

6023 18 - 2

62378-8

NO. 62378-8

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of :

VICKI LYNN BALASHOV

Respondent,

v.

DIMITRI M. BALASHOV

Appellant.

2009 AUG 7 AM 11:07
FILED
STATE OF WASHINGTON

REVIEW FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
The Honorable James A. Allendoerfer

APPELLANT'S REPLY BRIEF

KAREN D. MOORE
Attorneys for Appellant
Brewer Layman, P.S.
333 Cobalt Building
3525 Colby Avenue
P.O. Box 488
Everett, WA 98206-0488
Telephone: (425) 252-5167

TABLE OF CONTENTS

I. SUMMARY OF REPLY.....1

II. ARGUMENT.....3

A. Dimitri Did Not Invite Error By Introducing Evidence Regarding His Sexual Orientation When Vicki Raised The Issue Pre-Trial And During Trial.....3

B. The Trial Court Changed Custody From Dimitri To Vicki Based On Speculation That Dimitri’s Sexual Orientation Would Affect His Ability To Continue As The Children’s Primary Residential Parent.....7

C. RAP 2.5(a) Does Not Apply To Preclude Review Of The Trial Court’s Decision To Automatically Modify The Final Parenting Plan A Year After Trial Without A Finding Of Adequate Cause.....11

D. The Trial Court Manifestly Abused Its Discretion When It Entered A Final Parenting Plan Requiring An Automatic Change In Custody Without Any Kind Of Review Hearing To Ensure The Change Was In The Children’s Best Interests.....14

E. The Trial Court’s Finding Dimitri Engaged In An Abusive Use Of Conflict Is Not Supported By Substantial Evidence And Cannot Support The Trial Court’s Decision To Restrict Dimitri From Pursuing a Modification Of The Decision Making Provisions Of The Parenting Plan.....18

F. The Trial Court Abused Its Discretion By Giving Vicki Sole Decision Making Regarding The Children’s Religious Upbringing.....20

G. This Appeal Presents Important Debatable Issues Regarding The Trial Court’s Authority When Crafting A Final Parenting Plan. Vicki’s Request For Attorney’s Fees On Appeal Should Be Denied.....23

III. CONCLUSION25

TABLE OF AUTHORITIES

WASHINGTON CASES

Bay v. Jensen,
147 Wn. App. 641, 196 P.3d 753 (2008).....20

Dickerson V. Chadwell Inc.,
62 Wn. App. 426, 814 P.2d 687 (1991), review denied,
118 Wn.2d 1011 (1992).....6

Garcia v. Providence Med. Ctr.,
60 Wn. App. 635, 806 P.2d 766, review denied,
117 Wn.2d 1015 (1991).....6

In re Dependency of K.R.,
128 Wn.2d 129, 904 P.2d 1132 (1995).....3

In re Marriage of Burrill,
113 Wn. App. 863, 871, 56 P.3d 993 (2002).....18, 19

In Re Marriage of Cabliquinto,
100 Wn.2d 325, 669 P.2d 886 (1983).....7

In re Marriage of Crosetto,
82 Wn. App. 545, 918 P.2d 954 (1996).....23

In re Marriage of Foley,
84 Wn. App. 839, 930 P.2d 929 (1997).....23

In re Marriage of Jensen-Branch,
78 Wn. App. 482, 890 P.2d 803 (1995).....20, 22

In Re Marriage of Katare,
125 Wn. App. 813, 105 P.3d 44 (2004), review denied,
155 Wn.2d 1005, 120 P.3d 577 (2005).....19

In Re Marriage of Littlefield,
133 Wn. 2d 39, 940 P.2d 1362 (1997).....17

<u>In re Marriage of Magnuson</u> , 141 Wn. App. 347, 170 P.3d 65 (2007), <u>review denied</u> , 163 Wn.2d 1050 (2008).....	7, 8, 9
<u>In re Marriage of Mansour</u> , 126 Wn. App. 1, 13, 106 P.3d 768 (2004).....	21
<u>In re Marriage of Possinger</u> , 105 Wn. App. 326, 19 P.3d 1109 (2001).....	15, 16
<u>In re Marriage of Shumacher</u> , 100 Wn. App. 208, 997 P.3d 339 (2000).....	23
<u>In re Marriage of Studebaker</u> , 36 Wn. App. 815, 677 P.2d 789 (1984).....	11, 12
<u>In re Marriage of Wendy M.</u> , 92 Wn. App. 430, 962 P.2d 130 (1998).....	11, 13
<u>In re Marriage of Wicklund</u> , 84 Wn. App. 763, 932 P.2d 652 (1996).....	10
<u>In re Recall Charges of Feetham</u> , 142 Wn.2d 860, 72 P.3d 741 (2003).....	24
<u>Lindblad v. Boeing Co.</u> , 108 Wn. App. 198, 31 P.3d 1 (2001).....	11, 12
<u>Millers Cas. Ins. Co. v. Briggs</u> , 100 Wn.2d 9, 665 P.2d 887 (1983).....	24
<u>Olson v. City of Bellevue</u> , 93 Wn. App. 154, 968 P.2d 894 (1998), <u>review denied</u> , 137 Wn.2d 1034, 980 P.2d 1284 (1999).....	24
<u>Postema v. Postema</u> , 118 Wn. App. 185, 72 P.3d 1122 (2003), <u>review denied</u> , 151 Wn.2d 1011, 89 P.3d 712 (2004).....	13
<u>Roberson v. Perez</u> , 156 Wn.2d 33, 123 P.3d 84 (2005).....	11

State v. Olson,
126 Wn.2d 315, 893 P.2d 629 (1995).....4

State v. Pam,
101 Wn.2d 507, 680 P.2d 762 (1984).....4

State v. Whelchel,
115 Wn.2d 708, 801 P.2d 948 (1990).....6

STATUTES

RCW 26.09.002.....1, 15

RCW 26.09.184.....15

RCW 26.09.187.....1

RCW 26.09.270.....1

COURT RULES

CR 59.....11

RAP 2.5.....11, 12, 13

RAP 18.1.....23

RAP 18.9.....24

I. **SUMMARY OF REPLY.**

As stated in Appellant Dimitri Balashov's opening brief, a trial court must enter a final parenting plan determining a child's primary residence using the factors outlined in RCW 26.09.187(3)(a). In doing so, a trial court must rely on evidence about the *present condition* of the parent/child relationship to establish a parenting arrangement that serves the best interests of the child. A trial court must strive to adopt a parenting arrangement that "best maintains a child's emotional growth, health and stability, and physical care." RCW 26.09.002. Thus, there is a statutory recognition that a child's best interest is served by maintaining custodial continuity. RCW 26.09.270.

This appeal is not, as Respondent Vicki Balashov argues, a means for Dimitri to continue to control Vicki. This appeal presents a serious question: does a trial court abuse its discretion by entering a parenting plan requiring an automatic future change in a child's primary custodial parent/residence based on pure speculation about the future condition of the child/parent relationship? This question is compounded in this case because the trial court considered Dimitri's sexual orientation when speculating about his future stability and parent/child relationship.

In the instant case, Vicki does not dispute the trial court found the circumstances of the children at the time of trial were *not* stable. Vicki

does not dispute the trial court concluded, based on the instability of her relationship with the children at the time of trial, that the children would continue residing with Dimitri for an additional year following trial (as they had done so for the eleven (11) months preceding trial). Vicki does not dispute the trial court *automatically changed* custody of the children from Dimitri to Vicki one year after trial because the trial court *assumed, without any evidence*, continued counseling would sufficiently ameliorate the instability between Vicki and the children. Vicki does not dispute the trial court considered Dimitri's sexual orientation when assessing his stability both at trial and in the future. Instead, Vicki argues this Court cannot review the trial court's decision because Dimitri has somehow invited or failed to preserve his claimed errors. Dimitri has done neither, and this Court should reject Vicki's arguments and consider the merits of this appeal.

In this case, the trial court concluded the *children's best interests at the time of trial were served by remaining with Dimitri*. This conclusion was based on all the testimony presented at trial, including the testimony of the children's Guardian Ad Litem, who recommended the children primarily reside with Dimitri. However, the trial court went on to conclude the children's best interests one-year later would be served by automatically changing residences from Bainbridge Island with Dimitri to

Everett with Vicki, leaving behind their schools, friends, counselor, and the community they had known their entire lives. The trial court's conclusion was based upon *pure speculation* regarding what would be in the best interests of the children in the future, rather than on the evidence of what was in the best interests of the children at the time of trial. This was error.

II. ARGUMENT.

A. **Dimitri Did Not Invite Error By Introducing Evidence Regarding His Sexual Orientation When Vicki Raised The Issue Pre-Trial And During Trial.**

Vicki argues “[o]nly on the prompting of the father’s attorney was evidence presented on the issue whether the father’s sexual orientation affected his parenting.” Respondent’s brief, page 30. As such, Vicki argues that Dimitri “invited” the trial court’s error in considering his sexual orientation and cannot now raise this issue on appeal. Respondent’s brief, page 31. Vicki cites In re Dependency of K.R., 128 Wn.2d 129, 904 P.2d 1132 (1995) to support her request this Court simply refuse to consider this issue.

“Under the doctrine of invited error, counsel cannot set up an error at trial and then complain of it on appeal.” K.R., 128 Wn.2d at 147. The facts of K.R. are different from the facts presented here. In K.R., defense counsel for the parents, Mr. and Ms. Jones, made a motion to admit

polygraph evidence from both the defense and the State. Under Washington law, the polygraph evidence would not have been admissible absent stipulation. The trial court granted the defense motion. Later, defense counsel argued the State's failure to sign an actual stipulation regarding the admissibility of the polygraph prevented the court from introducing the evidence, and the State argued there was a stipulation. Ultimately, both parties presented polygraph evidence – the defense expert testified telephonically, the State's expert testified in person. On appeal, the Joneses argued the polygraph evidence should not have been admitted. Id. The Washington Supreme Court refused to consider the Joneses arguments stating: “this court will deem an error waived if the party asserting such error materially contributed thereto.” Id. (citing State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds in State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995)).

In the instant case, Dimitri did not “materially contribute” to the trial court's error. It is clear from the record, Vicki had concerns about Dimitri's sexual orientation. From the outset of the case, Vicki sought to demonstrate Dimitri was less stable because he was exploring his sexuality. See Exhibit 55 (Vicki's first declaration filed in support of her motion for temporary orders). In her deposition prior to trial, Vicki answered “yes” when asked if she believed Dimitri had done anything

sexually inappropriate with either of the children. 2 RP 445. Although she later appeared to abandon this belief, instead characterizing it as an “inappropriate boundary issue” that was resolved by trial, it was clearly something Dimitri anticipated would be an issue at trial.

Further, contrary to her assertion at page 29 in her brief, Vicki’s references to Dimitri’s sexual orientation were linked to his parenting. During her direct examination, Vicki testified about Dimitri’s ability to exercise appropriate judgment in front of the children, stating:

I have had concerns about inappropriateness, inappropriate behavior by Dimitri in front of the children. Dimitri talked to me in front of Maxim at the swimming pool about his experiences in having coffee with gay men.

1 RP 160. Over Dimitri’s objection, Vicki opined that she believed Dimitri “suffered from a very strong and long-lasting period of depression” because he loved another man, Lou Krukar. 2 RP 339. She testified:

...[Dimitri] was depressed for a long period of time after Lou stopped hiking with him. And, at first, I thought it’s because Dimitri tells me that in Russia men, of all friendships in Russia, is so much deeper than American friendships. And Dimitri hasn’t had a real friendship in such a long time, and he finally had one with Lou, and now Lou won’t see him. I came to see it was love sickness and depression. And it lasted for months, and even over a year.

2 RP 341. Thus, Vicki certainly put the issue of Dimitri's sexual orientation, and the potential impact it could have upon his parenting, before the Court.

Dimitri was entitled to cross-examine Vicki as well as introduce his own evidence regarding his sexual orientation without fear of losing the right to appeal how the trial court used this evidence. Dimitri appropriately chose the tactic of demonstrating Vicki's bias during cross-examination in an effort to mitigate any prejudice. In these situations, the invited error doctrine should not apply to preclude appellate review. See State v. Whelchel, 115 Wn.2d 708, 727-28, 801 P.2d 948 (1990) (it is not invited error for defendant to refer in opening remarks to evidence expected to be admitted at trial) affirmed, 232 F.3d 1197 (9th Cir. 2000); Dickerson v. Chadwell, Inc., 62 Wn. App. 426, 430-31, 814 P.2d 687 (1991), review denied, 118 Wn.2d 1011 (1992); Garcia v. Providence Med. Ctr., 60 Wn. App. 635, 641, 806 P.2d 766 (party may try to minimize adverse effect of evidence by introducing it first), review denied, 117 Wn.2d 1015 (1991).

B. The Trial Court Changed Custody From Dimitri To Vicki Based On Speculation That Dimitri's Sexual Orientation Would Affect His Ability To Continue As The Children's Primary Residential Parent.

In what little substantive argument she presents on this issue, Vicki attempts to focus this Court's attention on the fact the trial court did not restrict or impose any limitations on Dimitri's residential time with the children. Thus, she argues the trial court did not apply the wrong legal standard by considering Dimitri's sexual orientation when crafting the final parenting plan. See Respondent's brief, page 26-27 (citing In re Marriage of Cabalquinto, 100 Wn.2d 325, 327, 669 P.2d 886 (1983)). This argument misses the point. In the instant case, the trial court placed the ultimate limitation on Dimitri's residential time with the children – the trial court changed the children's primary residence based on speculation about Dimitri's sexual orientation and the future effect it *could have* on his relationships, including his relationship with his children.

It is appropriate for a trial court to consider the “environmental and parental stability” of each parent in crafting a parenting plan. In Re Magnuson, 141 Wn. App. 347, 352, 170 P.3d 65 (2007); RCW 26.09.187(3)(a)(i). In Magnuson, however, the majority opinion concluded the trial court did not err in considering the father's transgender status, because the trial court considered specific evidence about the

present effect of the father's transgender status on the children. See Magnuson, 141 Wn. App. at 351-52 (trial court specifically considered GAL testimony about children's present "uncomfortable and nervous behavior" as well as testimony about children's adjustment).

In the instant case, in contrast with Magnuson, there was no evidence before the trial court to conclude Dimitri's sexual orientation was presently harmful to the children or caused him to be presently unstable. Instead, the trial court concluded the children's present needs were best met by continuing to reside with Dimitri based on the instability of the relationship between Vicki, her fiancé, and the children, and the children's present emotional needs. CP 109-110, 117-119. Vicki does not challenge the appropriateness of the trial court's conclusion, and this conclusion is the touchstone of the trial court's error.

Here, unlike the trial court in Magnuson, the trial court did not simply weigh the present situation in each parent's household and craft a parenting plan based on the present situation. Instead, the trial court speculated about the future situation in each parent's household, including speculation about Dimitri's sexual orientation, to change the parenting plan. Vicki attempts to harmonize this case with Magnuson by arguing:

In designating the mother as the primary residential parent, the trial court found the mother's situation more stable as 'the impact of the [the father's pending] gender

reassignment surgery on the children is unknown.’
Magnuson, 141 Wn. App. at 350. ...

As in Magnuson, the effect, if any, of [Dimitri’s] recent realization he was gay on the children was an “unknown,” as the children were not aware of [Dimitri’s] sexual orientation and [Dimitri] had only recently “accepted” this homosexuality. The trial court’s consideration did not result in any restrictions on the [Dimitri’s] residential time, and was not the basis for the trial court’s designation of [Vicki] as the primary residential [parent].

Respondent’s brief, page 29. This argument ignores the fact the Magnuson trial court had specific evidence from the guardian ad litem about the children’s present reaction to their father’s transgender status. Magnuson, 141 Wn. App. at 351. This evidence was critical to the majority holding in Magnuson that the trial court did not abuse its discretion by considering the father’s transgender status when determining primary residential placement. See Id. (the trial court acted within its fact-finding discretion when drawing inferences from testimony about father’s transgender status to make findings about potential for future instability); compare Magunson, 141 Wn. App. at 354 (Kulick, J. dissenting) (trial court should only consider present circumstances of parents and not consider future potential impact on children as a result of one parent’s transgender status).

In the instant case, however, there is no evidence upon which the trial court could act within its discretion to infer how, or even if, Dimitri’s

sexual orientation would affect his future relationship with his children. This is what distinguishes this case from the Magnuson case, and highlights the trial court's error. In order to later change custody from Dimitri to Vicki, the trial court had to necessarily speculate that the children's relationship with Vicki would *improve* such that a future change would be in their best interests at that time. However, improvement in one parent's situation is not, by itself, sufficient to allow a change in custody. RCW 26.09.270 also requires a finding of detriment in the custodial parent's household. Thus, the trial court had to also necessarily speculate about a corresponding *negative* future change in Dimitri's household. The only finding this Court has to demonstrate what the trial court considered about Dimitri's future relationship with the children, or a change in his future living situation, is found in Finding of Fact number 8 in paragraph 3.2 of the Final Parenting Plan – the finding specifically related to Dimitri's sexual orientation. CP 110.

A trial court abuses its discretion if it restricts parental rights because of a parent's sexual orientation when there is no evidence to demonstrate the parent's conduct is "adverse to the best interests of the child." In re Marriage of Wicklund, 84 Wn. App. 763, 770, 932 P.2d 652 (1996). There was no evidence to demonstrate Dimitri's parenting was "adverse to the best interests of the child" at the time of trial – the trial

court's decision to leave the children with Dimitri leads to the opposite conclusion. Similarly, there was no evidence to demonstrate Dimitri's parenting would be "adverse to the best interests of the children" in the future. The trial court manifestly abused its discretion by basing its decision to change custody on the potential future impact Dimitri's sexual orientation would have on his relationships.

C. RAP 2.5(a) Does Not Apply To Preclude Review Of The Trial Court's Decision To Automatically Modify The Final Parenting Plan A Year After Trial Without A Finding Of Adequate Cause.

An appellate court may refuse to review a claim of error that was not raised at the trial court level. RAP 2.5(a). By "using the term 'may' RAP 2.5(a) is written in discretionary, rather than mandatory terms." Robverson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 84 (2005); In re Marriage of Wendy M., 92 Wn. App. 430, 434, 962 P.2d 130 (1998). In her response brief, Vicki argues Dimitri has failed to preserve his right to challenge the propriety of the trial court's "automatic modification" under RAP 2.5(a). Vicki argues Dimitri was required to bring his challenge before the trial court at the time of the court's oral decision, presentation of final orders, or upon a CR 59 motion. Respondent's brief, page 32-33.

Vicki cites two cases, In re Marriage of Studebaker, 36 Wn. App. 815, 818, 677 P.2d 789 (1984) and Lindblad v. Boeing Co., 108 Wn. App.

198, 207, 31 P.3d 1 (2001) in support of her argument. These cases are far different than the instant case. In both cases, the appellate court declined to review arguments that should have been presented to the trial court prior to the trial court's final ruling. See Studebaker, 36 Wn. App. at 816 (appellate court refused to consider new argument on appeal that trial court erred in modifying decree to require father to pay for post secondary support because modification of undifferentiated maintenance created tax consequences for father); Lindblad, 108 Wn. App. at 206-07 (appellate court refused to consider employee's new theory of liability in support of his argument the trial court erred in granting summary judgment in favor of employer). In the instant case, however, Dimitri is raising an argument regarding the propriety of the trial court's final ruling itself. Dimitri could not have foreseen the trial court would rule the way it did – neither party proposed any kind of an automatic change. Thus, unlike the appellants in Studebaker and Lindblad, there would have been no opportunity to bring this argument to the trial court's attention prior to its final ruling¹. RAP

¹ Two days before entry of final pleadings, Dimitri's trial counsel filed his Notice of Intent to Withdraw immediately upon entry of final orders. See Appellant's Second Supplemental Designation of Clerk's Papers, Sup. CP ____, attached hereto as Appendix A. At the time of the presentation hearing on August 22, 2008, Dimitri moved to continue the presentation hearing and the trial court denied that motion. See Appellant's Second Supplemental Designation of Clerk's Papers, Sup. CP ____, attached hereto as Appendix B. Dimitri had no legal counsel upon which to rely upon for advice/guidance immediately following entry of the final orders in this case. Finally, an objection in a post-trial motion may not be sufficient to preserve an issue for appeal under RAP 2.5(a).

2.5(a) does not apply to prevent appellate review under these circumstances.

Even if RAP 2.5(a) did apply, this Court should exercise its discretion and review this issue. Whether a trial court can enter a final parenting plan requiring an automatic modification without evidence or mechanism to determine whether the modification will be in the best interest of the children is an issue of paramount importance not only to the best interests of the Balashov children but to all children. See In Re Marriage of Wendy M., 92 Wn. App. at 434 (appellate court exercises discretion and reviews issue involving interests of minor child, the child's paternity, and support because these are matters of paramount importance to child); Postema v. Postema, 118 Wn. App 185, 194-95, 72 P.2d 1122 (2003), review denied, 151 Wn.2d 1011, 89 P.3d 712 (2004) (although trial counsel failed to preserve issue for appeal by failing to discover legislative intent of statute and arguing different standard throughout trial, appellate court exercised discretion and reviewed issues because whether definition of "support" for minor child included non-monetary contributions to child's life and well-being). This Court should review this issue.

Postema v. Postema, 118 Wn. App. 185, 194, 72 P.3d 1122 (2003), review denied, 151 Wn. 2d 1011, 89 P.3d 712 (2004).

D. The Trial Court Manifestly Abused Its Discretion When It Entered A Final Parenting Plan Requiring An Automatic Change In Custody Without Any Kind Of Review Hearing To Ensure The Change Was In The Children's Best Interests.

Here, Vicki argues the trial court's delay in implementing its "ultimate goal for the children to reside primarily" with Vicki was carefully constructed to simply allow the children to complete school and counseling before transitioning to Vicki's home. Respondent's brief, page 34-35. This argument creatively ignores the real thrust of the trial court's concerns about the children, *at the time of trial*. The trial court stated the children:

...have not been able to grieve the loss of the marital relationship between their parents, and unrealistically cling to the hope that it will return. They have not been able to conceptualize a change of school districts and one child opposed any unwelcome change. In addition, the children have not been able to accept the mother's fiancé as someone they may soon be living with as their stepfather. More sensitivity and advance communication between the mother and the children on these difficult issues would have been preferable, and may delay the success of a transition in the children's lives.

CP118; see also, CP 109-110 (untimely interruption in children's counseling to address adjustment to divorce if moved to mother's home immediately). Notably, Vicki does not dispute the fact, or provide any argument addressing the fact, that the trial court assumed, without any

factual findings, that the year delay would result in a positive change in the children's emotional turmoil and their relationship with Vicki.

Instead, Vicki singularly argues the trial court did not abuse its discretion by failing to schedule a review hearing to determine if the change in custody was in the children's best interests because a review hearing is not required. Respondent's brief, page 35. In In Re Marriage of Possinger, 105 Wn. App. 326, 19 P.3d 1109, review denied, 145 Wn.2d 1008 (2001), however, this Court's decision that the trial court had the authority to enter a "permanent plan containing an interim schedule" turned on the fact the trial court held a review hearing to assess what was in the "best interests of the child" at the time of the proposed change. As stated in Appellant's opening brief:

[t]he best interests of the child standard remains the paramount policy underlying the [Parenting] Act, and our Legislature has so directed in RCW 26.09.002 and .184(1)(g). It would be strange indeed to construe an act designed to serve the best interests of the children of divorcing parents in such a manner as to require trial courts to rush to judgment on insufficient evidence with respect to the children's best interests, or to ignore the fact that the lives of the parents are in such a state of transition that the children's best interests would be served by deferring long-term parenting decisions for a reasonable period of time following entry of a decree of dissolution of marriage.

Appellant's opening brief, page 38 (citing Possinger, 105 Wn. App. at 336). In Possinger, the trial court stated:

What the evidence has shown is that the current residential plan is workable and has been workable; that the alternative that has been proposed [by the mother] is not workable in this Court's assessment. I say this because it's clear to me that these individuals are in somewhat of a transitional period, and I cannot get from what has been presented to the Court a clearer determination of what should be done on a long-term basis for this child.

Id. at 329. Thus, rather than speculating about future changes, the trial court deferred making a final decision so it could assess what was in the child's best interests one-year after trial, when the child entered the first grade. Id. By holding a review hearing in the future to assess the needs of the child before making a final determination regarding custody, the trial court consistently exercised its discretion to craft a parenting plan that was in the best interests of the child.

In the instant case, however, the trial court abused its discretion by failing to ensure the final residential schedule was in the best interests of the children. Despite the fact the trial court made numerous findings demonstrating the parties' and children's lives were in a state of transition at the time of trial, the trial court made no specific findings, and simply speculated, that the children's best interests would be served by an automatic change in primary custody one year after trial². Vicki does not,

² The only findings that remotely address why a "future" change was necessary demonstrate that the trial court considered it would be untimely to interrupt the children's counseling and that a logical transition date would be in one year because of their school schedule – both considerations of the children's needs at the time of trial. See CP 109

and cannot, point to any evidence presented at trial that would allow the trial court to exercise its discretion to conclude an automatic change in the future would be in the best interests of the children.

“The structuring of the residential schedule contained in a parenting plan must be based on the statutory factors and the circumstances of the parties as they exist at the time of trial.” In re Marriage of Littlefield, 133 Wn.2d 39, 56, 940 P.2d 1362 (1997). In the instant case, it is clear the trial court manifestly abused its discretion by speculating about the future circumstances of both parties and the children. As such, this Court must reverse the trial’s court’s decision to automatically change custody and reinstate Dimitri as the residential parent. Based on the evidence at trial, the trial court concluded the children’s best interests were served by maintaining their primary residence with Dimitri. Vicki has not cross-appealed the trial court’s decision maintaining the children’s primary residence with Dimitri, and, as such, that decision must stand.

(Finding of Fact 6(c) and 10). Neither of these findings are sufficient to demonstrate the change would be in the children’s best interests at that time.

E. The Trial Court's Finding That Dimitri Engaged In An Abusive Use Of Conflict Is Not Supported By Substantial Evidence And Cannot Support The Trial Court's Decision To Restrict Dimitri From Pursuing a Modification Of The Decision Making Provisions Of The Parenting Plan.

“In order to restrict a parent’s role under a parenting plan, the trial court must find...the abusive use of conflict by the restricted parent creates a danger of serious damage to the children’s psychological development.” In Re Marriage of Burrill, 113 Wn. App. 863, 871, 56 P.3d 993 (2002). Vicki argues the trial court properly found Dimitri engaged in an abusive use of conflict. She further argues the effect of this finding is inconsequential because the trial court did not restrict Dimitri’s parenting role, it only placed limitations on his “behavior” while the children reside with him. Respondent’s brief, page 36. This argument ignores the fact the trial court referred to Dimitri’s former parenting style and his continuing conflicted relationship with Vicki as factors that “impact[ed] on his suitability as primary residential caretaker for the children.” CP 119 (Finding of Fact 3.12(6)). Thus, this finding impacted the trial court’s decision to change primary care from Vicki to Dimitri. More importantly, this finding is directly related to the trial court’s decision to restrict Dimitri’s ability to seek sole-decision making in the event co-parenting therapy was not successful. CP 121.

There is no evidence to support a finding Dimitri's behavior towards Vicki damaged the children psychologically or impaired their relationship with her. Cf., Burrill, 113 Wn. App. at 872 (mother supported repeated allegations of sexual abuse that were unfounded resulting in danger of psychological harm to children based on significant impairment of time with father and repeated interviews regarding incidents). Nor does it make any sense the trial court would make this finding and then keep Dimitri in the role of primary parent. To do so would necessarily expose the children to continued risk of psychological harm, an abuse of discretion in and of itself.

Vicki argues the trial court's "abusive use of conflict" finding supports the trial court's blanket prohibition on Dimitri's ability to seek a modification of the decision making provisions of the parenting plan. Even if the trial court properly concluded Dimitri engaged in an abusive use of conflict that created a risk of harm to the children, Vicki concedes the restrictions contained in paragraph 3.10 of the Parenting Plan were specifically designed to address this risk of harm. Respondent's brief, page 36; CP 115-116. The restrictions were specifically identified and reasonably calculated to prevent the harm. In re Marriage of Katare, 125 Wn. App. 813, 826, 105 P.3d 44 (2004). On the other hand, the trial court identifies no restriction in paragraph 2.1 or 2.2 of the Parenting Plan: (1)

requiring a complete restriction on Dimitri's statutory right to file a modification action, or (2) describing how the restriction will prevent the unidentified harm. When questioned about the reason for this unilateral restriction on Dimitri's access to the court, the trial court again speculated that believed Dimitri, not Vicki, would intentionally frustrate the co-parenting process. CP 276. This is not a sufficient basis to limit a party's access to the court. See Bay v. Jensen, 147 Wn. App. 641, 657, 196 P.3d 753 (2008) (court has authority to enjoin a party from engaging in litigation only upon a pattern of abusive and frivolous litigation).

F. The Trial Court Abused Its Discretion By Giving Vicki Sole Decision Making Regarding The Children's Religious Upbringing.

A trial court must find a "substantial probability of actual or potential harm to children before restricting a parent's decision-making role" in order to satisfy the constitutional protections for religious freedom. In re Marriage of Jensen-Branch, 78 Wn. App. 482, 491, 890 P.2d 803 (1995).

The constitutional right to free exercise of religion does not allow sole decision making in this area, even if the parents are not capable of joint decision making, if leaving each parent free to teach the children about religion independently would not cause actual or potential harm to the children.

Jensen-Branch, 78 Wn. App. at 492; see also, In re Marriage of Mansour, 126 Wn. App. 1, 13-14, 106 P.3d 768 (2004) (trial court required to grant sole-decision making to mother on issues of education and nonemergency health care because of finding of abuse by father but no abuse of discretion in awarding joint decision making for religious upbringing because no evidence to establish actual or potential harm of father's influence on child.). Here, Vicki implicitly concedes, by failing to provide any argument to the contrary, there are no findings of actual or potential harm to justify a restriction on Dimitri's decision making role. This concession allows this Court to reverse the trial court's decision without any further inquiry.

If this Court is inclined to consider this issue further, Vicki argues the trial court was not required to make any findings because Dimitri "was not prevented from freely exercising his own religious beliefs, he was not prohibited from taking the children to church, and in any event he had no 'competing' religion." Respondent's brief, page 39. This is not the proper test. Regardless of whether Dimitri actively attends church or actively practices any religious beliefs at the present time, his constitutional right to free religions exercise cannot be restricted without specific findings of harm to the children. The fact Dimitri does not actively practice a religion at the present time only underscores the lack of

any parental conflict to support such findings. See Jensen-Branch, 78 Wn. App. at 491 (restrictions on decision making must be based on child's needs and fashioned to protect children from harmful parental conflict while still protecting rights to free religions exercise).

Further, Dimitri's acknowledgment that he has not objected to the children participating in Vicki's Orthodox Christian religion is not a *concession* that Vicki should have sole-decision authority. See Respondent's brief, page 39. Vicki's and Patrick Hall's testimony regarding the religious belief held by their church that "homosexuality is a sin," or a "failing" that "needs to be struggled against," further demonstrates the impact sole decision making for religion could have on the Balashov children. See 4 RP 723 (Patrick Hall); 4 RP 823 (Vicki). Under these circumstances, it is difficult to imagine Dimitri would concede to Vicki the final authority to indoctrinate the children with this sole religious viewpoint. The trial court manifestly abused its discretion by restricting Dimitri's decision making role regarding the children's religious upbringing.

G. This Appeal Presents Important Debatable Issues Regarding The Trial Court's Authority When Crafting A Final Parenting Plan. Vicki's Request For Attorney's Fees On Appeal Should Be Denied.

This court has discretion to grant attorney fees on appeal. RAP 18.1. Vicki argues she should be awarded her fees on appeal for two reasons. First, she argues this appeal is simply a continuation of Dimitri's intransigence during trial. Second, she argues fees must be assessed because this appeal is without merit. An award of attorney's fees is not warranted in this case.

Dimitri has not been intransigent on appeal. "Intransigence is the quality or state of being uncompromising." In re Marriage of Shumacher, 100 Wn. App. 208, 216, 997 P.3d 399 (2000). Washington courts have found intransigence as a basis for attorney fees when a party engages in obstructive behavior, files unnecessary motions, fails to cooperate with counsel, or participates in other activities that make trial unduly difficult or that increase legal costs unnecessarily. In re Marriage of Foley, 84 Wn. App. 839, 846, 930 P.2d 929 (1997); In re Marriage of Crosetto, 82 Wn. App. 545, 564, 918 P.2d 954 (1996). Vicki alleges none of this type of behavior in her request for fees before this Court. This Court should decline to award Vicki her attorney's fees on this basis.

Similarly, this court should decline to award Vicki attorney's fees under RAP 18.9 (authorizing attorney's fees for frivolous appeals). "An appeal or motion is frivolous if there are 'no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility' of success". In re Recall Charges of Feetham, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) (quoting Millers Cas. Ins. Co. v. Briggs, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)). We consider the record as a whole and resolve all doubts in favor of the appellant. Olson v. City of Bellevue, 93 Wn. App. 154, 165, 968 P.2d 894 (1998), review denied, 137 Wn.2d 1034, 980 P.2d 1284 (1999). As demonstrated in the preceding arguments, the issues presented here are not frivolous.

VII. CONCLUSION.

This Court should reverse the trial court's Final Parenting Plan to the extent that it automatically modifies the children's primary residence one-year after trial based on pure speculation about what would be in the children's best interests at that time. Additionally, this Court should strike any restriction in the Final Parenting Plan preventing Dimitri's from seeking to modify the decision-making provisions and require joint decision making for the children's religious upbringing. Finally, this Court should deny Vicki's request for attorney's fees on appeal.

Respectfully submitted this 14th day of August, 2009.

BREWE LAYMAN
Attorneys at Law
A Professional Service Corporation

By 

Karen D. Moore, WSBA 21328
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 14th day of May, 2009, I caused a true and correct original along with one copy of the foregoing document to be delivered by US mail to the following:

Richard D. Johnson
Court Administrator
The Court of Appeals of the State of Washington
Division I
One Union Square
600 University Street
Seattle, Washington 98101-4170

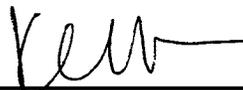
I also caused a true and correct copy of the foregoing document to be delivered via US mail to the following:

Attorneys for Respondent

Catherine Wright Smith, WSBA 9542
Edwards Sieh Smith & Goodfriend PS
1109 1st Ave Ste 500
Seattle WA 98101- 2988

Cynthia R. First, WSBA 18902
Schwimmer First, LLP
1721 Hewitt, Suite 600
Everett WA 98201

Dated this 7th day of May, 2009 at Everett, Washington.



Karen D. Moore, WSBA 21328

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 AUG 14 AM 11:07

APPENDIX A



CL12675603

FILED

2008 AUG 20 PH 3: 15

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

**SUPERIOR COURT OF WASHINGTON
COUNTY OF SNOHOMISH**

In re: Marriage of:

VICKI BALASHOV,

Petitioner,

vs.

DIMITRI BALASHOV,

Respondent.

NO. 07-3-01812-5

**NOTICE OF INTENT TO
WITHDRAW**

TO: Snohomish County Superior Court Clerk; and to
VICKI BALASHOV, through your attorney, CYNTHIA FIRST of
SCHWIMMER FIRST:

Please take notice, through the undersigned, effective Tuesday,
September 2, 2008, or whenever Final Findings and Conclusions,
Dissolution Decree, Parenting Plan, and Order of Child Support, which
ever is later, the *Law Office of Glen St.Louis*, will withdraw as attorney of

2
~~Notice on Intent~~
~~Sent for Health Care Records~~
TO WITHDRAW

Law Office of Glen St.Louis
9203 NE 142nd Street
Bothell, Wa 98011
(425) 821-0202 telephone

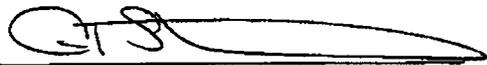
40
153

1 record for the respondent, DIMITRI BALASHOV, unless an objection is
2 received within the next 10 days.

3 Effective the above date; unless there is a substitution of attorney
4 pending earlier, or other motion, all further pleadings, original personal
5 service, notices, correspondences and other communication pertaining to
6 the above case should be sent to Mr. Dimitri Balashov at the last known
7 address of:

8 Mr. Dimitri Balashov
9 111 Wood Ave. S.W.
10 Bainbridge Island, WA 981110

11 Dated this 20 th day of August, 2008.

12 
13 _____
14 GLEN ST. LOUIS, WSBA 29166,

15 Attorney for Dimitri Balashov
16
17
18
19
20
21
22
23

24 **Sealed Per Health Care Records**

25 **Law Office of Glen St. Louis**
9203 NE 142nd Street
Bothell, Wa 98011
(425) 821-0202 telephone

APPENDIX B



CL12588689

SUPERIOR COURT OF
WASHINGTON
FOR SNOHOMISH COUNTY

2008 AUG 22 PM 2:34

JUDY KRAS
COUNTY CLERK
SNOHOMISH CO. WASH.

VICKI BALASHOV
(PETITIONER)
AND
DIMITRI BALASHOV
(RESPONDENT)

CAUSE NO.: 07-3-01812-5
JUDGE: JAMES H. ALLENDOERFER
REPORTER: NOT REPORTED
CLERK: N. ALBERT
DATE: 8-22-08 @ 1:00 P.M.

THIS MATTER CAME ON FOR: PRESENTATION
CONTINUED DATE/TIME/CALENDAR AND CONTINUANCE CODE:
HEARING DATE SET/TIME/CALENDAR CODE:

ACTION:

HEARING STRICKEN/CODE:

PETITIONER APPEARED: YES

COUNSEL: CYNTHIA FIRST

RESPONDENT APPEARED: YES

COUNSEL: GLEN ST. LOUIS

GUARDIAN AD LITEM APPEARED:

DOCUMENTS FILED:

ORDERS ENTERED: RESTRAINING ORDER PERMANENT; DECREE OF DISSOLUTION; PARENTING PLAN; AND FINDINGS OF FACT AND CONCLUSIONS OF LAW, TO BE FILED BY COUNSEL

PROCEEDINGS/COURT'S FINDINGS:

RESPONDENT'S MOTION TO CONTINUE: DENIED.

ARGUMENT OF COUNSEL.

THE FATHER SHALL BE GIVEN CREDIT FOR VISION AND DENTAL ON THE CHILD SUPPORT WORKSHEET; AND THE MOTHER SHALL BE GIVEN CREDIT FOR HEALTH CARE.

THE COURT ENTERS THE PARENTING PLAN AS AMENDED.

ORDER OF CHILD SUPPORT TO ENTER.

30
159