

FILED
SUPREME COURT
STATE OF WASHINGTON
10/13/2023 1:18 PM
BY ERIN L. LENNON
CLERK

No. 102373-1

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

DONNA M. COCHENER,

Respondent,

and

CHRISTIAN T. METCALFE,

Petitioner.

ANSWER TO PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

By: Valerie Villacin
WSBA No. 34515

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Respondent

TABLE OF CONTENTS

A. Relief Requested..... 1

B. Restatement of the Case.....2

 1. Both parents petitioned to modify the parenting plan and requested sole decision-making.2

 2. Because joint decision-making was impossible, the trial court granted sole decision-making to mother, who it found had better “interpersonal communication” than father.....3

 3. Division One affirmed, holding that substantial evidence supported the trial court’s findings that it was in the children’s best interest for the mother to have sole decision-making.....5

C. Grounds for Denying Review.10

 1. Federal law does not prohibit state courts from granting sole decision-making to one parent if appropriate to serve the children’s best interests and protect them from harm.10

 2. The trial court did not retaliate against father for his purported “protected advocacy.” 15

3.	Division One’s decision affirming the trial court’s credibility determination regarding petitioner’s expert witnesses is consistent with this Court’s decisions.....	20
D.	Conclusion.....	28

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Navin v. Park Ridge Sch. Dist. 64</i> , 270 F.3d 1147 (7th Cir. 2001)	11
<i>Taylor v. Vermont Dep't of Educ.</i> , 313 F.3d 768 (2nd Cir. 2002)	11
STATE CASES	
<i>Brewer v. Copeland</i> , 86 Wn.2d 58, 542 P.2d 445 (1975)	21
<i>Dickson v. Dickson</i> , 12 Wn. App. 183, 529 P.2d 476 (1974), <i>cert. denied</i> , 423 U.S. 832 (1975)	14
<i>Estate of Stalkup v. Vancouver Clinic, Inc., P.S.</i> , 145 Wn. App. 572, 187 P.3d 291 (2008)	28
<i>Fernando v. Nieswandt</i> , 87 Wn. App. 103, 940 P.2d 1380, <i>rev. denied</i> , 133 Wn.2d 1014 (1997)	24
<i>Greene v. Union Pac. Stages</i> , 182 Wash. 143, 45 P.2d 611 (1935)	28
<i>Jarstad v. Tacoma Outdoor Recreation, Inc.</i> , 10 Wn. App. 551, 519 P.2d 278, <i>rev. denied</i> , 83 Wn.2d 1014 (1974)	22
<i>Katare v. Katare</i> , 175 Wn.2d 23, 283 P.3d 546 (2012), <i>cert. denied</i> , 568 U.S. 1090 (2013).....	13-14

<i>Marriage of Chandola</i> , 180 Wn.2d 632, 327 P.3d 644 (2014).....	14
<i>Marriage of Fahey</i> , 164 Wn. App. 42, 262 P.3d 128 (2011), <i>rev. denied</i> , 173 Wn.2d 1019 (2012)	12-13
<i>Marriage of Leaver</i> , 20 Wn. App.2d 228, 499 P.3d 222 (2021)	25-27
<i>Marriage of Olson</i> , 69 Wn. App. 621, 850 P.2d 527 (1993).....	14
<i>Marriage of Sedlock</i> , 69 Wn. App. 484, 849 P.2d 1243, <i>rev. denied</i> , 122 Wn.2d 1014 (1993)	20
<i>Momb v. Ragone</i> , 132 Wn. App. 70 27, 130 P.3d 406, <i>rev. denied</i> , 158 Wn.2d 1021 (2006)	14
<i>Richey & Gilbert Co. v. Nw. Nat. Gas Corp.</i> , 16 Wn.2d 631, 134 P.2d 444 (1943).....	24
<i>State ex rel. Flieger v. Hendrickson</i> , 46 Wn. App. 184, 730 P.2d 88 (1986), <i>rev. denied</i> , 107 Wn.2d 1032 (1987)	24
<i>Strauss v. Premera Blue Cross</i> , 194 Wn.2d 296, 449 P.3d 640 (2019)	20
<i>Swenson v. Lowe</i> , 5 Wn. App. 186, 486 P.2d 1120 (1971).....	24
<i>Windsor v. Bourcier</i> , 21 Wn.2d 313, 150 P.2d 717 (1944).....	27-28

STATUTES

RCW 26.09.002..... 12
RCW 26.09.520 12

RULES AND REGULATIONS

ER 701..... 27
RAP 13.4 1

A. Relief Requested.

Donna Cochener, respondent below, asks this Court to deny Christian Metcalfe’s petition for review of Division One’s unpublished decision (Appendix: “Op.”) affirming the trial court’s order granting respondent sole-decision making for the parties’ children. The trial court’s fact-based, discretionary decision choosing respondent to be the parent with sole decision-making was not based on its “retaliation” against petitioner for his purported advocacy on behalf of the children. Instead, as is clear from the record, the trial court made its reasoned decision in the best interests of the children based on the testimony of the parties and their witnesses. No RAP 13.4(b) grounds warrant review of Division One’s decision affirming the trial court’s discretionary decision.

B. Restatement of the Case.

- 1. Both parents petitioned to modify the parenting plan and requested sole decision-making.**

Respondent Donna Cochener and petitioner Christian Metcalfe are the parents of two sons, born September 10, 2008, and February 4, 2013. (RP 235) When they divorced in 2016, the parties agreed to a parenting plan for their sons, then ages 8 and 3 (Ex. 34: CP 357-69), with equal residential time (CP 358) and joint decision-making. (CP 365)

Both sons have medical, educational, and behavioral issues, which grew more complex after the agreed parenting plan was entered. (See Ex. 364; RP 1438-39, 1476-77, 1510-12) The parents were unable to effectively co-parent, which often caused delay in timely intervention for the children. (See RP 1588-90, 1593-94) As a result, both parties in March 2020 sought to modify the parenting

plan, and both parents requested sole decision-making.

(CP 1, 26)

2. Because joint decision-making was impossible, the trial court granted sole decision-making to mother, who it found had better “interpersonal communication” than father.

After a six-day trial in June 2021, King County Superior Court Judge Hillary Madsen (“the trial court”) modified the parenting plan and granted sole decision-making to Cochener. (CP 1226, 1238-39) The trial court agreed with the parents that “joint decision-making is impossible.” (Finding of Fact (FF) 10B(12), CP 1233) The trial court found “the intensity of the co-parenting dynamic is so extreme that multiple expert and lay witnesses testified the children are suffering.” (FF 10B(11), CP 1233)

In deciding which parent should make decisions for the children, the trial court considered both parents’ “interpersonal communication” skills in light of the fact that both sons “receive services from a number of treating

providers [and] [c]ommunicating with providers and coordinating the children's care is involved and time consuming." (See FF 10A(2), CP 1231; FF 10B(13), CP 1233) The trial court granted sole decision-making to Cochener after finding that she had "less deficits in the area of interpersonal communication" (FF 10B(13), CP 1233) than Metcalfe, whose "interpersonal communications," the trial court described "as 'overwhelming,' 'burdensome,' 'intimidating,' 'persistent,' 'tenacious,' and 'manipulative,'" which has "alienated important people" in the children's lives. (FF 10B(17), CP 1234)

The trial court found that even if Metcalfe had not intended for his "advocacy efforts" to be perceived as threatening and intimidating, it was no "excuse for poor behaviors and actions; particularly when the result negatively impacts" the children. (FF 10B(17), CP 1234)

Although it granted Cochener sole decision-making, the trial court directed that she give Metcalfe "notice and

opportunity in advance of any decision-making as described in the Parenting Plan.” (CP 1239) Further, Metcalfe remains entitled to information related to the children, including “all of the children’s medical, psychological, counseling, and educational records,” including access to the providers, who “shall speak candidly concerning the children herein to either of the parents upon presentation of this Parenting Plan, without court order or subpoena.” (CP 1253-54)

3. Division One affirmed, holding that substantial evidence supported the trial court’s findings that it was in the children’s best interest for the mother to have sole decision-making.

Metcalfe appealed the trial court’s decision, which Division One of the Court of Appeals affirmed in an unpublished decision on August 14, 2023. The Court held that substantial evidence supported the trial court’s finding that Metcalfe’s interpersonal communication has “alienated important people” in the children’s lives, noting

that “multiple providers testified that Metcalfe’s manner of interaction negatively impacted their relationships with Metcalfe and affected the quality of services they were able to provide” to the children. (Op. 7)

Division One held substantial evidence supported the trial court’s finding that “Metcalfe engaged in behaviors and actions that negatively affected the children, and were appropriately characterized as ‘poor’ in that respect.” (Op. 9) The Court pointed to evidence that Metcalfe’s emails to the sons’ school were “lengthy and repetitive.” (Op. 7) The parenting evaluator, who was largely supportive of Metcalfe, had also testified that Metcalfe failed to recognize the impact on the children’s providers from their impression of him as a “high conflict person.” (Op. 9) The parenting evaluator testified that “Metcalfe’s conduct is experienced by others as ‘overwhelming and frustrating and intense and overcommunicating,’ and that this negatively impacts the children.” (Op. 9)

Division One held that substantial evidence supports the trial court's finding that "between the two parents, communication deficits manifested to a lesser extent with Cochener than with Metcalfe." (Op. 11) Division One noted testimony from providers, who described Cochener as having "positive and really good, clear communication." (Op. 10; *see also* Op. 11) Meanwhile, providers described Metcalfe "as extraordinary in the terms of the amount of time and demands he has" (Op. 10-11), making it "very challenging to work together" (Op. 11), and having a "pattern of emailing a variety of people and asking for different things . . . [,] [which] was hard to manage." (Op. 10)

These providers acknowledged that they expect a greater amount of interaction with parents of special needs children than other parents but that their interactions with Metcalfe were "unlike any other interaction I have had in this job" (Op. 10) and "stood out as 'noteworthy' and

‘singular.’” (Op. 7) One teacher described communicating with Metcalfe as “unique in my 26 years of teaching” for “how belligerent and persistent” he could be. (Op. 11) The school principal also testified while that she has worked with many families with children who have different challenges, dealing with Metcalfe has been “by far, the most extreme, the most difficult.” (Op. 11; *See* RP 1151-52)

Division One held the trial court did not abuse its discretion in granting sole decision-making to Cochener, as its “findings provide a tenable basis for the trial court to conclude that Cochener is better suited to hold sole decision-making authority” for the children. (Op. 14) In doing so, Division One rejected Metcalfe’s argument “that Cochener will not adequately advocate for appropriate service levels from educational and health care providers. The trial court did not enter a finding that this is true, and it was entitled to find that any risk was counter-balanced

by Cochener’s lesser likelihood of alienating important provider relationships.” (Op. 14)

Division One also rejected Metcalfe’s argument that it was required to accept the testimony of his two expert witnesses over other evidence. (Op. 18) Division One noted that the testimony of Metcalfe’s expert witnesses was “contrasted” by the testimony of the parenting evaluator, and by putting greater weight on the parenting evaluator’s testimony, “the trial court made an ordinary credibility determination, which we do not revisit on appeal.” (Op. 18)

Division One also rejected Metcalfe’s argument that the trial court’s decision was based on actions that were “protected by federal law.” (Op. 20) Division One noted that the trial court “did not rely on the content of Metcalfe’s communications nor criticize at any point his right to seek appropriate care for his children,” in granting sole decision-making to Cochener. (Op. 20) Instead, the trial court “focused on the manner of Metcalfe’s

communication,” which the trial court found “was interfering with the children’s ability to receive the support they needed. Federal law contemplates, and Washington law directs, that in such circumstances a state court may appoint one parent as sole decision-maker.” (Op. 20)

C. Grounds for Denying Review.

- 1. Federal law does not prohibit state courts from granting sole decision-making to one parent if appropriate to serve the children’s best interests and protect them from harm.**

In seeking review from this Court, Metcalfe apparently abandons the position advocated by Disability Rights Education and Defense Fund (“DREDF”), which filed an amicus brief on his behalf, that the trial court’s decision granting sole decision-making to Cochener conflicts with the “public policy favor[ing] parental participation and advocacy in the educational needs of children” underlying the Individuals with Disabilities

Education Act (“IDEA”). (DREDF Br. 6) Metcalfe’s abandonment of this position is well-taken.

Any rights a parent may have under the IDEA do not override a state court’s authority to determine who may make educational decisions on behalf of a child in a domestic relations matter. *See Taylor v. Vermont Dep’t of Educ.*, 313 F.3d 768, 772 (2nd Cir. 2002). As Division One noted, the Second Circuit in *Taylor* stated that the IDEA leaves “intact a state’s authority to determine who may make educational decisions on behalf of a child.” (Op. 20, quoting *Taylor*, 313 F.3d at 772) Division One also noted that the Seventh Circuit in *Navin v. Park Ridge Sch. Dist.* 64, 270 F.3d 1147 (7th Cir. 2001) similarly stated that “nothing in the IDEA overrides states’ allocation of authority as part of a custody determination.” (Op. 20, quoting *Navin*, 270 F.3d at 1149)

Rather than the IDEA, Metcalfe now claims that the Americans with Disabilities Act (ADA) and the Washington

State Law Against Discrimination Act (WLAD) controls the trial court's decision on parental decision-making for children. (Petition 19) However, neither the ADA nor WLAD, which prohibits discrimination on the basis of disability or retaliation against an individual for engaging in advocacy on behalf of disabled persons, limits the trial court's authority to grant sole decision-making to one parent in a proceeding where "the best interests of the child shall be the standard." RCW 26.09.002.

For instance, in *Marriage of Fahey*, 164 Wn. App. 42, 262 P.3d 128 (2011), *rev. denied*, 173 Wn.2d 1019 (2012), Division Two rejected the father's argument that the trial court's consideration of his disability in deciding whether to allow the children to relocate with the mother was "per se illegal discrimination or bias." Division Two held that the trial court properly considered the father's disability in its "overall analysis" of the relocation factors under RCW 26.09.520. 164 Wn. App. at 64, ¶49. Division Two held the

trial court properly considered the impact the father's "disability had on his ability to provide for his children's needs" in deciding whether to allow or restrain the children's relocation. 164 Wn. App. at 64, ¶49.

Here, even if Metcalfe's purported advocacy efforts were "protected" (which Cochener does not concede), the trial court was not barred from relying on its negative impact on the children in choosing to grant Cochener sole decision-making over Metcalfe's objection. As this Court has held, "[w]e have long recognized a parent's right to raise his or her children may be limited in dissolution proceedings because the competing fundamental rights of both parents and the best interests of the child must also be considered." *Katara v. Katara*, 175 Wn.2d 23, 42, ¶36, 283 P.3d 546 (2012), *cert. denied*, 568 U.S. 1090 (2013).

In fact, this Court and all three divisions of the Court of Appeals have recognized that a trial court has authority to enter provisions in a parenting plan that protect children

from harm, even harm caused by protected conduct of the parent. *See e.g., Katare*, 175 Wn.2d at 41-42, ¶¶ 35, 36 (upholding restriction preventing father from taking his children to India, the father’s home country); *Marriage of Chandola*, 180 Wn.2d 632, 653, ¶¶44-46, 327 P.3d 644 (2014) (upholding restriction on father “cosleeping” with child despite father’s claim that it was part of his culture); *see also Momb v. Ragone*, 132 Wn. App. 70, 80-81, ¶¶23-27, 130 P.3d 406 (statute authorizing courts to prevent child’s relocation does not violate relocating parent’s “fundamental right to freedom in making personal choices regarding private family matters”), *rev. denied*, 158 Wn.2d 1021 (2006); *Marriage of Olson*, 69 Wn. App. 621, 630, 850 P.2d 527 (1993) (interest of “preserving and fostering health relationship between parents and their children” outweighed father’s “First Amendment right to speak his mind freely”); *Dickson v. Dickson*, 12 Wn. App. 183, 187-88, 529 P.2d 476 (1974), *cert. denied*, 423 U.S. 832 (1975)

(upholding speech restrictions on father, which threatened to have a detrimental impact on the children).

Because any federally protected rights Metcalfe may have did not trump the trial court's authority under state law to make a decision that was in the children's best interests to protect them from the negative effects of Metcalfe's behavior, this Court should deny review of Division One's unpublished decision.

2. The trial court did not retaliate against father for his purported "protected advocacy."

Because neither the ADA nor WLAD limits the trial court's authority under RCW ch. 26.09 to make decisions in the best interest of the children and protect them from harm, review of Division One's decision is not warranted based on Metcalfe's claim that the trial court "failed in its duty to ensure" that Metcalfe's purported protected advocacy "did not subject him to retaliation." (Petition 24)

In seeking review, Metcalfe claims “the record is replete with instances of [his] advocacy.” (Petition 25) No one disputed that Metcalfe’s interactions with the children’s providers were in “advocacy” of what he believed was in the children’s best interest. In fact, there were instances where Cochener agreed with Metcalfe’s position on an issue. It was his execution of that position that Cochener disagreed with. As Cochener described, Metcalfe does not understand “where advocacy ends and where [] outright conflict begins.” (RP 1591)

For instance, as Metcalfe points out in his petition, he and Cochener had agreed to change the older son’s ABA therapist. (Petition 26) However, Cochener did not agree with Metcalfe’s execution of that decision—by unilaterally and abruptly terminating the ABA therapist without a transition plan for a new ABA therapist—because it negatively impacted the son. (RP 1462-64, 1499; Ex. 151) As Cochener testified, this had a “huge impact” on the son,

who was “very upset to not say goodbye to [his therapist] and had some outbursts over it and some crying over it.” (RP 1463-65)

It was how Metcalfe carried out his advocacy, not the advocacy itself, that negatively impacted the children. Another example is the dispute Metcalfe had with the older son’s tutor regarding his use of a calculator. (Petition 25) In addressing this dispute, the trial court did not find that Metcalfe was not entitled to address this issue with the tutor; the trial court’s concern was Metcalfe’s “reaction” to the dispute, which it found “outrageous” and caused the son “discomfort.” (FF 10B(17), CP 1234)

Metcalfe accused the tutor of “undermining” and “shaming” the son. (RP 1301) The tutor described Metcalfe’s emails to her as “condescending, patronizing, threatening, hurtful, and . . . ridiculous,” reaching “an absurd level of crazy.” (RP 1304-05) Metcalfe also Velcroed two calculators into the binder holding the son’s

assignments and stickered over the tutor's directions to not use a calculator for function machine homework. (RP 1302, 1304-05)

Metcalf also unnecessarily drew the son into the dispute by "ril[ing] [him] up (RP 1302-03), bringing him "into the drama," and putting him in the "middle," which was "confusing" to him. (Ex. 2 (DMC 00069)) Metcalf also wanted to terminate the tutor, who had, at that point, been successfully working with the son for the previous three years. Because Cochener disagreed with terminating the tutor, the issue had to be arbitrated. (RP 1292, 1485-86)

As Division One recognized, the trial court did not "rely on the content of Metcalf's communications nor criticize at any point his right to seek appropriate care for his children." (Op. 20) Instead, as Division One recognized, the trial court was concerned with Metcalf's "communication style," which was "interfering with the children's ability to receive the support they needed." (Op.

20) As Division One pointed out, “multiple providers testified that Metcalfe’s manner of interaction negatively impacted their relationships with Metcalfe and affected quality of service they were able to provide.” (Op. 7)

The trial court described Metcalfe’s “advocacy efforts” as “overwhelming, burdensome, intimidating, persistent, tenacious, and manipulative,” which “alienated important people” in the children’s lives and “negatively impact[ed]” the children. (FF 10(B)(17), CP 1234) Further, the children’s providers described the burden caused by Metcalfe due to the “extraordinary” amount of “time and demands he has.” (Op. 10-11)

In light of this evidence and the trial court’s finding that the children’s special needs demand “frequent decision-making and information sharing” (FF 10B(8), CP 1233), which requires “[c]ommunicating with providers and coordinating the children’s care [that] is involved and time-consuming” (FF 10A(2), CP 1231), Division One held

that the trial court’s “finding that Cochener has less deficit in the area of interpersonal communication, provide a tenable basis for the trial court to conclude it is in the best interests of the children that Cochener hold sole decision-making.” (Op. 14-15)

Division One’s decision affirming the trial court’s discretionary decision granting Cochener sole decision-making, which it held was supported by substantial evidence, does not violate any federal protected rights of Metcalfe. This Court should deny review.

3. Division One’s decision affirming the trial court’s credibility determination regarding petitioner’s expert witnesses is consistent with this Court’s decisions.

As this Court has held, “[t]he credit to be given to any witness’s testimony, including expert opinion testimony, is quintessentially a matter for the trier of fact to determine.” *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 302, ¶11, 449 P.3d 640 (2019); *see also Marriage of Sedlock*, 69 Wn. App. 484, 491, 849 P.2d 1243 (“The factfinder is given wide

latitude in the weight to give expert opinion.”), *rev. denied*, 122 Wn.2d 1014 (1993). “A trial court has the right to reject expert testimony in whole or in part in accordance with its views as to the persuasive character of that evidence.” *Brewer v. Copeland*, 86 Wn.2d 58, 74, 542 P.2d 445 (1975).

Consistent with this Court’s decisions, Division One properly affirmed the trial court’s decision placing “great weight” on the testimony of the parenting evaluator and “not great weight” on the testimony of Dr. Marlowe, Metcalfe’s expert witness. (Op. 15-18) As Division One recognized, the trial court had a sound basis for placing greater weight on the testimony of the parenting evaluator, who the trial court found performed an “extremely thorough” investigation, including “hours of interviews with both parents, the children, and providers” than on Dr. Marlowe, who “had limited interactions with Mother and the children.” (Op. 17, quoting FF 10B(16), CP 1234)

Dr. Marlowe in fact had *zero* interaction with Cochener and the children. Nor did she speak to any of the children’s providers. (RP 168, 171) Instead, Dr. Marlowe’s opinion was based solely on records and information from Metcalfe. (RP 173, 175) As a result, Dr. Marlowe did not have the “whole picture” of the children on which to form an opinion of their progress and needs (RP 1489), which the trial court properly considered when deciding the weight to place on her testimony. A factfinder may disregard an expert opinion if the information supplied to the expert was “incomplete or unreliable.” *Jarstad v. Tacoma Outdoor Recreation, Inc.*, 10 Wn. App. 551, 556, 519 P.2d 278, *rev. denied*, 83 Wn.2d 1014 (1974).

For instance, Dr. Marlowe testified that she believed the younger son was a “non-reader” and dyslexic. (RP 195-96) However, had she spoken to Cochener or the younger son’s teachers, Dr. Marlowe would have learned that not only could the younger son read, he was a “voracious

reader,” who was reading above grade level. (RP 1155-56, 1520-22)

Similarly, Dr. Marlowe concluded that the older son could not learn a ten times multiplication table without a calculator. (RP 190-91) However, had she spoken to the older son’s tutor, who had, by then, been working with him for 5 years, Dr. Marlowe would have learned that the son was not only capable of learning a ten times multiplication table without a calculator, he had in fact learned it. (RP 1303; *see also* RP 1487-88)

Nevertheless, Metcalfe claims the trial court abused its discretion in not placing greater weight on Dr. Marlowe’s testimony when “no other expert evidence contradicted Dr. Marlowe’s testimony that” the older son “must use a calculator in all settings.” (Petition 32) However, as this Court held, “[e]ven in those instances where several competent experts concur in their opinion and no opposing expert evidence is offered, the [factfinder

is] still bound to decide the issue upon their own fair judgment, assisted by the statements of the experts.” *Richey & Gilbert Co. v. Nw. Nat. Gas Corp.*, 16 Wn.2d 631, 650, 134 P.2d 444 (1943). “The credibility of expert testimony . . . , even though uncontradicted, is for the trier of the facts.” *Swenson v. Lowe*, 5 Wn. App. 186, 191, 486 P.2d 1120 (1971).

Expert opinions are “purely advisory in character” and the factfinder “may place whatever weight they choose upon such testimony and may reject it, if they find that it is inconsistent with the facts in the case or otherwise unreasonable.” *Richey*, 16 Wn.2d at 650; *see also Fernando v. Nieswandt*, 87 Wn. App. 103, 107, 940 P.2d 1380, *rev. denied*, 133 Wn.2d 1014 (1997) (court is free to reject the recommendation of an expert if not supported by the other evidence). “The trial court may refuse to accept uncontradicted expert testimony as long as it does not act in an arbitrary or capricious manner.” *State ex rel. Flieger*

v. Hendrickson, 46 Wn. App. 184, 190, 730 P.2d 88 (1986), *rev. denied*, 107 Wn.2d 1032 (1987).

Here, it was not “arbitrary or capricious” for the trial court to place less weight on Dr. Marlowe’s testimony, which was solely based on records, than the testimony of the parenting evaluator who spoke with the children, parents, and providers, as well as testimony from the providers themselves and Cochener, who observe and interact with the children on a regular basis.

Metcalfé nevertheless claims review is warranted because Division One’s decision conflicts with Division Three’s decision in *Marriage of Leaver*, 20 Wn. App.2d 228, 499 P.3d 222 (2021), which he claims stands for the proposition that “it is a manifest abuse of discretion to adopt an untrained lay opinion over that of qualified experts.” (Petition 31-32) Metcalfé is wrong.

As Division One concluded, *Leaver* is “distinguishable.” (Op. 17-18) In *Leaver*, Division Three

held that the trial court should have given greater weight to the expert testimony from the husband's psychiatrist and neuropsychological evaluator, who opined that the husband was disabled and unable to work, than to the lay opinion of the wife, who admitted "she was not deeply involved in [his] mental health treatment," and had never witnessed the husband "outside the home on a full-time or near full-time basis at his current stage of mental illness." *See* 20 Wn. App.2d at 240, ¶¶29, 30.

Division Three recognized in *Leaver* that "[m]ental illness, particularly depression, can present itself with symptomatology resembling personality defects such as laziness or lack of motivation. Given the risk of confusion, there is a grave danger in deferring to a layperson's assessment of the nature of mental illness, particularly when the layperson has a financial incentive to disregard the impact of mental illness." 20 Wn. App.2d at 240, ¶30.

Here, unlike the experts in *Leaver*, Dr. Marlowe never met the children, who were the subject of her evaluation. Further, whether the children can perform their multiplication tables without a calculator or read are not subjects where there is a “risk of confusion”—they either can, or they cannot, and lay witnesses who work with the children can testify to their own personal observations of the children’s capabilities. *See* ER 701 (lay witness may provide opinion that is “rationally based on the perception of the witness”).

It is not the law that testimony of an expert witness outweighs the testimony of a lay witness. As this Court has held, “[c]ompetent testimony, both expert and lay, is entitled to the weight and credibility the court or jury, as the case may be, thinks it is entitled to under all the circumstances, and neither takes precedence over the other as a matter of law.” *Windsor v. Bourcier*, 21 Wn.2d 313, 316, 150 P.2d 717 (1944). The factfinder has the right to

believe the testimony of lay witnesses and to disbelieve the testimony of expert witnesses. *Greene v. Union Pac. Stages*, 182 Wash. 143, 146, 45 P.2d 611 (1935); see also *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wn. App. 572, 590-91, ¶42, 187 P.3d 291 (2008) (trier of fact is free to disbelieve testimony of an expert witness). A court is not required to accept the conclusion of an expert witnesses “and reject the testimony of lay witnesses in conflict therewith.” *Windsor*, 21 Wn.2d at 316.

Because Division One’s decision affirming the trial court’s credibility determination and the weight it placed on the evidence is consistent with decisions from this Court and the lower appellate courts, review is not warranted.

D. Conclusion.

This Court should deny review.

I certify that this answer is in 14-point Georgia font and contains 4,205 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 13th day of October, 2023.

SMITH GOODFRIEND, P.S.

By: /s/ Valerie A. Villacin
Valerie A. Villacin
WSBA No. 34515

Attorneys for Respondent

DECLARATION OF SERVICE

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

That on October 13, 2023, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Hillary J. Collyer Lasher Holzapfel Sperry & Ebberson PLLC 601 Union Street, Suite 2600 Seattle, WA 98101-2302 collyer@lasher.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Sharon J. Blackford Sharon Blackford PLLC 600 Stewart St Ste 400 Seattle, WA 98101-1217 sharon@washingtonappellatelaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Asti Gallina Riverside Law Group 905 W Riverside Avenue, Suite 404 Spokane, WA 99201 amg@riverside-law.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Brooklyn, New York this 13th day of
October, 2023.

/s/ Andrienne E. Pilapil
Andrienne E. Pilapil

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of

DONNA M. COCHENER (f/k/a DONNA
COCHENER-METCALFE),

Respondent/Cross Appellant,

and

CHRISTIAN T. METCALFE,

Appellant/Cross Respondent.

No. 83271-9-I

DIVISION ONE

UNPUBLISHED OPINION

BIRK, J. — Donna Cochener and Christian Metcalfe filed cross petitions to modify the parenting plan for their two children, each seeking sole decision-making for the children’s educational and health care needs. The trial court generally granted sole decision-making to Cochener, including for educational and medical decisions. Metcalfe appeals, asserting several errors. We affirm the trial court’s grant of sole decision-making to Cochener among other rulings, we reverse in part, and we remand as further described below.

I

Donna Cochener and Christian Metcalfe were previously married. Together they share two sons, L. and E. Both children have complex special medical and educational needs. Cochener and Metcalfe’s original parenting plan was entered in 2016 and directed joint decision-making. In March 2020, both parties filed petitions to change the parenting plan, each arguing they should be granted sole

decision-making authority. The cross petitions were presented over a six day trial from June 28 to July 9, 2021.

Metcalfe argued, generally, that Cochener was resistant to acknowledging and had downplayed the extent of the special needs and mental health issues of the children, did not advocate for the children, and did not cooperate with Metcalfe in decision-making. Cochener argued, generally, that Metcalfe engaged in excessive conflict, made unreasonable demands of providers, and distorted information between the parties and providers. Eighteen witnesses testified at trial. Metcalfe called among others experts Wendy Marlowe, PhD, whom Metcalfe hired to conduct a records review and prepare a report, and Theodore Mandelkorn, MD, a behavioral medicine physician who had treated L.

Metcalfe also called Jennifer Wheeler, PhD, who served as a court-appointed parenting evaluator. Dr. Wheeler was appointed as an agreed, court appointed expert and provided a report and testimony concerning her evaluation of the parents' respective parenting skills and their interactions with medical and educational providers. Among other things, Dr. Wheeler based her report on interviews with Metcalfe and Cochener, as well as 18 third party professionals familiar with L.'s and E.'s educational and health needs. Dr. Wheeler reviewed L.'s and E.'s educational and health care records. Without objection, the trial court admitted Dr. Wheeler's report and notes from her interviews with the various witnesses. Dr. Wheeler recommended the court implement sole decision-making, suggesting that Metcalfe be responsible for health care decision-making and that Cochener be responsible for educational decision-making.

The trial court found joint decision-making was no longer feasible and “splitting decision-making” was not appropriate because “education and healthcare decisions for these children are so intertwined as to be inseparable.” This finding is unchallenged and is accepted as true on appeal. In re Marriage of Magnuson, 141 Wn. App. 347, 351, 170 P.3d 65 (2007). After granting a motion for reconsideration in part which clarified the language of several provisions, the trial court entered the amended final order and findings on petition to change a parenting plan, and the amended parenting plan granting sole decision-making authority to Cochener in all areas except religious upbringing.

II

We address first Metcalfe’s challenge to the trial court’s granting Cochener sole decision-making authority. Metcalfe assigns error to several findings of fact, and the trial court’s legal conclusions flowing from them. Metcalfe argues the trial court “abused its discretion by ordering sole decisionmaking to [Cochener] for all decisions except religious upbringing.” Metcalfe assigns error to the trial court’s decisions that Cochener may make any major decision 14 days after notifying Metcalfe, that Cochener may schedule all of the children’s appointments, and that the parenting plan is in the best interests of the children. Metcalfe further argues the trial court abused its discretion by finding any harm caused to the children by changes to the parenting plan is outweighed by the benefits.

A

We first consider Metcalfe’s challenges to certain findings of fact. “The trial court’s findings of fact will be accepted as verities by the reviewing court so long

as they are supported by substantial evidence.” In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). “Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted.” Id.

1

Metcalfe challenges portions of finding 17, among them, that Metcalfe’s “reaction to tutor Eliza Furmansky’s request for [L.] not to use a calculator on certain worksheets was outrageous. [L.] experienced discomfort as a result.”

In November 2019, Metcalfe came into conflict with Eliza Furmansky, L.’s tutor since 2016. Furmansky had instructed L. to complete a times table work sheet without the aid of a calculator. Metcalfe sent an e-mail that stated L.’s IEP (individualized education program) allowed use of a calculator in all school settings, and that he would be “honoring that accommodation.” Furmansky explained her rationale regarding calculator use for this exercise. Metcalfe responded, “I understand your opinion, but you misunderstand your role with my and [Cochener’s] son. You are not the decision maker. If you’ll neither honor [L.]’s legal rights under his IEP or my co-equal decision making authority as his parent, I wonder if you want to continue working with [L.]?” In the final e-mail on the subject, Metcalfe said, “I also suspect that per Title III of the ADA / ADA¹ that your business can not legally deny this reasonable accommodation to my son—and that to do so would constitute discrimination.” “So to be clear if you are to continue to work with [L.] you need to follow the IEP and allow him to use a calculator—even for simple math. If you can’t follow that guideline then I do not

¹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 37.

believe you should continue to work with [L.]. If you still object ask yourself if [Cochener] would succeed at getting a judge/arbitrator to go against [L.]’s Dep[artment] of Education / Federally backed IEP. (I’d think that highly unlikely).” Metcalfe took L.’s binder and attached “not one, but two calculators as well as taping over [Furmansky’s directions].” Furmansky testified, “[I]t felt like he was trying to get [L.] to start a fight with me.” Furmansky described Metcalfe’s e-mails as “condescending, patronizing, threatening, hurtful, . . . and . . . ridiculous.” While Furmansky continued to work with L. after the conflict with Metcalfe, she “would not attempt to ask for him to support [L.] in specific ways at home again . . . because that would cause more trouble than be a support.”

Metcalfe’s e-mail communications with Furmansky and Furmansky’s testimony are substantial evidence supporting the trial court’s finding that his reaction was “outrageous.” As a result of the conflicting instructions, L. “expressed some embarrassment and sadness” when Furmansky began to erase answers that had been completed with a calculator. This is substantial evidence supporting the finding that L. experienced discomfort. This challenged aspect of finding of fact 17 is supported by substantial evidence.

2

Metcalfe challenges the portion of finding of fact 17 stating Metcalfe’s “interpersonal communication has alienated important people in [L.] and [E.]’s lives.”

Evidence showed that in fall 2018, Metcalfe abruptly and unilaterally terminated L.’s ABA therapy services with Magnolia Behavioral Therapy (MBT)

because he disagreed with changes to how L.'s behavior was tracked day to day. When he learned of the change, Metcalfe requested a "pros and cons of this approach," and stated that if he was "not comfortable with the risks," "I plan to withdraw my consent for [L.] to receive services from MBT." Metcalfe later responded, "Whether well intentioned or not I believe your actions and approach to be flawed and not in the best long term interests of my son. . . . Please be advised that as of end of day tomorrow, Fri 10/26, I withdraw my consent for you, your firm and your providers to work with my son, [L.]." When MBT outlined the discharge process, Metcalfe responded, "No need to complete the discharge steps and after today MBT does not have my consent to discuss [L.] with anyone after today. To be clear your firm and [L.'s therapist] were terminated because of her very poor actions. This is not a mutual parting of ways. I ask for less and not more additional actions by [MBT] so please clear out today." Cochener testified L. was "very upset to not say goodbye to [his therapist] and had some . . . outbursts over it and some crying over it." Dana Doering, Guardian Ad Litem (GAL) for both children, affirmed that after Metcalfe's decision to terminate MBT's services, L. was without ABA therapy for several months while the parties were in a dispute about choosing a new therapist.

Carla Hershman, L.'s mental health therapist, reported to Dr. Wheeler, " 'It appeared to me that his dad is highly sensitive. . . it felt as though any wrong word from me would potentially end the relationship. . . [L.] has not had the chance to build long-term relationships with providers, with some exceptions, because dad finds reasons that people are not good enough, and pulls him.' "

Metcalfe filed complaints against six providers. Metcalfe argues this is a limited number out of the total number of service providers. Metcalfe assembled a list of 57 providers by reviewing insurance claims. The list included providers who had never interacted with the children. The providers Metcalfe filed complaints against were closely involved with the children, including E.'s daycare, L.'s behavioral therapist, and the school both children attended for years. As discussed in section II.A.4. below, multiple providers testified that Metcalfe's manner of interaction negatively impacted their relationships with Metcalfe and affected the quality of services they were able to provide. There is substantial evidence to support the finding that Metcalfe alienated important people in the children's lives.

3

Metcalfe challenges the portion of finding of fact 17 stating "that [Metcalfe] engaged in 'poor behaviors and actions.'" The trial court's sentence reads in full: "Intent cannot be an excuse for poor behaviors and actions; particularly when the result negatively impacts [L.] and [E.]."

In January 2019, when Metcalfe felt a teacher was not providing the level of detail he wanted in a conversation, Metcalfe made a formal request for an in-person meeting, in accordance with the Spruce Street School's grievance policy. The school asked Metcalfe to clarify what his grievance was. Metcalfe responded with a lengthy e-mail further challenging the school's response to his initial complaint. Throughout the exchange, Metcalfe's e-mails were lengthy and repetitive.

In May 2019, Metcalfe requested Spruce Street implement a specific behavior log for L. Metcalfe said he was requesting the log “not because he’s having significant difficulty right now, but rather to better support his success.” When teachers stated that they did not think a behavior log was needed for L., Metcalfe responded, in part, “[I]f Spruce Street School is unwilling to workout [sic] a compromise to better support [L.] this year it makes me question its ability and willingness to support him next year.” On May 10, 2019, Metcalfe asked Dr. Mandelkorn to provide a doctor’s note recommending the specific daily feedback system for L. Dr. Mandelkorn provided such a note. The note stated L. “has been diagnosed to have Autism Spectrum Disorder and Attention Deficit Disorder.” L. had not been formally diagnosed with autism at that time, and Dr. Mandelkorn testified he is not an expert in autism or special education. At a meeting on May 17, 2019, Metcalfe presented Spruce Street with Dr. Mandelkorn’s letter. Cochener was not advised of the meeting beforehand, and Metcalfe did not send her a copy of the letter until after the meeting.

In June 2019, L. was formally diagnosed with autism spectrum disorder. Cochener and Metcalfe agreed to refrain from telling L. about his diagnosis until they could collaborate on how to discuss it with him. Metcalfe did not honor this agreement, and instead informed Cochener by e-mail in late August 2019 that he had shared L.’s diagnosis with him. Cochener reported this information was a source of distress for L., and that “ [i]t was hurtful to [her] that [she] wasn’t allowed to be part of that conversation... it limited my ability to talk about his autism with [L.] for a while.” (Some alterations in original.)

The GAL recommended the parties delay sharing the report of Metcalfe's retained litigation expert, Dr. Marlowe, with Seattle Public Schools as part of the formulation of an IEP for L. Metcalfe ignored this recommendation and sent Dr. Marlowe's report to Seattle Public Schools. Doering stated it was not reasonable to put this report into the IEP process, "or to have a non-neutral report that was conflicted between parents confound what was supposed to have been a very collaborative process."

Dr. Wheeler testified Metcalfe "has a very logical, rational basis for every one of his efforts to get a third party involved to resolve these disputes or dilemma. . . . [W]hat he misses . . . or fails to adequately . . . take into account is the collective impact each of those individual efforts both on people's impressions of him as . . . being this high conflict person, but also the impact it has on individuals." Dr. Wheeler stated Metcalfe's conduct is experienced by others as "overwhelming and frustrating and intense and overcommunicating," and that this negatively impacts the children.

There is substantial evidence supporting the trial court's finding that Metcalfe engaged in behaviors and actions that negatively affected the children, and were appropriately characterized as "poor" in that respect.

Metcalfe challenges the portion of trial court's finding 13 that states Cochener has "less deficits than [Metcalfe] in the area of interpersonal communication." (Boldface omitted.)

Dr. Wheeler's report indicated Cochener had difficulty seeing merit in Metcalfe's perspective because of her perception of his fomenting conflict. This led to Cochener "contribut[ing] to their ongoing high-conflict dynamic." Furmanky testified Cochener had "positive and really good, clear communication." Dr. Wheeler testified Cochener was not resistant to accepting any diagnoses of the children from medical professionals, and none of the professionals Dr. Wheeler spoke to had concerns about Cochener's decision-making in medical or educational issues for the children.

The GAL testified that Metcalfe revisited the same issues repeatedly, while Cochener rarely did.

Karen Brady, Executive Director of Ryther, which provided ABA services to L., was reported by Dr. Wheeler as stating, "The amount of contact I have had with [Metcalfe] is extraordinary... the number of phone calls and emails and meetings I have had with him is extraordinary. It is unlike any other interaction I have had in this job.'" (Alteration in original.) Brady stated Ryther had to implement a communication plan under which Metcalfe was allowed to e-mail only once per week because "[h]e had a pattern of emailing a variety of people and asking for different things... it was hard to manage that.'" (Second alteration in original.) Brady stated Metcalfe "was okay with [a therapist] working with his son when he knew she didn't have a certification," but then "filed a complaint with [the Department of Health]." After not receiving the outcome he sought in a meeting, Metcalfe responded, "I am so sorry I have to do this, but I have to file a complaint." Brady described Metcalfe as "extraordinary in terms of the amount of

time and demands he has,” stating he stood out as “noteworthy” and “singular” in Brady’s “28 years of being at Ryther.” A teacher at L.’s school similarly described communicating with Metcalfe about days when L. lacked one-to-one support as “unique in my 26 years of teaching” for “how belligerent and persistent” Metcalfe could be.

Briel Schmitz, head of Spruce Street School, testified, “[Cochener] has been clear. I’ve never had any miscommunication.” When asked about communication with Metcalfe, Schmitz said, “[O]ver time, . . . the dynamic . . . changed from the school leading the conversation and providing . . . our expertise to [Metcalfe] never being satisfied, . . . wanting to tell us how to do our work, not respecting our opinions . . . it became very challenging to work together.” Spruce Street required a parent communication plan be put in place in order to allow L. to continue attendance. A court later ordered a parent communication plan to facilitate E.’s attendance as well. Schmitz said, “I feel like I was emotionally abused in this situation and taken advantage of.” Schmitz said, “I’ve worked with a lot of kids who have different challenges and needs and this is, by far, the most extreme, the most difficult.”

This testimony, as well as the evidence noted above, is substantial evidence supporting the trial court’s finding that between the two parents, communication deficits manifested to a lesser extent with Cochener than with Metcalfe.

Metcalfe argues substantial evidence does not support a portion of the trial court’s finding 10, which states, “Mother and Father have drawn other people and

their children into their conflicts, such as when Father tried to persuade Spruce Street volunteers and staff to rescind Mother's nomination to the board of directors."

In April 2019, Metcalfe contacted Spruce Street to discuss his conflict with Cochener concerning an incident that occurred at E.'s daycare in May 2018. The incident was before E. started at Spruce Street, in August 2018. Cochener served on the board of the school. Citing the conflict, Metcalfe made three requests of Spruce Street, including (1) that Cochener be precluded from serving on the compensation or governance committees or as President so long as either of the children are enrolled, (2) to "make the current and future President of the Board aware of this situation," (3) that administrators "work to maintain a strong working relationship with both [Cochener] and me and . . . be willing to offer unvarnished feedback to either or both of us that would benefit our children." On April 30, 2019, Metcalfe stated in an e-mail to Spruce Street staff: "Because of [Cochener]'s last actions and if her role and power are likely to grow at spruce street school [sic], especially if she were to have a say regarding [Schmitz's] salary, I'm not sure I'll be comfortable having either or both of my kids continue to be students there. (Regarding which I have joint decision making authority)."

This evidence demonstrates Metcalfe requested Cochener's role on the board be limited, but it does not evidence precisely an attempt to have her nomination rescinded. To that extent, the finding regarding Cochener's position on the Spruce Street board is not supported by substantial evidence precisely as drafted. However, there is substantial evidence that the parents drew others into

their conflict. Dr. Wheeler identified both parents' interactions with providers as contributing to a "high-conflict dynamic." Metcalfe met with Spruce Street to discuss an incident that did not occur there. Metcalfe asked Spruce Street to limit Cochener's role on its board. Finding of fact 10 is therefore supported by substantial evidence, except to the extent it finds Metcalfe sought specifically to have Cochener's nomination to the board rescinded.

B

We turn next to the trial court's grant of sole decision-making to Cochener, the findings that doing so is in the best interest of the children and any harm is outweighed by the benefits, and the court's decision to impose provisions allowing Cochener to make major decisions 14 days after inviting Metcalfe's input, and to schedule the children's appointments.

RCW 26.09.187(2)(b)(ii) states, "The court shall order sole decision-making to one parent when it finds that . . . [b]oth parents are opposed to mutual decision making." A trial court's decision to modify a parenting plan is reviewed for abuse of discretion. In re Marriage of Zigler, 154 Wn. App. 803, 808, 226 P.3d 202 (2010). A trial court's decision will not be reversed unless the court's reasons are untenable. In re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." In re Marriage of Fiorito, 112 Wn. App. 657, 664, 50 P.3d 298 (2002). "A trial judge generally evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge's day-to-day experience warrants deference upon

review.” In re Parentage of Jannot, 149 Wn.2d 123, 127, 65 P.3d 664 (2003). When a trial court’s findings of fact are partly supported by substantial evidence and partly not, we consider the extent to which the unchallenged and supported findings justify the trial court’s legal conclusions. See Andren v. Dake, 14 Wn. App. 2d 296, 319, 472 P.3d 1013 (2020).

The trial court did not abuse its discretion when it granted sole decision-making to Cochener. Both Metcalfe and Cochener were opposed to mutual decision making. The trial court considered evidence and witness testimony presented over a multi-day trial, weighed that evidence, and arrived at findings of fact that are either unchallenged and accepted as true on appeal, or, as discussed above, supported by substantial evidence in the record. These findings provide a tenable basis for the trial court to conclude that Cochener is better suited to hold sole decision-making authority for L. and E.

The trial court did not err when it found such a change is in the best interest of the children and any harm is outweighed by the benefits. Metcalfe argues the harm to L. and E. is that Cochener will not adequately advocate for appropriate service levels from educational and health care providers. The trial court did not enter a finding that this is true, and it was entitled to find that any risk was counter-balanced by Cochener’s lesser likelihood of alienating important provider relationships. In an unchallenged finding, the court stated, “Mother and Father cannot co-parent, which is especially troubling because the special needs of their children demand frequent decision-making and information sharing.” In another unchallenged finding, the trial court stated, “The intensity of the co-parenting

dynamic is so extreme that multiple expert and lay witnesses testified the children are suffering. Their children have complained. The parents themselves agreed during trial they cannot make decisions together without intervention or support from intermediators.” These findings, together with the finding that Cochener has less deficit in the area of interpersonal communication, provide a tenable basis for the trial court to conclude it is in the best interests of the children that Cochener hold sole decision-making, and that any harm of such an arrangement is outweighed by the benefits. These findings also justified the ruling that Cochener may make all of the children’s appointments, and may make major decisions 14 days after notifying Metcalfe.

III

Metcalfe asserts it was error for the trial court to place “great weight” on Dr. Wheeler’s testimony, together with determining it would “not put great weight” on Dr. Marlowe’s and Dr. Mandelkorn’s opinions. Metcalfe argues the trial court erred by “rejecting the testimony of Dr. Marlowe and Dr. Mandelkorn and relying instead upon lay opinions,” and challenges the finding that “Dr. Mandelkorn admitted he had very little contact with Cochener upon which to formulate his opinion.” The experts’ testimony provides support for the trial court’s weighing of their opinions.

Metcalfe retained Dr. Marlowe as a litigation expert to conduct a records review and prepare a report. The evidence before the trial court was that Dr. Marlowe’s only contacts were with Metcalfe and his attorneys, and she reviewed records that Metcalfe provided to her. Dr. Marlowe based her opinions of the children’s academic performance on evaluations from 2019, and testified she did

not know where E.'s reading levels were at the time of the hearing. Nevertheless, Dr. Marlowe stated E. was not able to read at the time of the hearing, and that he would come out of Spruce Street School a nonreader. In contrast, both Cochener and the head of Spruce Street testified that at the time of trial, E. was a "voracious reader."

Metcalfe called Dr. Mandelkorn, eliciting testimony that Metcalfe was "pleasant to deal with," and that Metcalfe's e-mail communication "fell within the expectations of the issues [they] were dealing with." Dr. Mandelkorn had 14 appointments with L. Of those, Metcalfe attended "a preponderant number" and Cochener attended seven. Based on only these interactions with Cochener at L.'s appointments, in 2019, Dr. Mandelkorn stated in an e-mail to another provider that Cochener "[h]as significant mental health problems and is [in] complete denial of the issues." Dr. Mandelkorn testified he had no personal knowledge of Cochener's mental health.

Dr. Wheeler prepared a report by conducting 23.1 hours of interviews with the parents, parent-child observation sessions at both parents' homes, psychological assessments and questionnaires with both parents and both children, 12.3 hours of collateral interviews with medical and educational providers involved in the children's care, and reviewing records related to the case. Dr. Wheeler testified Dr. Mandelkorn "was clearly given the impression . . . that [Cochener] . . . suffered from . . . some kind of mental health disorder . . . and he was given that impression by Mr. Metcalfe. . . . [T]hat certainly is an example of . . . a provider being given an impression of her that . . . was inaccurate and

negative.” Dr. Wheeler testified Dr. Marlowe was given mischaracterizations of Cochener, stating, “[S]he was given the impression that Ms. Cochener wasn’t involved . . . as much as she is.”

“The factfinder is given wide latitude in the weight to give expert opinion.” In re Marriage of Sedlock, 69 Wn. App. 484, 491, 849 P.2d 1243 (1993). The trial court placed lesser weight on Dr. Marlowe’s testimony based on her having “had limited interactions with Mother and the children, and her opinion is based on the records provided by Father.” While Cochener does not point to a particular omission in the records Metcalfe provided to Dr. Marlowe, the context of the trial court’s weighing of her testimony was in contrast to Dr. Wheeler’s evaluation, which the trial court stated was “extremely thorough, and includes hours of interviews with both parents, the children, and providers.” Likewise, the trial court placed lesser weight on Dr. Mandelkorn’s opinion, because he “had very little contact” with Cochener upon which to form his opinion.

Metcalfe nevertheless relies on In re Marriage of Leaver, 20 Wn. App. 2d 228, 499 P.3d 222 (2021) to argue the trial court abused its discretion in making these credibility determinations. There, in the context of spousal maintenance, a spouse presented expert testimony, which was not countered by any other expert, that his long-standing mental health conditions significantly impaired his ability to join the workforce and gain financial independence. Id. at 230. However, the trial court adopted the other spouse’s lay opinion that he “could do more if he would just put his mind to it.” Id. This court found this was an abuse of discretion and reversed. Id. at 231. We were careful to observe that the trial court was not

necessarily required to arrive at a particular ultimate decision concerning maintenance, even though it was required to base its decision on evidence that did not violate the prohibition on lay opinion testimony. Id. at 241. Leaver is distinguishable. First, in this case Dr. Marlowe's and Dr. Mandelkorn's testimony are contrasted by Dr. Wheeler's testimony, so it is not a case in which any one expert's views were without countervailing evidence. Second, the court did not admit lay opinion testimony and credit it over qualified expert testimony. In placing greater weight on Dr. Wheeler's testimony than on Dr. Marlowe's or Dr. Mandelkorn's, the trial court made an ordinary credibility determination, which we do not revisit on appeal. See In re Marriage of Rideout, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003).

IV

Metcalf argues he was subjected to federally-prohibited retaliation by Spruce Street School for "his advocacy on behalf of his children." The Disability Rights Education and Defense Fund (DREDF) submitted an amicus brief and presented oral argument. DREDF argues "the trial court displayed a troubling lack of consideration for father's right to advocate for his son. The trial court made no attempt to determine whether appellant's advocacy was protected activity before (mis)characterizing that advocacy as a defect in appellant's parenting." At oral argument, counsel for DREDF argued their complaint is that the trial court did not specifically mention that it was being careful not to hold advocacy against Metcalfe. Wash. Court of Appeals oral argument, In re Marriage of Cochener, No. 83271-9

(Jun. 15, 2023), at 2 min., 26 sec. to 2 min., 38 sec., <https://tw.w.org/video/division-1-court-of-appeals-2023061201/>.

In its brief, DREDF cites cases in which third parties who had advocated for disabled students sued school districts for failure to meet federal requirements. For example, in North Kitsap School District v. K.W., 130 Wn. App. 347, 352-53, 123 P.3d 469 (2005), grandparents sued a school district for failing to provide a free appropriate public education to their grandchild under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-91. DREDF also cites a case holding that advocacy on behalf of disabled students is a protected activity under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12203; 28 C.F.R. § 35.130(b). Barker v. Riverside County Office of Educ., 584 F.3d 821 (9th Cir. 2009). In Barker a teacher sued a county office of education, alleging retaliation after she filed a lawsuit on behalf of disabled students. Id. at 827. However, neither Metcalfe nor DREDF cites authority holding that any federal law imposes any substantive requirements on a state court deciding the issue of decision-making in a parenting plan according to state law. Regulations under the IDEA acknowledge that state courts may limit decision-making to one parent, providing that if “a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (4) of this section to act as the ‘parent’ of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the ‘parent’ for purposes of this section.” 34 C.F.R. § 300.30(b)(2). A federal court has rejected a parent’s argument that her federal rights under IDEA could supersede a state court’s authority to grant sole

educational decision-making to the other parent. Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 772 (2nd Cir. 2002). There, the court stated, “We decline plaintiff’s invitation to federalize the law of domestic relations and hold that the IDEA . . . leave[s] intact a state’s authority to determine who may make educational decisions on behalf of a child.” Id. Another federal court applying the IDEA stated that “nothing in the IDEA overrides states’ allocation of authority as part of a custody determination,” and observed that the rights granted to parents in IDEA do not supersede state courts’ authority. Navin v. Park Ridge Sch. Dist. 64, 270 F.3d 1147, 1149 (7th Cir. 2001).

We do not agree the trial court based its determination concerning decision-making on any actions by Metcalfe characterizable as advocacy protected by federal law. The trial court focused on the manner of Metcalfe’s communications with the children’s educational and health care providers, which the trial court found was deleterious to the children’s relationship with key providers. The trial court did not rely on the content of Metcalfe’s communications nor criticize at any point his right to seek appropriate care for his children. Its findings were that his communication style was interfering with the children’s ability to receive the support they needed. Federal law contemplates, and Washington law directs, that in such circumstances a state court may appoint one parent as sole decision-maker. RCW 29.09.187; Taylor, 313 F.3d at 772. Metcalfe’s and DREDF’s argument that the trial court’s decision ran afoul of any federal protections for students with disability is meritless.

V

During a break between witnesses, while discussing the fact that testimony had taken longer than expected, the trial court noted to Cochener's counsel, "I have noticed that with the professional witnesses . . . your budget for cross-examination has been a little under," and expressed concern that Dr. Wheeler's testimony the next day would take more than the planned time. Cochener's counsel stated, "[F]or the record . . . Dr. Marlowe was very defensive and . . . I think also nonresponsive . . . she used up more time than I think was necessary. . . . And with Dr. Mandelkorn, there were a lot of objections that increased my time." After some additional discussion, the trial court stated, "[I]t's a trend and . . . I shouldn't say it's a trend with . . . all the professional witnesses. I think it's just . . . happens to be with doctors that this has happened. . . . [A]nd doctors are notoriously terrible witnesses, so I can appreciate."

Metcalf argues this stated an opinion that doctors are "terrible witnesses" and worked to his disadvantage because he relied on Dr. Mandelkorn and Dr. Marlowe. Cochener counters that "[t]aken in context, the trial court was merely commenting on the length of time that [Cochener]'s cross-examination of both Drs. Mandelkorn and Marlowe was taking." Further, quoting the trial court's findings of fact, Cochener argues, "The trial court was clearly not biased against 'doctors' . . . because it 'placed great weight on [Dr. Wheeler's] testimony.'" The trial court's statement cannot fairly be construed either as a statement about the value of testimony by doctors or as bias. We find no error, and even if we did, any error in this isolated comment would be harmless. See State v. Gonzales, 90 Wn. App.

852, 855, 954 P.2d 360 (1998) (a harmless error is one “which is trivial, formal, or merely academic and which in no way affects the outcome of the case.”).

VI

During Dr. Marlowe’s testimony, the trial court asked, “[Y]ou are aware, of course, that the Seattle Public Schools have been sued any number of times for not providing meaningful education to children, right? . . . I’m just curious . . . in general we’ve all had the experience, I think it’s common sense that Seattle Public Schools does not have a stellar reputation for providing . . . specially designed education services for children. So why do you think that they would do that for [E.] when they haven’t done it for so many children?” Dr. Marlowe responded, “Well, they did a good job in [L.’s] IEP.” She went on “[a]nd I know that they really care about kids and . . . I have seen . . . the services that they’ve provided for kids.”

Metcalfé portrays this as an injection by the trial court of its own impression of events outside of the evidence. Metcalfé cites Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994). Liteky states,

[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Id.

Even if the court's comments were read as revealing an opinion from an extrajudicial source, they do not "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Id. The main issue was not whether Spruce Street School or Seattle Public Schools would be a better fit for E. Moreover, at the time of trial, L. was attending a Seattle public school. At no time did the trial court question L.'s placement in Seattle Public Schools, and nothing in the trial court's final oral ruling or written orders suggests that its determination about decision-making was based on an expectation about whether the children would attend Seattle Public Schools, let alone an opinion by the court about the appropriateness of their doing so. Further, even if the comment was error, any error would be harmless in view of the evidence and issues in the case.

VII

Metcalfe challenges a provision of the parenting plan that reads in part: "No parent will put down Christianity to or in front of the children, or allow other members of their household to put down either parents' spirituality." Metcalfe argues the trial court's wording of the religious upbringing provision violates the First Amendment.

The provision was not discussed until a posttrial hearing. Cochener's counsel stated, "Ms. Cochener just wants to be sure that Mr. Metcalfe does not have the ability to block her from teaching the children about her religion." The Court inquired as to the parents' religious practices. Cochener identified herself as "a practicing Christian," and Metcalfe stated, "I don't identify with any particular religion." Metcalfe stated it would not be a problem for him to teach the children to

respect Cochener's religion, and "I think we should both expose the kids to different things so they can find their own way in life and be respectful to the other's views." Cochener stated, "[M]y only concern is that my children have expressed that they have been told denigrating things about Christianity in their dad's house. . . . I have no concern about raising my children with a respect for all religions and beliefs and non-beliefs." The Court responded, "So any negative comments about Christianity made to the children or in front of the children . . . will be adequate cause to change the position to sole decision-making." The trial court subsequently incorporated Metcalfe's and Cochener's agreements in the written order: "Parents have agreed to raise their children to affirm all religious traditions, appreciate the good in the practice of other faiths, and respect those who have no religious preference. No parent will put down Christianity to or in front of the children, or allow other members of their household to put down either parents' spirituality."

Parents have a fundamental right to make decisions regarding the care, custody, and control of their children. Troxel v. Granville, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). The parental right to determine the child's religious upbringing derives both from the parents' right to the free exercise of religion and to the care and custody of their children. See Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion" in reference to universal compulsory education), overruled on other grounds by Emp't Division v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). A parent's right to direct the religious upbringing

of a child may be subject to limitation “if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.” Id. at 233-34. Article 1, section 11 of the Washington State constitution is more protective of religious freedom than the First Amendment. In re Marriage of Jensen-Branch, 78 Wn. App. 482, 491, 899 P.2d 803 (1995). A Washington court may restrict a parent from teaching children about faith “only upon a substantial showing of potential or actual harm to the children as a result of the children’s adverse reaction to parental conflict over the children’s religious upbringing, and only to the degree necessary to prevent harm to the children.” Id. at 483.

Elsewhere, Massachusetts upheld a prohibition that a parent “shall not share his religious beliefs with the children if those beliefs cause the children significant emotional distress or worry about their mother or about themselves.” Kendall v. Kendall, 426 Mass. 238, 241, 250, 687 N.E.2d 1228 (1997). A Colorado court reversed a prohibition on homophobic religious teachings when the court could not “determine from the findings whether the trial court applied the correct standard in limiting [a parent’s] right to determine the child’s religious upbringing.” In re Interest of E.L.M.C., 100 P.3d 546, 564 (Colo. App. 2004). There, though the other parent argued the restriction was a mere nondisparagement clause, the court did not uphold it on that basis “because it is not so described in the trial court’s order. Nor is it mutual.” Id.

As written, the challenged provision limits religious topics the parents may discuss with the children in potentially undefined and subjective ways, and is not

specific to nondisparagement of the respective parents' spirituality. The record does not show the trial court analyzed whether parental decisions on religious discussions will jeopardize the health or safety of the children. The parties agreed at oral argument that their dispute is adequately resolved as long as the parenting plan provides that neither parent shall disparage the other parent's spirituality. Wash. Court of Appeals oral argument, Cochener, No. 83271-9 (Jun. 15, 2023), at 2 min., 26 sec. to 2 min. (Cochener's Counsel) and at 21 min. 12 sec. to 21 min. 18 sec. (Metcalf's Counsel), <https://tw.org/video/division-1-court-of-appeals-2023061201/>. Such a provision would be consistent with orders concerning religious upbringing that have been upheld. We reverse the religious upbringing provision, and remand for the religious decision-making provision to be revised to reflect the parties' agreement that mutual nondisparagement of each parent's spirituality is sufficient.

We otherwise affirm. We do not reach Cochener's cross appeal. We remand on the issue of religious decision-making only.

Birk, J.

WE CONCUR:

Chung, J.

Dwyer, J.

SMITH GOODFRIEND, PS

October 13, 2023 - 1:18 PM

Transmittal Information

Filed with Court: Supreme Court

Appellate Court Case Number: 102,373-1

Appellate Court Case Title: In the Matter of the Marriage of: Donna M. Cochener and Christian T. Metcalfe

The following documents have been uploaded:

- 1023731_Answer_Reply_20231013131729SC506447_4187.pdf

This File Contains:

Answer/Reply - Answer to Petition for Review

The Original File Name was 2023 10 13 Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- amg@riverside-law.com
- cate@washingtonappeals.com
- collyer@lasher.com
- litdocket@foster.com
- mcqueen@lasher.com
- sharon@washingtonappellatelaw.com
- sharonblackford@gmail.com

Comments:

Sender Name: Andrienne Pilapil - Email: andrienne@washingtonappeals.com

Filing on Behalf of: Valerie A Villacin - Email: valerie@washingtonappeals.com (Alternate Email: andrienne@washingtonappeals.com)

Address:

1619 8th Avenue N

Seattle, WA, 98109

Phone: (206) 624-0974

Note: The Filing Id is 20231013131729SC506447