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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

NO. 343448-III

SPOKANE COUNTY SUPERIOR COURT NO. 02-3-01235-1

HEIDI RACHAEL SILVER, n/k/a O'DAY,

APPELLANT.

v.

MATTHEW BENJAMIN SILVER,

RESPONDENT,

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The parties herein are Heidi R. O'Day and Matthew B. Silver. CP 26. The Appellant is Heidi R. O'Day, who will be referred to respectfully as Mother. The Respondent is Matthew B. Silver, who will be referred to respectfully as Father. This is an appeal by Mother regarding a post-child support modification issue.

The parties' marriage was dissolved by a Decree of Dissolution (Decree) entered on November 8, 2002. They have two children of their marriage, Alyssa Silver and Christian Silver. CP 13. The prior Order of Child Support was entered on July 31, 2014. Mother filed a child support modification petition on June 3, 2015. CP 28. She was pro se during the modification case. Father was represented by Attorney Terry D. Gobel. CP 33.

A child support modification hearing was held on October 26, 2015, before Court Commissioner Pro Tem, Wendy Colton. The oral record is contained in the Verbatim Report of Proceedings before the Honorable Wendy L. Colton. RP 1 - 35. After argument by Mother and Father's attorney, Terry D. Gobel, Pro Tem Commissioner

Colton ruled orally to adopt the worksheets proposed by Father, as Mother did not dispute them. RP 33. The Court further ordered post-secondary education support for the parties' child, Alyssa Silver, to be shared by she and her parents in equal thirds. RP 31. The child's federal income tax exemption was to be alternated by the parents, if the child does not claim herself in the tax year. RP 35.

Attorney Gobel was charged by the Court to draft the final orders. RP 34. The proposed final orders were to be forwarded to Mother by email that day. RP 35. Mother could sign off or note any objections to the Family Law Department by the following Friday. RP 35. Mother did not sign the final orders proposed by Attorney Gobel. Attorney Gobel presented the final orders to the Family Court by mail. CP 347. The Washington State Child Support Schedule Worksheets, Findings/Conclusions on Petition for Modification of Child Support, and Order on Modification of Child Support were entered in camera by the Court on November 18, 2015. CP 60 - 62, 63 - 72, 351 - 356, 357 - 358.

Mother timely filed her Motion for Reconsideration and Motion to Strike Notice and Objection Without Oral Argument on November 24, 2015. CP 73 - 91. In absence of Court action on

Mother's pending motions, Attorney Gobel arranged a special setting on February 3, 2016, to present Father's proposed Order Denying Motions to Strike and For Reconsideration of Post-Secondary Ed Support. CP 92 - 96. That February 3, 2016, hearing was held on the record and a Verbatim Report of Proceedings Before the Honorable Wendy L. Colton results. RP 36 - 70. After a hearing on the merits, with opportunity for both sides to argue, the Court entered an Order on Motion for Reconsideration, dated February 3, 2016. CP 100 - 101.

On February 12, 2016, Mother filed a Motion to Revise Commissioner's Ruling and Notice to Appear, asking the assigned judge "for revision of the Order of Commissioner Pro Tem Wendy Colton entered herein on February 3, 2016. CP 102 - 108. After another hearing on the merits, with opportunity for both sides to argue, the Court entered an Order on Revision, dated March 3, 2016. CP 122. The Honorable Raymond F. Clary ordered that, "... this Court adopts the rulings of Pro Tem Comm. Colton, except that the award of \$500.00 attorney fees against Mrs. O'Day is set aside." CP 122.

On April 1, 2016, Mother filed a Notice of Appeal to Court of Appeals. CP 371 - 382. Her request sought "review by the designated

appellate court of the improperly awarded income tax exemption (granted to Respondent), entered on November 8, 2015, and adopted by the Court in revision on March 3, 2016.” CP 371. Brief of Appellant was received by Respondent’s counsel on October 10, 2016. This Brief of Respondent results.

ARGUMENT

I. THERE ARE NO APPEALABLE ERRORS AND NO ISSUES WORTHY OF REVIEW RAISED BY APPELLANT

A. THE COURT’S AWARD OF THE CHILD’S FEDERAL INCOME TAX EXEMPTION WAS NOT ERROR.

Mother’s assignment of error #1, alleges that the Court erred by allowing Father to claim both children’s tax exemptions for 2015. Brief of Appellant at 4. That is denied. The Court in *Marriage of Peterson*, stated the standard for review which applies here: “The appellate court will overturn an award of child support only when the party challenging the award demonstrates that the trial court’s decision is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons.” 80 Wash.App. 148, 152, 906 P.2d 1009 (1995).

Mother’s last Petition for Modification of Child Support

sought modification only for Alyssa. CP 31. It is silent as to Christian. The “Post-Secondary Support” option is checked. CP 29. The “Relief Requested” section prayed for “extending child support beyond Alyssa Rachelle Silver’s 18th birthday until (he)(she) is no longer dependent upon either or both parents and is capable of self-support.” CP 31. Only Alyssa’s college support modification issue was before the Court. In the Order of Child Support Final Order, entered on November 18, 2015, under Section 3.17, unless Alyssa notifies the parents in writing by January 1st that she will use the exemption, the Court ordered the parents to alternate it, with Father taking odd years (starting in 2015) and Mother taking even years (starting in 2016). CP 6.

The statute on Federal income tax exemption division for child support is found at RCW 26.19.100. It states:

“The parties may agree which parent is entitled to claim the child or children as dependent for federal income tax exemptions. The court may award the exemption or exemptions and order a party to sign the federal income tax dependency exemption waiver. The court may

divide the exemptions between the parties, alternate the exemptions between the parties, or both.”

There are no published cases explaining this statute. The Legislature’s use of the term “may” is instructive. To understand the meaning of a statute, general principles of statutory construction are applied, which begins with the premise that if a statute is “plain and ambiguous,” it is self-executing. *Harmon v. Dept. of Social and Health Services*, 134 Wash.2d 523, 530, 951 P.2d 770 (1998). The use of “may” in this context is not ambiguous and is subject to the Court’s broad discretion.

At the support modification hearing on October 26, 2015, Attorney Gobel specifically raised the issue of “dependent exemption” by asking the Court for clarification of its ruling in that context. RP 35. Mother made no objection. The Court orally ruled, “If Alyssa is not claiming herself, not needing that exception for herself, I’ll allow each parent to have one year.” RP 35. Again, Mother made no objection. In response to the Court’s question about whether Mother

was available to review proposed final documents by email, she replied, “Yes.” RP 35.

Mother filed a Notice and Objection on October 30, 2015, which was devoid of any legal authority in support of the pleading. CP 55 - 56. In that document, she alleged, “... I was not given the opportunity to address the awarding of the 2015 tax credit for Alyssa to Respondent.” CP 55. Mother’s failure to request Court action is not error on the Court. Mother’s assignment of error #1 is meritless.

B. APPELLANT WAS AFFORDED ALL THE PROPER PROCESS WHICH WAS DUE.

In Mother’s assignment of error #12, she alleges that the Court erred by “permitting ongoing irregularities” and “other misconduct in the proceedings” which allegedly violated her “right to due process.” Brief of Appellant at 5. Due process affords a party the right to notice and opportunity to be heard. *Marriage of Wherley*, 34 Wash.App. 344, 347, 661 P.2d 155 (1983). Mother provides no facts to support her allegation of due process deprivation. The vague,

cumulative and generally impeaching allegation is denied. Mother's assignment of error #12 is meritless.

Mother's Notice and Objection seeks to bootstrap the award of Federal income tax exemptions in Commissioner Rachel Anderson's Order of Child Support from July 31, 2014. CP 55 and CP 9 - 25. However, the difference between the two child support orders is without material distinction. The most recent award of Alyssa's tax exemption was not awarded exclusively to Father, but rather alternated between the parents annually. Mother also claimed that since she voluntarily withheld the maximum personal tax withholdings, her net income was severely reduced "completely cancelling out any financial benefit to the kids from the increased child support for the rest of 2014." CP 55. By the voluntarily act of reducing her own net income, Mother cannot claim an injustice or appealable error due to her self-inflicted withholding wound. That matter is a personal finance decision and not a legal issue before the Court. Mother's other claims of financial hardship in the Notice and

Objection, which she claims are attributable to the Federal income tax exemption award, are inapposite. CP 55 - 56.

Mother argued that the loss of Alyssa's exemption award, will affect her income through "decrease by approximately \$400 per month, like last year." CP 56. Father manifested his objection to the Notice and Objection by filing a Motion to Strike, Motion for Fees and Sanction and Motion for Shortened Time, on November 2, 2015. CP 57 - 59. Among other things, sanctions were requested under CR 11 for Mother's thinly veiled attempt at improper reconsideration before written orders were entered and sanctions under RCW 4.84.185, because the filing was frivolous. The request for CR 11 sanctions was perfected by notice to Mother by email dated October 30, 2015, as required by *Biggs v. Vail*, 124 Wash.2d 193, 198, 876 P.2d. 448 (1994). CP 58. Father's motion sought an award of \$500 in fees "for blatant abuse of process and other violations as set forth above." CP 58.

C. PRESENTMENT ARRANGEMENTS AND SETTING

WAS APPROPRIATE AND NECESSARY.

Mother did not sign Father's proposed orders on child support modification. Attorney Gobel forwarded these proposed orders to the Spokane County Family Law Coordinator for presentation as is the local practice. Mother confirms Attorney Gobel's understanding that she "neither agreed nor objected." CR 349. Amanda Peterson, Spokane County Family Law Coordinator, acknowledged receipt and gave Mother the following notice by letter, "If you disagree with Mr. Gobel's proposed documents you must submit your own proposed documents or changes to the documents no later than 4:00 p.m. Friday, November 13, 2015." CP 349. On November 18, 2015, five days after the deadline, Commissioner Pro Tem Colton entered Attorney Gobel's orders on child support modification in camera.

Chief among those orders signed by the Court were Washington State Child Support Schedule Worksheets entered on November 18, 2015. CP 351 - 356. Father's net income was found to

be \$3,974.15. Mother's net income was found to be \$4,215.38. The parties combined income was \$8,189.53. Father's proportional share of income was set at 48.5%. Mother's proportional share of income was set at 51.5%. Both parents were ordered to pay a transfer payment to Alyssa each month in the amount of \$253.42. CP 65. This new support amount was set to start on November 1, 2015. CP 66.

On November 24, 2015, Mother filed a new Motion for Reconsideration and Motion to Strike Notice and Objection Without Oral Argument. CP 348 - 350. She asked that Alyssa be required to provide registration records instead of attendance records within 14 days (not 7) and grant Mother all the Federal income tax exemptions for Alyssa. CP 67 and 68. Mother failed to cite any provision of CR 59 and failed to state the legal grounds for the relief she requested. As with the Notice and Objection, Mother again cited tax withholding issues and "that I pay more than half of the support for Alyssa." CP 75. Mother moved the court "to strike my October 30, 2015, Notice and Objection, as it is not useful and only serves to increase

unnecessary paperwork in the Court file.” CP 75.

D. APPELLANT ACCUSED THE COURT COMMISSIONER PRO TEM OF INAPPROPRIATENESS WITH THE IMPLICATION OF FRAUD.

Mother’s Motion for Reconsideration and Motion to Strike Notice and Objection Without Oral Argument contained a new allegation if “SEVERE ERROR THAT REQUIRES CORRECTION, OR IT BECOMES A CRIMINAL ACT, ACCORDING TO RCW 42.20.040 [sic] AND RCW 42.20.050.” CP 74. Mother alleged that the Court attached her signature page from support modification orders which she purports to have proposed, to the actual support modification orders the Court actually signed on November 18, 2015. CP 73.

The text of RCW 42.20.040 reads,

“Every public officer who knowingly make any false or misleading statement in any official record or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor.”

The text of RCW 42.20.050 reads,

“Every public office who, being authorized by law to make or give a certificate or other writing, shall knowingly make and deliver as true such a certificate or writing containing any statement which he or she knows to be false, in a case where the punishment thereof is not expressly prescribed by law, shall be guilty of a misdemeanor.”

Essentially, Mother raised the alarm for alleged “FRAUD.” CP 74.

On December 1, 2015, Father filed his Motion for Order Denying Reconsideration to Strike Pleading and Granting Sanctions Against Petitioner Mother. CP 359 - 363. A copy of that pleading was mailed to Mother on November 30, 2015, as documented by a Declaration of Mailing filed on December 1, 2015. CP 368 - 369. Relief sought included

“an order which denies the Petitioner’s Motion for Reconsideration of modified post-secondary education support order” and “strikes the offensive pleading and further moves the Court for an award of attorney fees and sanctions against Petitioner, in favor of Respondent, for having to take this action to address the frivolous, impertinent and baseless pleading.”

CP 359. This request for relief was based on, in part,

“Petitioner Mother’s motions are deficient under the law and require sanctions. As required by CR 59, the mother has failed to establish facts making a prima facie case showing a plausible basis for valid reconsideration in irregularity of proceedings, abuse of discretion, misconduct by Mr. Silver, accident or surprise which ordinary prudence could not have guarded against, newly discovered evidence, an award to excessive or inadequate as unmistakably to indicate the Court was governed by passion or prejudice, error in the recovery, lack of justification of the decision under the law, error of law occurring at hearing or objected to at the time of hearing, or abortion of substantial justice. In other wordss, Petitioner Mother has failed to show that her motion is well-grounded in fact, warranted by existing law or a good-faith argument, not interposed for an improper purposes nor that her denial of findings of fact by the court warranted by the evidence or reasonably based and lack of information or belief. Petitioner Mother’s motions are frivolous and must be punished by sanctions, which include an award of \$500.00 in attorney fees to Respondent Father and the imposition of an additional screening order.”

CP 360 - 361. The Father’s motion ended with, “ Petitioner Mother’s demand that the Court essentially re-try this matter is a grand waste of time and mocks the integrity of this Court.” CP 362.

E. AT RECONSIDERATION HEARING THE COURT CLARIFIED CHILD’S INFORMATION SHARING DUTIES

TO THE PARENTS.

Attorney Gobel set a hearing before Commissioner Pro Tem Colton for February 3, 2016, to consider the Father's prior motion and present a proposed Order Denying Motions to Strike and for Reconsideration of Post-Secondary Ed Support. CP 92 - 96. Copies of the Notice of Presentment and actual proposed order were mailed to Mother. Proof of mailing is in the Certificate of Mailing filed on January 22, 2016. CP 368 - 369. Mother vaguely refers to a Motion, Certification and Order for Change of Judge, which she filed January 29, 2016. This was never served on the undersigned or Respondent and never set for hearing. The Mother's change of judge issue is moot. A hearing was held on February 3, 2016, at which Attorney Gobel and Mother attended, and argued on the record. RP 36 - 70. Attorney Gobel argued objections to Mother's reconsideration request and for a screening process for the Court to preliminarily review the Mother's pleadings for basic sufficiency (without prejudice) before permitting the filing and service of same. RP 40. The Court

administered the oath to Mother. RP 41. Mother began her argument, but was not responsive, so the Court redirected her:

“So, if you could keep your comments limited to this, you know, the specific pieces of the order that you disagree with or think that I should reconsider, I’m giving you that opportunity today to do that.”

RP 44. Commissioner Pro Tem Colton confirmed that she had read “this entire file.” RP 44. Mother backtracked from her pleadings during oral argument, stating to the Court,

“And so the end result was that when my husband got a copy of Your Honor’s final order and we discovered that my signature page was attached from my proposed order to the order that Mr. Gobel had provided, I felt that that needed to be addressed very quickly because I was concerned it creates an error on the record and that results in fraud – not that I would ever, Your Honor, accuse you of committing fraud.”

RP 45. Mother stated that she signed Father’s proposed WA Child Support Schedule Worksheets. RP 46. The Court again had to redirect Mother’s argument with “And again, I just, I just want to steer you to the orders. I’d like to know, you know, specifically about

the orders, what you're requesting that I reconsider." RP 48. Mother responded with "I'm asking you to please grant me Alyssa's tax credit for calendar year 2015 and calendar year 2016." RP 49.

First, she claimed surprise - that she "wasn't notified of losing the tax credit until October 26, 2014," depriving her of having an opportunity "to plan ahead financially." RP 49. Second, she claimed financial hardship due to the modification eliminating a child support transfer payment for Alyssa. RP 49. Third, Mother asked for Christian's tax exemption, despite that child not being included in the post-secondary child support modification case at all. RP 49. Fourth, Mother claimed that she "would be paying more than 50 percent," presumably of Alyssa's living expenses. Mother further asked the Court to deny Father's request for sanctions, saying, "I'm not an attorney." RP 50. Mother besmerched Father and his counsel for filing an objection to setting of a support modification hearing so discovery requests could be served and for setting the presentment hearing. RP 50. Mother asked the Court to strike her own Notice and

Objection, “because it’s truly not helpful and it simply adds to the bulk of the case file”. RP 50. Mother also asked that Alyssa be permitted to provide parents with class registration information, rather than attendance for Eastern Washington University (EWU) within 14 days of its availability. RP 50.

The Court asked for Attorney Gobel’s reply regarding the clarification regarding EWU attendance records and the absence of tax exemption language in the underlying petition for post-secondary education support modification. RP 51. Attorney Gobel responded that the Court, modification and post-secondary education support orders never intended to limit or modify the statutory reach of RCW 26.19.090. RP 53. It was further pointed out that Mother never asked the Court for post-modification adjustment of the transfer payment for Alyssa’s college support. RP 54. Attorney Gobel restated, “We still believe that it’s inappropriate to have brought the reconsideration motion.” RP 54. In an abundance of fairness, the Court gave Mother opportunity to make a surrebuttal. Notwithstanding irrelevant issues

and allegations, Mother stated, “Mr. Gobel did not put anything on the record that he was going to ask for that tax credit anywhere ahead of that hearing. It was sprung at the end of the hearing.” RP 56. “So he’s verbally filed that motion at the last minute and that’s why I’m asking you to address that and correct it.” RP 56. The Court confirmed that the parties “argued it” and said, “I recall the reason why I did what I did....” RP 57.

The Court noted that the Mother’s signature page was apparently attached without Mother’s permission. RP 47. The support modification orders entered on November 18, 2015, were otherwise affirmed. RP 59. Commissioner Pro Tem Colton could not make a determination that the reconsideration motion was done in a frivolous manner. RP 60. However, there were issues contained in her motion that the Court determined were without merit, specifically “the allegation that there is a criminal act that occurred.” RP 60. The Court clarified the attendance records requirement. RP 60. Alyssa will comply with the requirements of RCW 26.19.090 and RCW

26.09.225, giving both parents access to her education records. RP 60. Time for Alyssa's compliance was expanded to two weeks. RP 61. The Court denied Mother's request to reconsider the tax exemption award issue. RP 63.

The Court then ruled on Father's motions for fees and sanctions by informing Mother,

"I have to hold you to the same standard that I hold to all litigants that come before me, whether they're an attorney or not an attorney. You're required to file motions and, you know, follow the same procedures that the other attorneys have to follow."

RP 64. Attorney fees of \$500 were awarded to Father "for having to respond to the additional motions". RP 64. The Court found, "I'm sure it's costs Mr. Silver a lot more than \$500 to respond to the post – or the motions post-October 26th, but I am limiting it to \$500." RP 66. Mother objected to the fee award. RP 66. The Court denied the pre-screening requirement for Mother's pleadings. RP 68. The Court entered the Order on Motion for Reconsideration after hearing on the

same day. CP 100 - 101. Mother signed with her approval, but noted “without prejudice.” CP 101.

F. THE REVISION COURT AFFIRMED ALL THE CHILD SUPPORT ORDERS.

Mother timely served a Motion to Revise Commissioner’s Ruling and Notice to Appear on February 12, 2016. CP 102 - 108. She sought revision of the \$500 fee award, alleged inaccuracy of written orders prepared by Attorney Gobel, alleged lack of appropriate procedures to modify the July 31, 2014 support order, “lack of determination of dependence of Alyssa,” the “Commissioner practicing law from the bench” and “same standards for everyone”. CP 102 - 108. Mother requested further revision relief for reimbursement of costs, cash reimbursement for annual work leave, “judicial estoppel against Mr. Gobel from continually changing his position on arguments” and sanctions against Father and his attorney “which would specifically deter them from future misconduct”. CP 102 - 108. Mother also requested additional time for argument beyond

the standard 10 minutes. CP 107.

At the March 3, 2016, hearing, after a full hearing on Mother's motion for revision, The Honorable Raymond F. Clary, adopted the rulings of Commissioner Pro Tem Colton, but reversed the \$500 attorney fee award. A transcript of that hearing was not served by Mother on Attorney Gobel. However, Mother's Statement of Arrangements refers to it having been ordered. The Appellate Court should not consider that record, if it was made available by Mother.

G. THE ASSIGNMENT OF ERROR REGARDING AWARD OF CHILD'S FEDERAL INCOME TAX EXEMPTION TO FATHER LACKS MERIT.

Mother's assignment of error #5 also relates to tax exemptions in three sub-parts: a) alleged failure to discuss whether the decision is based on law or equity, b) alleged failure to follow CR 52, and c) alleged failure to enter findings of fact, conclusions of law, and a special finding that "the issues of tax dependency exemption was properly opened for discussion." Brief of Appellant at 4. Mother's vague, cumulative and generally impeaching allegation about law vs.

equity being addressed is unsupported by factual arguments and legal citations, as to be unintelligible so it is denied. The Court in the *Marriage of Morris* established that “the Court has broad equitable powers in family law matters. 176 Wash.App. 893, 903, 309 P.3d 767 (2013). Mother does not claim the Court was without jurisdiction for any part of the child support modification case and its sequelae.

Mother’s reference to CR 52 raises the issue of findings of fact, but her vague, cumulative and generally impeaching allegation is unsupported by legal citations and argument on the record, so they are likewise denied. The provision for written findings of fact being supported by the evidence in support cases is found at RCW 26.19.035(2).

“An order for child support shall be supported by written findings of fact upon which the support determination is based and shall include reasons for any deviation from the standard calculation and reasons for denial of a party’s request for deviation from the standard calculation. The court shall enter written findings of fact in all cases whether or not the court: (a) Sets the support at the presumptive amount, for combined monthly net incomes below five thousand

dollars; (b) sets the support at an advisory amount, for combined monthly net incomes between five thousand and seven thousand dollars; or (c) deviates from the presumptive or advisory amounts.”

The Court in *Marriage of Brockopp*, held that in a child support modification hearing, “the uniform child support schedule requires the court to make written findings of fact that must be supported by the evidence and in turn support the court’s conclusions”. 78 Wash.App. 441, 446, 898 P.2d 849 (1995).

“In establishing the child support schedule, the legislature intended to insure that every child support award satisfies the child’s basic needs and provides additional financial support commensurate with the parents’ income, resources, and standard of living. RCW 26.19.001; *In re Marriage of Leslie*, 90 Wash. App. 796, 803, 954 P.2d 330 (1998), *review denied*, 137 Wash.2d 1003, 972 P.2d 466 (1999). The legislature also intended to equitably apportion the child support obligation between both parents. RCW 26.19.001; *In re Marriage of Ayyad*, 110 Wash. App. 462, 467, 39 P.3d 1033 (2002).”

Marriage of Clarke, 112 Wash.App. 370, 377 (2002). Mother fails to substantiate her assignment of error #5. It is without merit.

H. THE COURT’S ORDERS ARE WELL REASONED AND

SUPPORTED BY SUBSTANTIAL EVIDENCE.

Commissioner Pro Tem Colton entered the required child support schedule on November 18, 2015. CP 351 - 356. Findings/Conclusions on Petition for Modification of Child Support were also entered on November 18, 2015. CP 60 - 62. The Court further affirmed its findings on the tax exemption award at reconsideration. CP 100 - 101. This is especially the case where Mother's net income is clearly greater than Father's. CP 351 - 356.

Marriage of Brockopp also stands for the principle that "On appeal, we will not substitute our judgment for that of the trial court where the record shows that the trial court considered all relevant factors." *Id.*, at 446. Mother does not specify which written findings she believes should have been made, but are absent. Further, Mother does not specify which findings she believes must be changed and why. The Superior Court is not required to enter specific findings when material facts are undisputed. Mother's allegations are so vague, cumulative and generally impeaching that they must be denied

here. *Marriage of Stern* states in this regard,

“In Washington, findings of fact supported by substantial evidence will not be disturbed on appeal.’ *Bering v. Share*, 106 Wash.2d 212, 220, 721 P.2d 918 (1986) *cert. Denied*, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987); *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash.2d 570, 575, 343 P.2d 183 (1959). If the record contains evidence of “sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise”, substantial evidence exists. *In re Snyder*, 85 Wash.2d 182, 185-86, 532 P.2d 278 (1976). The amount of child support rests in the sound discretion of the trial court. This court will not substitute its own judgment for that of the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances. *In re Marriage of Nicholson*, 17 Wash.App. 110, 119, 561 P.2d 1116 (1977).”

57 Wash.App. 707, 717, 789 P.2d 807 (1990) *rev. denied*, 115 Wash.2d 1013 (1990). The historic record of the Court’s hearings are objectively verifiable and may be used to support the Lower Court’s findings. *In re Dependency of J.C.*, 130 Wash.2d. 418, 426 - 427, 924 P.2d 21 (1996). Findings of Fact that are supported by substantial evidence in the record are verities on appeal. *Marriage of Crosetto*, 101 Wash.App. 89, 98 N.5, 1 P.3d 1180 (2000).

It is manifestly reasonable that the Court alternated the tax exemption equally between the parties every year for Alyssa. If Mother deemed herself prejudiced by the Court's informality of findings of fact, her remedy was to timely move the Court to vacate the judgment under CR 60(b), rather than pursue an appeal. *Bjorneby v. Bjorneby*, 56 Wash.2d 561, 562, 354 P.2d 384 (1960). It seems that Mother seeks review to establish the negative fact that Father should not have been awarded Alyssa's tax exemption for the 2015 tax year. The Court is not required to make negative findings on non-material issues. *Daughtry v. Jet Aeration Co.*, 91 Wash.2d 704, 708, 592 P.2d 631 (1979). Mother's position denies the finality of the Court orders and attempts an unjustified revisitation of the controversy.

Mother argues that the tax exemption question was not open for discussion, because it was not specifically pleaded by Father. Generally, that issue was tried by consent. CP 52. Under CR 15(b), amendment of the pleadings to conform to the evidence is permitted

where issues not raised by the pleadings are tried by the consent of parties, express or implied. In such a case, the appellate court must consider the record as a whole. *Mukilteo Retirement Apartments, L.L.C. v. Mukilteo Investors L.P.*, 176 Wash.App. 244, 256, 310 P.3d 814 (2013), rev. denied, 179 Wash.2d 1025, 320 P.3d 719 (2014).

For example, the Court in *Allstot v. Edwards*, 114 Wash.App. 625, 632, 60 P.3d 601 (2002), *recon denied*, 114 Wash.App. 625 (2002), *rev. denied* 149 Wash.2d 1028, 78 P.3d 656 (2003), held that a trial court is directed by CR 54(c) to grant relief to the entitled party “even if the party has not demanded such relief in his pleadings.’ *See State ex rel. A.N.C. v. Grenley*, 91 Wash.App. 919, 390, 959 P.2d 1130 (1998).” “Further, because the parties argued the issue and the trial court ruled on it, it is treated as if it had been pleaded. *Id.* at 931, 959 P.2d 1130 (*citing Reichelt v. Johns-Manville Corp.*, 107 Wash.2d 761, 766, 733 P.2d 530 (1987)).”

Specifically in *Marriage of Peterson*, 80 Wash.App. 148, 152, 906 P.2d 1009 (1995), *rev. denied*, 129 Wash.2d 1014, 917 P.2d 575

(1996), the Court denied a motion for reconsideration on the claim that division of the income tax exemption was not properly before the Court. Rather, the Court found it had authority to do so, because the exemption related to child support. *Peterson* goes on to hold, “Finally, tax exemptions for dependent children are generally considered to be an element of child support.” *Id.*, at 156.

“To ensure that an exemption is used efficiently as tax laws, income levels, and child support obligations change, the trial court must retain authority to allocate exemptions to the party who will benefit from them.” *Id.* Previously, Mother petitioned the Court to enter an order for the post-secondary education support of Allysa. The Court granted her petition and entered the modification, so Mother should be estopped from arguing against the 2015 tax exemption award to Father merely because she disagrees with it. The tax exemption award was appropriate in all aspects. Mother’s assignment of error #5 is meritless.

Mother’s assignment of error #2, alleges that the Court

violated RCW 42.20.040 or RCW 42.20.050 by permitting her signature page to be inadvertently filed with the Clerk attached to the final order. Brief of Appellant at 4. Mother does not seek vacation of the entire Order of Child Support Final Order. The Court noted the circumstances on the record. Mother has failed to show any prejudice as a result. If the Court's action in this regard is was error, it is harmless. Mother's assignment of error #2 is meritless.

Mother's assignment of error #3, alleges that the Court erred by failing to timely respond to her request for reconsideration relief, but then went forward at a presentment hearing set by Attorney Gobel. Brief of Appellant at 4. Both Motions for Reconsideration indicate "Without Oral Argument" in the heading and body of the document. CP 348 - 350 and CP 73 - 91. Under CR 59(e), the Court before whom a motion is pending has discretion to decide, sua sponte or on application, whether the motion shall be heard before entry of any judgment. CR 59(e)(1). The Court exercised its discretion permitting the matter to go forward on presentment as scheduled by

Attorney Gobel. Mother fails to show how the Court abused its discretion, so the allegation is denied. Mother's assignment of error #3 is meritless.

Mother's assignment of error #10, alleges that the Court erred during revision by limiting the hearing to attorney fees only. Brief of Appellant at 5. There is nothing in the record to support that. To the contrary, the Court at revision under RCW 2.24.050, reviews the Court Commissioner's action and record de novo. *In re Welfare of C.A.R.*, 191 Wash.App. 601, 607, 365 P.3d 186 (2015). Mother's assignment of error #10 is meritless.

Mother's assignment of error #4, alleges that the Court erred by permitting Attorney Gobel to draft orders "after I advised the Court of misconduct by Mr. Gobel." Brief of Appellant at 4. Mother did not raise the issue of irregularities with Attorney Gobel's orders. At no time did the Court find any misconduct by Attorney Gobel. Attorney Gobel's conduct in this matter is above reproach. Mother mentioned during argument at the reconsideration hearing that she

was served with pleadings on her birthday and seemed to take great offense at that. RP 58. However, Attorney Gobel was not mindful of that when service was arranged. Any coincidence between receipt of pleadings and a birthday is merely fortuitous and benign. This is a vague, cumulative and generally impeaching allegation. The assignment of error #4 is meritless.

I. APPELLANT'S FAILURE TO MOVE THE COURT FOR DEFAULT BEFORE RESPONDENT'S FILING IS NOT REVERSIBLE ERROR ON THE COURT.

Mother's assignment of error #7, alleges that the Court failed to take action against Attorney Gobel for not providing Father's financial information "within 20 days of receipt of the summons" in violation of RCW 26.09.175(4). Brief of Appellant at 5. There are no published cases explaining that statute. However, the 20 day default regime is similar to CR 12(a)(1). First, Mother never moved the Court for a default order against Father. The 20 day rule for answers does not automatically result in default by operation of law under CR 55. Under CR 55(a), "Any party may respond to any pleading or

otherwise defend at any time before a motion for default and supporting affidavit is filed, whether the party previously has appeared or not.” That is what Father did through his attorney in this matter. Mother fails to show any prejudice by that. The Court found no issue with the four-month delay. RP 30.

Second, delay in Father’s formal response to the petition was warranted, if not absolutely necessary. Mother provided absolutely no information to the Court regarding Alyssa’s university education plan, tuition, fees, scholarships, grants or loans until Father demanded such by serving Requests for Answers to Interrogatory Questions and Requests for Production of Documents by Respondent Propounded to Petitioner on September 10, 2015. RP 29. That and other vital financial resource information was used to assemble the Declaration of Father, which was filed on October 16, 2015. CP 285 - 292. There is no indication in the record that Mother was deprived of any opportunity to engage in her own discovery. The Declaration of Father and the Mother’s discovery answers and production were

reviewed and considered by the Court at the post-secondary support modification hearing. RP 3. If there is error as to Mother's assignment #7, Mother is at fault for failing to move the Court for the default relief she claims is absent.

Trial courts exercise broad discretion on default issues. *Shepard Ambulance, Inc. v. Helsell*, 95 Wn.App. 231, 237, 974 P.2d 1275 (1999), 140 Wash.2d 1007, 999 P.2d 1259 (2000). Default judgments are generally disfavored in the law as "one of the most drastic actions a court may take to punish disobedience to its commands." *Id.*, quoting, *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979) (citing *Widucus v. Southwestern Elec. Co-op, Inc.* 26 Ill. App.2d 102,109, 167 N.E.2d 799 (1960)). As a general rule, an appellate court will only consider those issues which were properly presented to the trial court and failure to rule on such an asserted error will usually constitute waiver of the right to seek appeal of such. *Seidler v. Hansen*, 14 Wash.App. 915, 918, 547 P.2d 917 (1976). It was established by this Court by *In re Marriage of*

Haugh, that:

“The appellant has the burden of perfecting the record so that the court has before it all the evidence relevant to the issue. RAP 9.2(b); *State v. Rienks*, 46 Wash. App. 537, 544, 731 P.2d 1116(1987), *review denied*, 110 Wash.2d 1021, 755 P.2d 173 (1988); *Allemeier v. University of Washington*, 42 Wash.App. 465, 472-73, 712 P.2d 306 (1985), *review denied*, 105 Wash.2d 1014 (1986). Also, a contention unsupported by legal argument is deemed waived. *State v. Adams*, 107 Wash.2d 622, 615, 732 P.2d 149 (1987).”

58 Wash.App. 1, 6, 790 P.2d 1266 (1990).

The Court is not at fault for considering all available information timely provided by Father at the modification hearing. Indeed, RCW 26.19.071(1), provides in part, “All income and resources of each parent’s household shall be disclosed and considered by the court when the court determines the child support obligation of each parent.” Thus, Mother’s assignment of error #7 regarding default is a vague, cumulative and generally impeaching allegation without merit and is therefore denied.

J. APPELLANT’S ATTEMPT TO FORCE THE LOWER COURT’S RECUSAL EX POST FACTO IS WITHOUT

MERIT.

Mother's assignment of error #8, alleges that the Court erred by failing to recuse itself. It is unknown which judicial officer Mother asserts is at fault. Brief of Appellant at 4. She fails to set forth specific factual and legal arguments to support such a claim. Mother never raised this concern to the Court. Mother asserts reversible error by attempting to bootstrap the right to excuse a judicial officer for prejudice under RCW 4.12.040 and RCW 4.12.050. However, this right does not apply to Court Commissioners and the argument fails. Under the standard of *Jones v. Halvsen-Berg*, 69 Wash. App. 117, 127, 847 P.2d 945 (1993), a judicial officer is presumed to perform without prejudice. A litigant who proceeds to a trial or hearing before a judge despite knowing of a reason for potential disqualification of the judge waives the objection and cannot challenge the court's qualifications on appeal." *Buckley v. Snapper Power Equip. Co.*, 61 Wash.App. 932, 939, 813 P.2d 125 (1991), *rev. denied*, 118 Wash.2d 1002, 822 P.2d 287 (1991). To the contrary, Mother stated to Commissioner Pro Tem

Colton, “I certainly did not mean to implicate anyone in any wrongdoing.” RP 47. This is a direct contradiction which demonstrates that assignment of error #8 is meritless. Brief of Appellant at 5.

K. THE ATTORNEY FEE ASSIGNMENT OF ERROR IS MOOT.

Mother’s assignment of error #9, alleges that the Court erred by not following the American Rule when it awarded attorney fees against Mother. Brief of Appellant at 5. The attorney fee award was reversed on revision. CP 122. Thus, this claim of error is moot. Mother’s assignment of error #9 is meritless.

L. ERROR DUE TO ALLEGED FAVORITISM IS UNSUBSTANTIATED.

Mother’s assignment of error #11, alleges that the Court erred during revision by offering Attorney Gobel the opportunity to present additional research to the Court at a later date. Brief of Appellant at 5. There is nothing in the Order on Revision that reserved jurisdiction, nor deferred entry of the same to permit

supplementation of the record. There was no actual supplementation of the record on revision. Indeed, the revision Court must only consider the testimony, evidence and record before the Court Commissioner under RCW 2.24.050. Mother failed to support this claim with the factual record. Mother's assignment of error #11 is vague, cumulative, generally impeaching and is meritless.

In error #6, Mother claims she was held to a higher performance standard than Attorney Gobel. Brief of Appellant at 5. Commissioner Pro Tem Colton said that she was being held to the same standard as any party litigant, attorney or not. RP 64. The Court is under no obligation to grant special favors to a pro se litigant. *Marriage of Olson*, 69 Wash.App. 621, 626, 850 P.2d 527 (1993). This is even the case when such a lay litigant represents themselves in an unskilled manner. *Id.* Pro se litigants are bound to the same rules of procedure and substantive law as attorneys. *Holder v. City of Vancouver*, 136 Wash.App. 104, 106, 147 P.3d 641 (2006), *rev. denied*, 162 Wash.2d 1011, 175 P.3d 1094 (2008).

Mother ignores the fact that on more than one occasion the Courts granted Mother's requests for post-modification relief. Commissioner Pro Tem Colton granted partial reconsideration by clarifying what university information Alyssa was required to provide to the parents. CP 100 - 101. Judge Clary granted partial revision by eliminating the \$500 attorney fee award. CP 122. The allegation that Mother was held to a higher standard for her performance is unsupported by the record and false. Mother's assignment of error #6 is meritless.

M. APPELLANT ALONE BEARS BURDEN TO PROVE EVERY ALLEGATION OF DISCRETION ABUSED BY THE COURT.

The Appellant bears the burden of proving an abuse of discretion. *Dugger v. Lopez*, 142 Wash.App. 110, 118, 173 P.3d 967 (2007). Mother has failed to substantiate any of her assignments of error. There is no proof that the lower courts abused their discretion in any way. As a general rule, an appellate court will only consider those issues which were properly presented to the trial court and

failure to rule on such an asserted error will usually constitute waiver of the right to seek appeal of such. *Seidler at 918*. Such is the present case. Under RAP 2.5(a), this Court may refuse to review any claim of error raised for the first time on appeal. Unchallenged findings of fact are verities on appeal. *Marriage of Vander Veen*, 62 Wash.App. 861, 865, 815 P.2d 843 (1991). The Father denies all the Mother's allegations of error.

N. APPELLANT'S UTTER FAILURE TO PROVE HER CASE ON APPEAL IS COSTLY AND UNDULY PREJUDICIAL TO FATHER-MOTHER IS INTRANSIGENCE.

Attorney fee awards typically must be based on contract, statute, or a recognized equitable exception. *Pierce County v. State*, 159 Wash.2d 16, 50, 148 P.3d 1002 (2006). However, a court may award attorney's fees based on a party's intransigence. *Matteson v. Matteson*, 95 Wash.App. 592, 604, 976 P.2d 157 (1999). "Intransigence includes foot dragging and obstruction, filing repeated unnecessary motions, or making the trial unduly difficult and costly by one's

actions. *Marriage of Bobbit*, 135 Wash.App. 8, 29 - 30, 144 P.3d 306 (2006).

The intransigence theory does not require the Court to do any balancing of need and ability to pay, as otherwise would be required by RCW 26.09.140. *Marriage of Mueller*, 140 Wash.App. 498, 510, 167 P.3d 568 (2007), *review denied*, 163 Wash.2d 1043, (2008). For consideration of a fee award on equitable principals due to intransigence, the financial resources of the parties is “irrelevant.” *Marriage of Crosetto*, 82 Wash.App. 545, 564, 918 P.2d 954 (1996). This method is available where a party has been intransigent. “A trial court may also award attorney’s fees if one [party’s] intransigence increased the legal fees of the other party.” *Marriage of Burrill*, 113 Wash.App. 863, 873, 56 P.3d 993 (2002), *rev. denied*, 149 Wash.2d 1007 (2003). ‘Intransigence’ is not defined by statute or cases. In the absence of a statutory definition, the common dictionary meaning prevails. *Choi v. City of Fife*, 60 Wash.App. 458, 462, 803 P.2d 1330 (1991), *rev. denied*, 116 Wash.2d 1034 (1991). The dictionary

definition of 'Intransigence' is "refusing to compromise, immovably adhering to a position or point of view." The New Lexicon Webster's Dictionary of the English Language 507 (1988).

Attorney's fees for intransigent behavior of a party have been awarded for some of the following additional behaviors: Basic "foot-dragging" and "obstruction" in *Eide v. Eide*, 1 Wash.App. 440, 445, 462 P.2d 562 (1969); use of threats in *Marriage of Greenlee*, 65 Wash.App. 703, 708, 829 P.2d 1120 (1992), *rev. denied*, 120 Wash.2d 1002 (1992); failure to cooperate with one's attorney and absence at trial in *State ex. rel. Stout v. Stout*, 89 Wash.App. 118, 126-27, 948 P.2d 851 (1997); frivolous motion practice, failure to cooperate with discovery and refusal to read documents in *Marriage of Foley*, 84 Wash.App. 839, 846, 930 P.2d 929 (1997); simply making trial unduly difficult and increasing legal costs by a party's actions in *Marriage of Morrow*, 53 Wash.App. 579, 591, 770 P.2d 197 (1989); or where a party has engaged in abusive use of motion practice in *Chapman v. Perera*, 41 Wash.App. 444, 455-56, 704 P.2d 1224 (1985), *rev. denied*,

104 Wash.2d 1020 (1985). “Where a party’s bad actions permeate the entire proceedings, the court need not segregate which fees were incurred as a result of intransigence and which were not.” *Burrill*, at 873.

O. APPELLANT’S INTRANSIGENCE ON APPEAL JUSTIFIES AN AWARD TO RESPONDENT FOR ATTORNEY FEES.

The lower courts did not find intransigence, but Appellant’s present appeal case has created a morass of unsubstantiated, irrelevant and legally unwarranted allegations and arguments. This is Mother’s attempt to make these proceedings more difficult and expensive for Father. It is retaliatory. Some of her assignments of error ask for review of issues which were granted at Mother’s request and/or in her favor. The result has forced Father to hire counsel at great expense to sort it out. The potential prejudice to Father for not addressing the meritless assignments of error is the default finding of a verity on appeal and remand. The actual prejudice to Father for addressing the meritless assignments of error is the tremendous

attorney expense. In either case, Father gains no ground and is left without a meaningful alternative. If Mother is not held accountable, she benefits from the education and may get a second 'bite at the apple.'

It is reasonable and appropriate for the Appellate Court to conclude that Mother's appeal is not justified and results in Father's substantial prejudice. The necessity of having to unravel numerous transactions to establish the interests of the parties justifies an award reflecting the intransigence fees and costs incurred in the process. *Marriage of Morrow*, at 590. This court has authority and discretion to award Respondent all attorney fees and costs incurred by the Father for having to respond to this appeal under RAP 18.1 under the cases cited above. Mother's entire case is devoid of merit. The Father has clean hands and wishes to move on with life. Father now requests that this court affirmatively exercise that discretion, find Mother intransigent for bringing this appeal without merit, and award him reasonable attorney fees and costs related to this appeal, which have

been substantial. Pursuant to RAP 18.14, Father's Financial Declaration is on record. CP 301 - 308.

II. THE TRIAL COURT'S DECISION IS NOT LEGAL ERROR.

All alleged errors and informal accusations by Mother flow from the general premise that the trial court's decisions are against her and are error. The issues raised by Appellant are an improper attempt to relitigate fair and well settled matters. Findings of fact are reviewed to determine if they are supported by the substantial evidence. *Nollette v. Christianson*, 115 Wash.2d 594, 600, 800 P.2d 359 (1990). Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. *Wenatchee Sportsmen Association v. Chelan County*, 141 Wash.2d 169, 176, 4 P.3d 123 (2000). Substantial evidence exists to support both of the trial court's various findings and actions here.

Another principal of jurisprudence is the finality of judgments. *Marriage of Jennings*, 91 Wash.App. 543, 958 P.2d 358 (1998), *rev. granted*, 137 Wash.2d 1007 (1999), *rev'd on other grounds*, 138

Wash.2d 612 (1999). It is the law that the trial court's decision will be affirmed unless no reasonable Judge would have reached the same conclusion. *Marriage of Landry* at 809-10. The Lower Courts' rulings are in language which is clear and unambiguous. That transparency preserves the integrity of the Findings of Fact, Conclusions of Law, Decree of Dissolution of Marriage, Child Support Order, and Parenting Plan. These orders make sense and should stand.

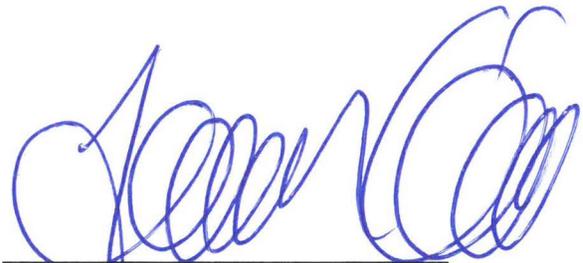
CONCLUSION

The Lower Court rulings, especially those regarding division of the child's Federal income tax exemption, are complete and proper. All are clearly supported by testimony, evidence and findings of fact. The record is complete. The trial court did not commit any reversible errors. All orders are valid and reasonable. All lower court decisions should be affirmed. Mother's appeal should be denied. Attorney fees and costs incurred in responding to the appeal should be awarded to Father against Mother for her Oppressive, unnecessary and retaliatory litigation. Mother is intransigent and Father has been

severely prejudiced by the necessity of having to hire legal counsel to defend against the unfounded assertions of error.

Respectfully submitted,

Dated: January 23rd, 2016.



Terry D. Gobel (WSBA #22988)
Attorney for the Appellee Father