. Lehman's complaints about former counsel, the argument on appeal is not under CR 60(b)(4). Thus, any argument or slight mention below concerning CR 60(b)(4) should be considered abandoned. Holder v. City of Vancouver,

136 Wn. App.104, 107; 147 P. 3d 641 (2006). And, the failure to demonstrate fraud by clear, cogent, convincing evidence, as concerns Mr. Lehman's counsel's performance, is fatal to his claim regarding any counsel's performance.

As made clear by Barr v. MacGugan, 119 Wn. App. 43, 8 P. 3d 660 (2003), if an attorney is authorized to appear on behalf of a client, that attorney's acts are binding on the client. Haller v. Wallis, 89 Wn.2d 539, 547; 573 P. 2d 1302 (1978). Unlike Barr, here Mr. Lehman's first attorney did not suffer from severe clinical depression at the hearing on 09/24/15. Nor did the second attorney suffer such a malady. Similarly, nor did the third attorney suffer from severe depression when he approved the orders presented to the trial court on 10/01/15 wherein he failed to object. Unlike Barr, no attorney was afflicted with a mental disability affecting Mr. Lehman's case sufficient to constitute grounds to support a motion to vacate. Indeed, unlike Barr, no attorney had mental health issues that caused a dismissal of the action "with prejudice." Barr, at 45. (Emphasis added). Barr is narrowly decided and factually inapposite and distinguishable.

As such the long standing rules requiring a showing by clear, cogent, and convincing evidence that fraud or misrepresentation, and not mere negligence or incompetence, apply. Rivers v. Washington, 145 Wn.2d 674, 679 (2002); Lane v. Brown & Haley, 81 Wn. App. 102, 107; (1996)(" . . . the incompetence of a party's own attorney is not sufficient grounds for

relief from a judgment in a civil case.”); Haller v. Wallis, 89 Wn. 2d 539, 547 (1978). See also, this Division’s opinions in Graves v. P.J. Taggares Co., 25 Wn. App. 118, 124 (1980); Marriage of Burkey, 36 Wn. App. 489, 491 (1984); and Marriage of Maddix, 41 Wn. App. 248; (1985). See also, Lindgren v. Lindgren, 58 Wn. App. 588 (1990). If anyone was provided with a “windfall” (Appellant’s Brief at 49), it was not, as argued, Ms. Lincoln, but the children. And, when matters concern the support of children, policy is very clear, a trial court’s orders should increase the adequacy of child support. RCW 2.09.001. As each of the cases cited above make clear, irregularities due to an attorney’s mis-performance are not irregularities sufficient to justify a court vacating an order under CR 60(b)(1). Irregularities clearly existed in Rivers, Haller, Graves, Burkey, Maddix, and Lindgren. Yet, the irregularities were insufficient. Similarly, irregularities also existed in Lane, 81 Wn. App. 102, 201 (1996) cited by Mr. Lehman. Yet, the motion to vacate in each case was denied. And, as this Division indicated in Marriage of Knutson, 114 Wn. App. 866; 60 P.3d 681 (2003), CR 60(b)(11) applies “sparingly” and a “change in a parties’ financial circumstances will not justify application of CR 60(b)(11).”

Indeed, it is Mr. Lehman’s burden to show prejudice in this matter Morris, at 903, and Mr. Lehman has failed to do so. Surely, Mr. Lehman can proceed against his former counsel in another tribunal for monetary relief, if he can show negligence. However, Makayla and Levi are the only

persons to be prejudiced if the Orders of Child Support entered 10/01/15 are vacated or reversed.

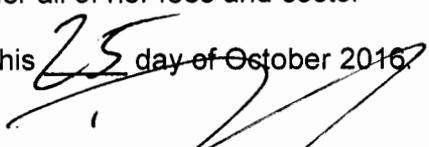
IV. ATTORNEY FEES

Pursuant to RAP 18.1, Ms. Lincoln seeks reimbursement of her full attorney fees and costs incurred in responding to this appeal. A fee declaration and financial statement will be submitted pursuant to RAP 18.1 as therein directed and as authorized by RCW 26.09.140.

V. CONCLUSION

For the reasons and factual statements discussed above, each of Mr. Lehman's Assignments of Error are without legal basis and substantial evidence exists to support the trial court's rulings. The trial court did not abuse its discretion at any time. Mr. Lehman's appeals should be denied and Ms. Lincoln fully reimbursed for her all of her fees and costs.

RESPECTFULLY SUBMITTED this 25 day of October 2016.



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Declaration of Service

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington THAT ON THIS DATE declarant filed the original of the document entitled: Appellee's Responsive Brief in Court of Appeals Cause No. 338681 at:

Court of Appeals of the State of Washington, Division III
Clerk of the Court
500 N. Cedar Street
Spokane, WA 99201

AND THAT ALSO ON THIS DATE declarant placed in the services of Eastern Washington Attorney Services a true and accurate copy of the document entitled: Appellee's Responsive Brief in Court of Appeals Cause No. 338681 for service upon all other parties, namely JULIE WATTS, Attorney for Petitioner/Appellant at her business address:

Julie Watts
Attorney at Law
422 W. Riverside, Ste. 1407
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DATED this 25th day of October, 2016.



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