91196-7

No. 44151-9-II;44961-7-II

SUPREME COURT

OF THE STATE OF WASHINGTON

CATHERINA BROWN, Respondent,

v.

CLYDE REED, Petitioner, Pro Se

MOTION FOR DISCRETIONARY REVIEW

-PRV-

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Clyde Reed asks this court to accept review of the decision or parts of the decision designated in Part B of this motion.

B. DECISION

The Petitioner requests review of the December 9, 2014 Appellate Court District II decision affirming the judgment of Judge John Hickman of the Pierce County Superior Court, awarding primary residential placement of the child of the parties to the Respondent. Petitioner requests review of the entire decision. A copy of the decision is in the Appendix beginning on Page A-1.

C. ISSUES PRESENTED FOR REVIEW

Is the parent designated as custodian in a temporary parenting plan to be granted preferred status in designation of primary parent in a permanent parenting plan? Does status as primary caregiver, based on designation as primary parent in a temporary parenting plan, result in designation as primary parent for purposes of a permanent parenting plan?

May constitutional protections for due process be suspended or ignored where an appellate court remands a case for further consideration by the trial court? Where the trial court proceedings prior to remand have been

discredited and reversed, —can the requirements of due process be considered to have met, in the absence of rights of cross examination, opportunity to call witnesses, opportunity to object/preserve error, and other mandated due process requirements? Where there is no development of a evidence, can findings and conclusions, which must be based on evidence, be properly supported?

May the state law's requirement that abusive use of conflict considerations (RCW 26.09.191) be ignored, or must they serve as an initial screen prior to the consideration of the seven enumerated factors in RCW 26.09.187 (3) (a)?

May erroneous findings and conclusions be used as the basis for a judgment? May findings and conclusions unsupported by any evidence—be used as the basis for a judgment?

In applying the standard of abuse of discretion, based on the presence of substantial evidence in the record, where one party presents extensive, rich and detailed evidence, supported by evaluation by licensed professionals and extensive testimony of individuals extensively familiar with the individuals character, —and the other side presents none—can the side presenting no evidence on the strength, nature and stability of the relationship be determined to have presented substantial evidence in the record? If not, mustn't a decision in that person's favor be considered an

abuse of discretion?

Where the court believes that no negative evidence regarding a given point has been presented, may it speculate that the given point is true, in the absence of positive evidence in support of that point?

Where there is appellate court precedent for granting a full review in the instance where the circumstances of a child have changed given the passage of time, may a court decline to grant such a full review?

Can a brief "closing statement" be considered an "independent review" of the seven enumerated criteria of RCW 26.09.187 (3) (a)—particularly where the closing statement simply summarizes an earlier proceeding reversed and discredited by the appellate court?

D. STATEMENT OF THE CASE

The initial trial proceeding in this case occurred in December 2008, in the court of Judge Sergio Armijo. After days of trial, the court indicated its readiness to make a decision, and an intent to award extensive overnight visitation to the Petitioner (Armijo VRP 12/08/08 p31-32). The Respondent, acting pro se, intervened with an assertion that the child suffered from a childhood illness, and that overnights with the Petitioner were contrary to medical advice(Armijo VRP 12/08/08 p36-37). As a result, the court agreed to withhold action until April 2009 to allow for further medical evaluation, and declined to provide for overnight visitation

for Petitioner, but provided continued temporary visitation pending final action (Armijo VRP 12/08/08 p39,41). The case was transferred to the court of Judge Hickman, who, in preliminary proceedings, awarded overnight visitation, admonishing the Respondent that she would have to provide direct reports from medical sources in support of a challenge to overnights for the Petitioner. (Hickman VRP 03/06/09 p43) Respondent could provide no such reports. (Hickman VRP 09/16/09 p372-374)

At the September 2009 trial in Judge Hickman's court, Respondent claimed that the Armijo Court had made a final decision on custody, awarding custody to the Respondent. (Hickman VRP 09/15/09 p275) Judge Hickman agreed, and confirmed a custody award to the Respondent, indicating that a final decision on custody had already been made by Judge Armijo. (Hickman VRP 10/09/09 p532) Petitioner appealed to District II.

In May 2012 the Appellate Court ruled that the trial court had erred in treating the action of the Armijo Court as a final decision and in failing to consider the seven enumerated factors of RCW 26.09.187 (3)(a) (i-vii), reversed the decision of the trial court, and required the trial court to use its independent judgment in coming to a decision on primary residential placement, based on RCW 26.09.187 (3) (a)(i-vii). (Appellate Decision, CP 254-257 p2, 13,14-15) Appellate Court directed the trial court to enter a final child support order. On remand, the trial court directed the parties

to provide financial information, including worksheets to the court, (VRP 06/15/12 p11) and indicated that the Court would schedule a proceeding to consider that information in making a decision on child support. (VRP 06/15/12 p12-14) The Court also indicated it would accept input from the parties as to how it should structure a process to address the seven enumerated factors. The court eventually indicated that it would hold a proceeding allowing each side to make "closing arguments"; each side would have 40 minutes to address both child support issues, and argument in support of primary residential designation. (VRP 08/03/12 p11) That proceeding occurred on September 14 2012 (VRP 09/14/12).

On October 8, 2012, the Court issued Amended Findings of Fact and Conclusions of Law which confirmed the Court's 2009 ruling awarding primary residential designation to the Respondent. (CP 103-109 p6) The Petitioner appealed the ruling to the Appellate Court. On December 9, 2014, the Appellate Court confirmed the ruling of the Superior Court. The current appeal is based on that ruling. The appeal also challenges the award of attorney's fees for Petitioner's motion for revision. (Motion for Revision, CP 322-324)

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Preference for Temporary Custodian The Appellate Court's decision

threatens the long-established Supreme Court precedent specifically precluding preference for a temporary custodial parent in permanent custodial placement. Supreme Court review of this decision is needed to avoid confusion and conflict on this critical policy question, closely watched by family court observers and advocates.

The Supreme Court has established clear precedent that status as primary caregiver during the pendency of a temporary parenting plan is not to establish preference in the determination of primary parent for purposes of a permanent parenting plan (121 Wn.2d 795, P.2d 629, MARRIAGE OF KOVACS)

> *"CONCLUSION. The Parenting Act of 1987 does not create a presumption in favor of placement with the primary care-giver. Instead, the Act requires consideration of seven factors and provides that the child's relationship with each parent be the factor given the greatest weight in determining the permanent residential placement."*

The decision of the Appellate Court, however, reverses that judgement, drawing a distinction between the party awarded temporary primary placement, and the primary caregiver, and indicating that, while the Supreme Court rejects a preference for the person awarded temporary primary placement, it supports preference for the primary caregiver. That amounts to a distinction without a difference. *"The language of the finding suggests that the trial court viewed the primary caretaker relationship, rather than Browns designation as primary custodian, as the most*

important evidence of a strong bond." (December 9 2014 Appellate Court)

The Supreme Court was clear, however, in its Kovacs ruling, in referring to the primary caregiver as having no presumed preference in designation of primary custodianship. The Appellate Court decision directly reverses that decision, supporting the trial court's granting of favored status based specifically, and only, on status as primary custodian during the temporary plan's tenure. In fact, the Supreme Court was specific in describing the legislature's reason for establishing the seven factors of RCW 26.09.187

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Washington's Parenting Act represents a unique legislative attempt to reduce the conflict between parents who are in the throes of a marriage dissolution by focusing on continued "parenting" responsibilities, rather than on winning custody/visitation battles (Kovacs, 121 Wn2d 795).

The trial court's failure to apply the seven enumerated factors in the first round, as confirmed by the Appellate Court—and it's reliance on the Kovacs-discredited concept that the parent designated as primary caregiver in the temporary plan will be confirmed as permanent primary custodian in the permanent plan, are a central reason this case has been as contested as it has. The court, for years, has either failed to apply, misapplied, or used temporary custodial designation as the chief reason in applying the 26,09,187 seven enumerated factors. The legislature, and the

Supreme Court, foresaw exactly this case in requiring direct, straightforward application of the seven factors. Respondent has engaged in wild, speculative accusations that the court has required the Petitioner to disprove—which he has, in each case, but the court has been distracted, and failed to focus on the seven factors. The child, meanwhile, has suffered with a decision based on other than her best interest.

Abuse of Discretion. The Court has provided that appellate courts or the supreme court will not disturb the custody ruling of a trial court with regards to primary residential placement, except in cases of abuse of discretion. as long as it is supported by substantial evidence. During the trial court's allowed 40-minute "closing argument," the Respondent's only argument supporting the "strength, stability" of her relationship with the child was that she had been the primary custodial parent during the period of the case—an argument that the Supreme Court rejected in *Kovacs*. Beyond that, nothing was provided. Reed provided extensive summary of testimony during the original trial describing his bond with the child, his engaged support for her, the structure provided for her, the manner in which he reconstructed his life to center around her. Summarized testimony included that from a professional credentialed and licensed bonding evaluator qualified by the court as an expert. Reed provided extensive written materials on the strength, stability and of Reed's

relationship with the child, as well as extensive additional written materials describing his relationship with the child. Brown provided none. Where one party provides rich, full, detailed supporting evidence, and the other party provides virtually none other than that ruled inappropriate by the Supreme Court, the quality and quantity of evidence must be considered by any fair minded person to favor the one providing the extensive evidence. A court ruling to the contrary should be seen as an abuse of discretion. The Appellate Court, however, found that there was no abuse of discretion.

Due Process The procedural history of this case is contorted far beyond any reasonable path of due process. Under long-established standards, due process requirements demand a clear, pre-determined process, knowable beforehand by both parties and the court. The ability to call witnesses, the ability to challenge the statements of the other party and demonstrate credibility gaps through cross examination, the ability to object as a means of preserving error—are standard elements of courtroom procedure, arrived at over decades of judicial history. All that was thrown out, however, through the court's determination that a 40-minute "closing statement" was all that would be allowed for each party. No witnesses were allowed, no cross examination, no objection to statements of the opposing party. The court did not describe what the parameters of the

proceeding were to be beforehand—the petitioner found out that no objections were to be allowed when he tried to object to an inappropriate assertion by Respondent's counsel. The approach also deprived the court of any evidence or supporting material upon which to base findings and conclusions—leaving it to speculate, to make up stuff, and to commit factual errors, in the absence of evidence. While this proceeding might be appropriate to determine some modest, limited marginal issues, the issue here was foundational to the central determination before the court—that of primary residential placement, and the seven criteria of RCW 26.09.187(3)(a). A 40-minute "closing statement", summarizing evidence provided during the development of a temporary parenting plan—does not, in any way, approximate due process. A young life hangs in the balance on this determination. The Appellate Court's affirmation of this process, and its refusal to consider due process concerns, raises serious questions for the Supreme Court about whether due process is to be adhered to in all circumstances, including on appeal. While it is acknowledged that appellate courts generally allow wide discretion to trial courts, the Supreme Court is called upon to decide whether that discretion allows the denial of due process.

Abusive Use of Conflict There is clear, unchallenged evidence of abusive use of conflict that poses a danger to the emotional health of the child in

this case. That evidence provided to the court included the description of an incident at an exchange of the child, where the Respondent, for no identifiable reason, put the then-toddler in extreme distress when she insisted that the child be handed to police officers, screaming at the top of her lungs, in the middle of the night in a Baskins/Robins parking lot—declining to walk over to get the child in the presence of three police officers. State law requires consideration of the seven factors of RCW 26.09.187(3)(a) *after* determining that the factors of 26.09.191 are not dispositive. *"The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors..."* In this case, though significant evidence of abusive use of conflict was cited, there is nothing to indicate that the court considered any such evidence. There is no analysis or discussion of it in the findings of fact and conclusions of law, other than a blanket re-affirmation of 2009 findings of fact and conclusions of law, which findings had been ruled inadequate and reversed by the Appellate Court. Yet the Appellate Court finds the "The trial court clearly had the discretion to weigh the persuasive value of Reed's materials, and was not required to address them." In Federal Signal v Safety Factors (125 Wn.2d 413), however, the Supreme Court found differently. "*Contrary to the judge's belief, findings must be*

made on all material issues in order to inform the appellate court as to "what questions were decided by the trial court, and the manner in which they were decided . . ." A review by the Supreme Court would be important to confirm the requirements of Federal Signal; the absence of such review will demonstrate that a contrary approach is allowed, and will foment confusion regarding court determination on this issue.

New Trial The Appellate Court decision raises a question where there has been different direction from different appellate courts; one court has clearly said that, where the passage of time has changed circumstances, those changed circumstances are to be taken into account. This appellate court was ambiguous, which allowed the trial court to take a different direction—to deny the opportunity for a full review. This case is of general public interest as well, in that clarity is needed in those instances where the appellate court reverses a trial court on a fundamental issue in a family law case—as to whether the best interest of the child requires consideration of the broad circumstances of the child's life.

The Appellate Court reversed the original 2009 ruling of the trial court, and directed that it conduct an "independent consideration" of the seven enumerated factors to be considered in deciding primary residential placement. These seven factors are the anchor-stone of the custodial designation proceeding, and require full and robust development in

supporting a decision of the court. Since the original trial court review concluded in September 2009, a full three years had passed before the trial court's October 2012 ruling. The child had grown substantially, and circumstances had changed. Clear evidence was available that addressed the seven enumerated factors of 26.09.187 (3)(a); clearly, the best interests of the child required consideration of such evidence. Instead, the trial court ruled that the only evidence that would be considered would be that relating to an 11-month period—between the 2008 Armijo ruling and the 2009 original Hickman ruling. At the time of the 2012 Hickman ruling, the child was 5 years old; this determination required that the wellbeing of a 5-year-old child would be determined by a narrow 11-month slice of her life. There is clear appellate court precedent providing for a full review where the passage of time has changed circumstances. Marriage of Kovacs 67 Wn.App. 727, 840 P.2d 214 " *We are aware the trial court rendered its decision almost two years ago, and the children's situation may have changed in the meantime. Accordingly, we remand for a new hearing on the issue of who should be the primary residential parent."* This precedent set a clear standard for review where the passage of time has potentially altered the circumstances of the case. Numerous statements made by the trial court indicated its intent to leave the ruling intact, and merely attach new findings and conclusions. *"I think what I'm*

going to have to do is just simply look at the transcript and come up with some findings of fact and conclusions of law as to why I did what I did". Yet the Appellate Court decided that the process was adequate. *"The trial court allowed each side to reargue the issue based on the statutory factors".* On the contrary, the trial court only allowed each side to summarize its earlier arguments from the temporary parenting plan proceeding, so designated by the appellate court in its original decision. The rules of the Superior Court contemplate a new trial under circumstances of this case: CR 59(a) On the motion of the party aggrieved, a verdict may be vacated and a new trial granted...(based on) error in law occurring at the trial...

Clear determination by the Supreme Court is needed to address the conflict in approach at the Appellate Court level. There is, additionally, a matter of fundamental interest to the public, in whether the best interests of the child require consideration of information and evidence that has become available since an original proceeding, subsequently rejected by an Appellate Court. A child's best interest is served by considering the full range of evidence available, rather than setting an 11-month limit on the portion of the child's life to be considered. Such a ruling by the Supreme Court is pertinent to many cases in family law that proceed on appeal, while the young lives continue to develop and change, and offer

greater insight as to the rightness of a given custody determination.

Findings of Fact and Conclusions of Law The current District II Appellate Court decision accepts the findings and conclusions of the trial court as sufficient. The Supreme Court review is needed to clarify expectations of trial courts in the preparation of findings and conclusions, to confirm that erroneous findings and conclusions cannot be the basis of a judgment, and to establish and affirm that those findings and conclusions are to be based on firm evidence, not on speculation. In this case, the trial court developed erroneous findings and conclusions, including that "at the time this case came before the court for trial, Mr. Reed had documented issues which he was having with the Respondent in being able to exercise consistent and regular visitation with his daughter." This is false; while there was consistent lateness at transfer by the respondent—replaced by double the late time, there was no pattern of visitation not being made available, nor was this testified to at the original trial or at the remand hearing. "Mr.Reed, as the result of concerns regarding health issues, had not had overnight visitations for any substantial period and had seen the child mostly on day visits only." This is false; the court had, in March 2009, ordered overnights; so for most of the 11-month period ruled under consideration by the court, (December 2008-November 2009), Petitioner had had overnight visits and substantial opportunity to form a bond.

"There was nothing brought to the attention of the court, or a finding made by the court, that the mother's past, present or future performance of parenting functions would be impaired in terms of the child's daily needs." This is false. The court itself, in earlier findings had said "there was no miscommunication, as claimed by the mother, regarding her failure to keep the child enrolled in occupational therapy."(Findings of Fact, November 2009). This was based on extensive testimony in court.

The Supreme Court has held that "A judgment is without stable foundation and cannot be upheld where it was expressly rested upon erroneous findings and conclusions..."24 Wn.2d 297, Forbus v. Knight

Further, the trial court speculated without evidence in its findings and conclusions. The trial court speculated that, because the mother had been assigned primary temporary custody, the bond between her and the child would have been stronger. There was no evidence presented to that effect, other than statement by Respondent's counsel that mother had been primary caregiver. Additionally, the trial court based its findings on a summary of a temporary parenting plan case, which had carried forward the decision of another judge. While it is a tortured path to the current conclusion, in the end, the findings and conclusions, in effect, adopt the judgment of an earlier judge, Sergio Armijo, who departed the case years ago. (In specific terms, Judge Hickman, in his 2009 decision, adopted the

2008 decision of Judge Armijo (who had failed to enter findings and conclusions); in his 2012 decision, he adopted the Hickman 2009 findings and conclusions—carrying forward the original Armijo decision.) This is clearly contrary to DGHI Enterprises, which concludes that "findings of fact and conclusions of law must be signed only by the judge before whom the case was tried. If the trial judge becomes unable to sign and file findings of fact and conclusions of law in the case, no other judge may do so, no matter what the circumstances, and the case must be retried."

The findings and conclusions also speculate that a point is true, in the absence of specific evidence to the contrary—but also in the absence of evidence in support. "The child had been full time with the mother and there was no evidence to indicate that there was not a strong bond between the mother and child or that she did not perform her normal parenting functions. The court finds that there would have been a much stronger bond and emotional needs for the child as it relates to the mother..." (Findings of Fact/Conclusions of Law October 2012)

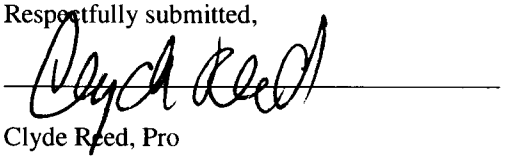
F. CONCLUSION

This court should accept review for the reasons indicated in Part E and direct that a new trial, with all the procedural requirements, be required. The court should specifically require that the best interests of the child be considered to address conditions of the child as of the date of the new trial,

including direct input from the child to the court.

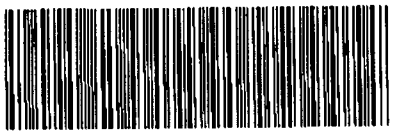
January 7, 2015

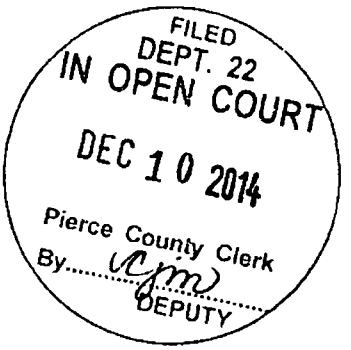
Respectfully submitted,



Clyde Reed, Pro

APPENDI CES





IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

CLYDE HARRISON REED, Petitioner, vs. CATHERINA YVONNE BROWN, Respondent.	Cause No. 07-3-03417-9 COURT OF APPEALS DIVISION II UNPUBLISHED OPINION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CLYDE H. REED, Appellant, v. CATHERINA Y. BROWN, Respondent.	Consolidated Nos. 44151-9-II 44961-7-II UNPUBLISHED OPINION

MAXA, J. — Clyde Reed appeals the trial court's orders establishing the primary custodial parent and final child support arrangements for his daughter THB, which were entered on remand following an earlier appeal. Reed argues that the trial court (1) failed to follow the directions in our earlier opinion to independently determine THB's primary custodial parent and made several errors in deciding the issue, (2) abused its discretion regarding the child support order in several respects, and (3) abused its discretion in awarding Catherina Brown attorney fees.

We hold that the trial court neither failed to follow our directions on remand nor erred in making its decision regarding THB's primary custodial parent. We also hold that the trial court did not abuse its discretion regarding the child support order or in awarding attorney fees. Accordingly, we affirm the trial court's parenting plan, child support order, and award of attorney fees.

FACTS

Reed and Brown dated for over a year but broke off their relationship shortly before learning that Brown was pregnant with THB. Brown gave birth to THB on February 14, 2007. Reed provided financial support to Brown and THB during and after the pregnancy. Brown lost her job in January 2007 and subsequently was unable to secure employment. THB lived with Brown after birth, and Reed periodically visited the child. However, when Brown wanted to move to Chicago to take a job there, Reed initiated legal proceedings to keep THB in Washington.

Prior Proceedings

The resulting litigation has proceeded through several different phases.[1] Initially, Reed sought a temporary order that would keep THB in Washington and establish a basic visitation schedule and child support obligations. The court commissioner entered an order that included a temporary parenting plan and a child support schedule.

The case went to trial before Judge Armijo in December 2008, but the trial was limited to determining the terms of a parenting plan. Judge Armijo entered a new temporary parenting plan that designated Brown as THB's primary custodial parent. The plan gradually increased Reed's visitation time in order to progress toward a shared custody arrangement in which Reed would have overnight visits with THB. Because this was a temporary parenting plan, Judge Armijo did not consider the seven statutory factors in RCW 26.09.187(3)(a) that a trial court must consider in making final parenting plan determinations. Judge Armijo scheduled a review of the

[1] The litigation history prior to May 2012 is detailed in our earlier unpublished opinion, *In re T.H.B.*, noted at 168 Wn. App. 1001 (May 8, 2012).

temporary plan and the commissioner's temporary child support schedule, and extended the temporary child support schedule until the review hearing scheduled for April 17, 2009.

In January 2009 the case was reassigned to Judge Hickman. The review hearing originally scheduled for April ultimately took the form of a second trial in September 2009 on the parenting plan and child support issues. The trial court reviewed the temporary parenting plan and established a permanent plan. In so doing, the trial court essentially adopted Judge Armijo's order establishing Brown as the primary custodial parent. However, the trial court did not expressly consider the RCW 26.09.187(3)(a) factors. The trial court also determined that the temporary child support order reflected an appropriate arrangement in THB's best interests and ruled that it should remain in effect, but inadvertently failed to enter a final child support order.

Reed appealed to this court. In May 2012, we issued an opinion holding that Judge Hickman had erred by adopting Judge Armijo's temporary parenting plan as a final parenting plan without issuing findings on the RCW 26.09.187(3)(a) factors. We remanded "for the trial court to consider these factors in deciding primary residential parent status." Clerk's Papers (CP) at 269. Further, because there was no final child support order on record despite the trial court's apparent intent to issue one, we remanded for issuance of that order.

Order Determining THB's Primary Custodial Parent

In the first appeal we directed the trial court on remand to make "an independent determination of T.H.B.'s primary residential parent." CP at 277. Our opinion also explained that "remand is required for the trial court to consider [the RCW 26.09.187(3)(a)] factors in deciding primary residential parent status." CP at 269. The trial court interpreted these directions as not requiring a new trial, but rather requiring the court to reassess the primary

custodial parent designation in light of the statutory factors. The trial court therefore did not accept new evidence, but it gave each party an opportunity at a September 2012 hearing to make a "closing argument" focused on the seven statutory factors. Report of Proceedings (RP) (Sept. 14, 2012) at 13.

During the September 2009 trial, the trial court granted a motion in limine limiting "the issues, evidence, and testimony" to events that occurred after the 2008 trial. CP at 31. Because we did not disturb the limiting order on appeal, the trial court on remand renewed the limitation, noting also that it would not consider evidence unavailable at the time of the 2009 trial.

Following the hearing, the trial court issued an order analyzing the statutory factors and reaffirming its original decision designating Brown as THB's primary custodial parent. Reed moved for reconsideration in October 2012. In denying that motion, the trial court explained that its basic analysis had not changed since 2009, even though it issued new findings of fact and conclusions of law in line with our directions.

Child Support

In the first appeal, we remanded for entry of a final child support order. On remand, the trial court allowed both parties to present supplementary information and documentation on their financial circumstances at the time of the September 2009 trial. The trial court believed that we remanded for entry of the original order, not for entry of an order reflecting the parties' current financial situations. The trial court stated that either party could move to modify the order if circumstances had changed since September 2009.

Brown submitted proposed worksheets showing the parties' income and deductions three days before the September 2012 hearing. Ten days after that hearing, Reed sent the court a letter

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disputing aspects of Brown's worksheets and attached his own proposed worksheets. For verification, both Reed and Brown provided additional tax returns, pay stubs, and, in Brown's case, unemployment benefit stubs. In October, more than a week after Reed sent his letter and proposed worksheets, the trial court issued an order outlining the contours of the child support plan and requesting revised worksheets from Brown reflecting that plan. The trial court then issued a child support order and final worksheets based on Brown's revised worksheets in January 2013.

Reed moved for reconsideration. Among other arguments, he argued for the first time that net expenses from an apartment building should be deducted from his income for purposes of calculating his child support obligation. The court held a hearing on the motion in February 2013 and ultimately granted the motion in part, denied it in part, and again asked Brown for revised worksheets. Reed later challenged the proportional crediting of $115.28 in medical expenses on Brown's revised worksheets, resulting in additional proceedings. The trial court entered the final child support order with final worksheets in May 2013.

Attorney Fees

When Reed moved for reconsideration of the order determining THB's primary custodial parent, Brown asked for attorney fees in response. At the October 2012 hearing, the trial court awarded Brown $500 in attorney fees but later reduced the amount to $400 because Brown's attorney had untimely filed a responsive pleading for the hearing.

Reed appeals the order determining THB's primary custodial parent, the final child support order, and the award of attorney fees.

ANALYSIS

Reed challenges the order designating THB's primary custodial parent, the child support order, and the trial court's award of attorney fees. We review the provisions of permanent parenting plans, child support orders, and the amount of attorney fees awarded for an abuse of discretion. *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014)(permanent parenting plans); *In re Marriage of Fiorito*, 112 Wn. App. 657, 663, 50 P.3d 298, 302 (2002); *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 484, 260 P.3d 915 (2011) (amount of attorney fees awarded). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Chandola*, 180 Wn.2d at 642. In assessing reasonableness, we give great deference to the trial court. *In re Parentage of J.H.*, 112 Wn. App. 486, 492, 49 P.3d 154 (2002).

A. PRIMARY CUSTODIAL PARENT DESIGNATION

We remanded for designation of THB's primary custodial parent in light of the statutory factors the trial court must consider when determining the residential provisions of a permanent parenting plan. Reed argues that the trial court (1) failed to follow our direction to independently review the primary custodial parent designation, (2) improperly concluded that Brown's time as THB's primary custodial parent under the temporary parenting plan supports a final determination that Brown should be THB's primary custodial parent, (3) erred in entering certain findings of fact, and (4) erred in failing to enter a finding of fact regarding relocation. We reject these arguments.

In determining the provisions of a permanent parenting plan, including designation of the primary custodial parent, the trial court considers the best interests of the child by analyzing seven factors identified in RCW 26.09.187(3)(a):

> (i) The relative strength, nature, and stability of the child's relationship with each parent;
> (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
> (iii) Each parent's past and potential for future performance of parenting functions . . . including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
> (iv) The emotional needs and developmental level of the child;
> (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
> (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
> (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

The statute further specifies that "[f]actor (i) shall be given the greatest weight," so the child's relationship with each parent is of utmost importance. RCW 26.09.187(3)(a).

As long as the trial court properly considers these statutory factors, it has wide discretion in determining parenting responsibilities. *In re Marriage of Possinger*, 105 Wn. App. 326, 335, 19 P.3d 1109 (2001). Where the parenting plan shows that the trial court considered the factors in analyzing the best interests of the child, we generally will not disturb its ruling. *See J.H.*, 112 Wn. App. at 493.

1. Failure to Independently Determine Primary Custodial Parent Designation

Reed argues that the trial court did not properly follow our direction to independently review the primary custodial parent designation. He claims that the trial court just used the new findings and conclusions to bolster its earlier decision without meaningful review. We disagree.

An appellate court's mandate is binding on the trial court and must be strictly followed. *Bank of Am., N.A. v. Owens*, 177 Wn. App. 181, 189, 311 P.3d 594 (2013). A trial court cannot ignore our specific directions. *Owens*, 177 Wn. App. at 189. We review the trial court's interpretation of those directions de novo, like any interpretation of case law. *See State v. Willis*, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004).

In the first appeal, we remanded Reed's case for "an independent determination of T.H.B.'s primary residential parent." CP at 277. We noted that "remand is required for the trial court to consider [the RCW 26.09.187(3)(a)] factors in deciding primary residential parent status." CP at 269. This language clearly directed the trial court to use its discretion to independently designate THB's primary custodial parent status in light of the statutory factors supporting the parenting plan.

The trial court decided not to hold a new trial to take evidence regarding the determination of THB's primary custodial parent. Instead, the trial court allowed each side to make a 40-minute "closing argument" addressing the RCW 26.09.187(3)(a) factors. RP (Sept. 14, 2012) at 11. We hold that this procedure was consistent with our mandate. We did not expressly order a new trial, and there is no indication that the trial court needed to gather additional evidence to make its independent determination.

Reed argues that the trial court did not engage in an independent consideration of the RCW 26.09.187(3)(a) factors, and instead simply "attach[ed] the seven factors to its original decision." Br. of Appellant at 27. There is some support in the record for this argument. Early in the process, the trial court interpreted our opinion as requiring the trial court to state a basis for the decision it made previously. The trial court stated, "I think it's clear from the Court of Appeals that they want me to enter Findings of Facts and Conclusions of Law, based on the RCW submitted, as to why I entered the parenting plan that I did based on hearing the evidence I did." RP (June 15, 2012) at 11-12. Similarly, the trial court stated, "I think what I'm going to have to do is just simply look at the transcript and come up with some Findings of Fact and Conclusions of Law as to why I did what I did." RP (June 15, 2012) at 4.

However, despite the trial court's earlier statements, it appears that it did independently review the RCW 26.09.187(3)(a) factors and reconsider the primary custodial parent designation. The trial court allowed each party to reargue the issue based on the statutory factors. The trial court then entered detailed findings of fact on the seven statutory factors and "reaffirmed" its 2009 ruling "consistent with the Court's evaluation of the factors." CP at 108. This language indicates that the trial court independently assessed the primary custodial parent designation in light of the statutory factors but ultimately arrived at the same decision. Neither the decision nor the language of the conclusions is inconsistent with an independent review. We therefore hold that the trial court complied with our directions.

2. Reliance on Previous Designation of Brown as Primary Custodial Parent

The trial court based its conclusion that Brown would be the primary custodial parent in part on "the fact that the mother has been designated the primary custodial parent by the Court,

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throughout this proceeding." CP at 108. Reed argues that the trial court erred in concluding that Brown's time as primary custodial parent under the temporary parenting plan supports a final determination that Brown should be the primary custodial parent under the permanent plan as well. We disagree.

Reed relies on *In re Marriage of Kovacs*, in which our Supreme Court held that a trial court may not presume that the primary custodial parent under a temporary parenting plan will remain the primary custodial parent under the final parenting plan. 121 Wn.2d 795, 808-09, 854 P.2d 629 (1993). However, there is no indication in the record that the trial court applied such a presumption. Instead, the trial court reasonably inferred from the circumstances that Brown had developed a strong bond with THB due to her role as primary caregiver. The language of the findings suggests that the trial court viewed the primary caretaker relationship, rather than Brown's legal designation as primary custodial parent, as the most important evidence of a strong bond.

Inferring the existence of a strong bond between a child and his or her primary caretaker is different than presuming that continued placement with the child's current primary custodial parent is in the child's best interest, even if the ultimate effect was the same in this particular case. We hold that the trial court did not err in considering the fact that Brown had been the primary custodial parent for several years.

3. Findings of Fact

Reed challenges two of the trial court's findings of fact. Findings of fact must be supported by substantial evidence, which is defined as a quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. *In re Marriage of Wilson*, 165 Wn.

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App. 333, 340, 267 P.3d 485 (2011). The trial court, as trier of fact, determines credibility and weighs the evidence, and we generally will not second guess the trial court on those questions. *Wilson*, 165 Wn. App. at 340. As long as substantial evidence was before the trial court, a reviewing court will not substitute its judgment even though it may have resolved a factual dispute differently. *Wilson*, 165 Wn. App. at 340.[2]

a. Strength of Bond and Relationship

Reed challenges the trial court's finding that Brown had the stronger bond with THB. He argues that the court (1) improperly equated the length of time spent with the child to a bond with the child, (2) based its determination on a factual error, (3) considered evidence outside the scope of review, and (4) failed to properly consider contrary evidence he submitted. However, we find that none of these arguments are persuasive.

i. Equation of Time Spent and Strength of Bond

Reed argues that the trial court unreasonably equated the amount of time spent with the child and the strength of the resulting bond. We disagree.

The trial court found that THB had a stronger relationship with Brown due to the amount of time the two spent together, while her relationship with Reed was characterized by a "lack of consistent visitation." CP at 105. Reed seems to argue that such a finding is per se unreasonable because it is possible to spend extensive time with a person without developing a strong bond. However, it is reasonable to infer that a very young child will have a stronger bond with a parent

[2] As a threshold matter, Reed does not clearly assign error to specific findings of fact as required in RAP 10.3(g). We choose to waive strict compliance with RAP 10.3(g) and review the findings Reed challenges.

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who is consistently present as a caregiver and companion than with a parent with whom the child has not spent much time.

While Reed presented evidence that his own bond with THB was strengthening, he offered no evidence that Brown's extensive interactions with THB had not produced the strong bond that would normally be expected. Therefore, we hold that substantial evidence supported this finding.

ii. Factual Error Regarding Reed's Visitation

Reed argues that the trial court erred in finding that he "had not had overnight visitations for any substantial period and had seen the child mostly on day visits only." CP at 105. According to Reed, this finding is erroneous because the trial court granted him two overnight visits per week in March 2009, about six months before trial. We agree that this finding was unsupported by substantial evidence, but we hold that the finding was not necessary to support the trial court's conclusions. We therefore affirm those conclusions and the resulting decision.

The trial court granted Reed one overnight visitation per week in March 2009, as contemplated in the temporary parenting plan. At that time, THB was just over two years old. So by the time of trial, overnight visitation had been in place for roughly one-fifth of her life. This seems to be a substantial period relative to the child's age. Moreover, the trial court limited the admissible evidence to that pertaining to the period from the end of the December 2008 trial until the time of the September 2009 trial, and Reed had overnight visitation for more than half of that period. Therefore, it was unreasonable to find that Reed "had not had overnight visitations for any substantial period" at the time of the September 2009 trial. CP at 105.

However, this finding was not necessary to support the trial court's conclusions. The court pointed to the overall lack of *consistent* overnight visitation as one reason for finding that Reed had not yet had an opportunity to develop a bond as strong as Brown's. In effect, this issue is not distinct from the issue of whether it is reasonable to infer that a young child will bond more closely with its consistent primary caregiver than with a parent it sees less frequently.

The finding as to the overnight visits appears in the section of the findings on the strength of THB's bonds at that time. The trial court's finding as to the substantiality of the overnight visitation period was not necessary to support the court's overall findings on the strength of THB's bonds. And only the findings on that issue were necessary to support the court's conclusions. We therefore hold that the trial court's erroneous finding that Reed's overnight visitation period was insubstantial is immaterial.

iii. Consideration of Evidence Outside Scope

Reed challenges the trial court's findings regarding the strength of THB's bond with Brown because it was based on evidence barred by the trial court's order precluding evidence before December 2008. As noted above, the trial court in its findings relied on the fact that Brown had been the primary caregiver since THB was born. To the extent the court considered Brown's history with THB to be more than just contextual information, it would violate the limiting order because it would require the court to consider events prior to December 2008 – specifically, Brown's caregiving activities between THB's birth in February 2007 and the end of the 2008 trial.

However, it appears that the trial court simply reconsidered Brown's present relationship with THB in its historical context. The court found that a bond based on Brown's shared history

with THB *existed at the time of trial*. Brown's status as primary caregiver during THB's infancy simply contextualized this bond. Because the court could reasonably conclude from Brown's testimony that the bond *remained* strong at the time of trial, the court did not need to base its ruling on any particular events or information outside the scope of its limiting order. Therefore, we hold that the trial court did not err in referring to pre-September 2008 evidence.

iv. Failure to Consider Reed's Contrary Evidence

Reed seems to argue that it was unreasonable for the trial court to find that Brown had a stronger relationship with THB because Reed presented more and better evidence of the strength of his relationship. While Reed's evidence may appear more persuasive in the written record, we will not disturb the trial court's credibility and weight determinations. *Wilson*, 165 Wn. App. at 340. Brown did present evidence as to the strength of her relationship with THB. We hold that the trial court did not abuse its discretion by deeming Brown's evidence more persuasive than Reed's, even though the opposite decision might also have been reasonable.

b. Brown's Parenting Ability

Reed argues that the trial court erred by finding that "[t]here was nothing brought to the attention of the Court . . . that the mother's past, present or future performance of the parenting functions would be impaired in terms of the child's daily needs." CP at 106. We disagree.

Reed points to the testimony of an occupational therapist who testified that Brown had taken THB out of occupational therapy with the intent to enroll her in a similar therapeutic course, but had not returned to therapy after failing to enroll in that course. However, Brown testified that she had attempted to enroll THB in the program and was simply on a waiting list, and did not believe that she was supposed to bring THB back to occupational therapy in the

meantime. Notably, THB was taken off the waiting list and actually began the new therapeutic course during the trial. The trial court apparently credited Brown's testimony and considered the therapist's testimony not credible or inapposite. Because this finding turned on credibility and evidentiary weight, we find that substantial evidence supported the finding.

4. Failure to Make Findings

Reed argues that the trial court erred by failing to address certain issues in its factual findings as well. According to Reed, the trial court was required to address (1) Brown's intent to relocate with THB, and (2) Brown's alleged abusive conduct directed toward Reed. We disagree.

In general, a trial court must make findings of fact on all material issues. *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 422, 886 P.2d 172 (1994). An issue is material in this context if a finding on that issue is necessary to support the trial court's conclusions of law. *See Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003).

a. Relocation

Reed argues that the trial court violated our mandate in the first appeal and erred by failing to include factual findings regarding Brown's intent to relocate with THB. We disagree.

We stated in our earlier opinion that "in light of Brown's asserted desire to move her and T.H.B. to Chicago, it is especially important that the trial court carefully consider all the enumerated factors in RCW 26.09.187(3)(a)." CP at 270. But we did not direct the trial court to address relocation on remand. We directed the trial court to address the enumerated factors, and the parents' intent to relocate is not among them. We acknowledged that Brown's apparent desire to relocate with THB made it "especially important" that the trial court address the RCW

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26.09.187(3)(a) factors, but this does not amount to a direction that the trial court issue findings as to Brown's intent to relocate. Therefore, we hold that the trial court's failure to make factual findings on relocation did not violate our mandate.

Reed argues that because Brown previously expressed a desire to move out of the area with THB, and such a relocation could impact several of the factors enumerated in RCW 26.09.187(3)(a), the trial court was required to make factual findings as to Brown's intent to relocate. As Reed points out, Brown's intent to relocate was related to several of the RCW 26.09.187(3)(a) factors. But a parent's desire and intent to relocate is not itself one such factor. Neither does it control nor determine any of the factors.

The trial court's findings in this case are sufficient to address the enumerated factors, and those findings are adequately supported without findings on Brown's intent to relocate. The issue is therefore not material, and we hold that the trial court did not err by failing to address it with specific findings of fact.

b. Abusive Use of Conflict

Reed also argues that the trial court erred by not addressing written materials summarizing evidence about Brown's alleged efforts to restrict visitation and abusive use of conflict that had been presented at the 2009 trial. Reed seems to indicate that RCW 26.09.191(3) required the trial court to address this evidence in its findings of fact. We disagree.

RCW 26.09.191(3) provides only that the trial court "may preclude or limit any provisions of the parenting plan" where a parent has abusively used conflict in a potentially dangerous manner or withheld the child from the other parent without good cause. The trial court clearly had discretion to weigh the persuasive value of Reed's materials, and was not

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required to address them. Regardless, the trial court did address the matters raised in Reed's materials, reaffirming its earlier decision that Brown's conduct did not violate RCW 26.09.191. Because specific findings on Reed's submitted materials were not necessary to support the trial court's conclusions, we hold that the trial court did not abuse its discretion by omitting discussion of the materials in its findings of fact.

B. CHILD SUPPORT ORDER

Reed assigns a number of errors to the trial court's handling of the child support order on remand. As noted above, we review child support orders for an abuse of discretion. *Fiorito*, 112 Wn. App. at 663. A trial court does not abuse its discretion as long as it considers all relevant factors and the award is not unreasonable. *Fiorito*, 112 Wn. App. at 664. We hold that the trial court did not abuse its discretion regarding the child support order.

1. Acceptance of Brown's Worksheets

Reed argues that the trial court erred by accepting Brown's worksheets when they were (1) incomplete, and (2) based on information outside the scope of admissible evidence. We reject both arguments.

a. Incomplete Worksheets

Reed argues that the trial court erred in accepting Brown's worksheets when the worksheets did not include her income from a side business she owned. RCW 26.19.035(3) provides that "[t]he court shall not accept incomplete worksheets or worksheets that vary from the worksheets developed by the administrative office of the courts."

But Reed did not challenge Brown's worksheets for omitting her business income until his motion for reconsideration. Under CR 59, the trial court may decline to address arguments

made for the first time on a motion for reconsideration, as long as the court does not abuse its discretion. *River House Dev. Inc. v. Integrus Architecture, PS*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012). And new evidence may generally only serve as grounds for granting a motion for reconsideration when it is newly discovered and "could not with reasonable diligence have discovered and produced at the trial." CR 59(a)(4).

While Brown's side business was addressed at the 2009 trial, Reed did not produce evidence of her personal income from that business. Reed did not seek to discover information about Brown's business income prior to the September 2012 hearing and produced no such evidence at that hearing. Even when Reed raised his motion for reconsideration, he offered only speculative estimates of Brown's income and did not seek production of the actual data. The trial court therefore had insufficient data with which to assess Brown's business income. We hold that the trial court did not abuse its discretion by accepting Brown's worksheets.[3]

b. Financial Data Outside the Scope of Evidence

Reed claims that by accepting Brown's worksheets, the trial court erroneously considered evidence outside the scope of its order limiting the evidence to that available at the time of the 2009 trial. Reed points to two pieces of evidence he believes the court should not have considered: (1) Brown's 2009 and 2010 tax returns, and (2) a medical bill from 2010. We reject these arguments.

[3] Reed points to Brown's late disclosure of her worksheets prior to the September 2012 hearing as the reason for his failure to provide the necessary data or at least raise the issue of Brown's failure to provide those data. But he failed to raise the issue in his letter to the court sent more than a week after that hearing, even though he made other arguments related to Brown's proposed worksheets.

i. 2009 and 2010 Tax Returns

Brown provided the trial court with her 2009 and 2010 tax returns for income verification purposes. RCW 26.19.071(2) requires tax returns "for the preceding two years" and pay stubs to verify each party's income. Reed argues that Brown's use of the tax returns for income verification violated the court's order limiting evidence to that available at the time of the 2009 trial because neither document was created until October 2011 (and could not even have been created until after the time of trial).

But the trial court asked the parties to submit relevant *supplemental* financial information on remand. It appears that Brown already had provided 2007 and 2008 tax returns to the trial court before the September 2009 trial. Reed does not point to any relevant authority requiring the trial court not to accept the supplemental tax returns for verification purposes. He also does not suggest that the trial court considered information in the tax returns related to the period after the September 2009 trial. Therefore, Reed has not shown that the trial court abused its discretion by accepting Brown's 2009 and 2010 tax returns in September 2012 for the purpose of assessing her financial circumstances in September 2009.

ii. Medical Bill

Brown provided the court with a medical bill for $115.28, and claimed the billed amount as medical expenses on her worksheet. The bill was for three visits, two of which occurred after the 2009 trial. Had Reed brought this to the court's attention, the court seemingly would have been bound by its own order to reject at least the portion of the expenses related to the two post-trial visits. However, Reed did not bring this to the trial court's attention despite having

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opportunities to do so. Under RAP 2.5(a), "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court."

Reed now claims that because Brown provided the worksheets to him only three days before the September 2012 hearing, he did not have enough time to inspect them and discover the error. But, as noted above, Reed challenged other aspects of the worksheets in his letter to the court, as well as in his motion for reconsideration and at later hearings. Reed even challenged the proportional credit of the billed amount, but did not challenge the use of the bill or the deductibility of the expenses. The failure to do so deprived the trial court of an opportunity to address the likely mistake. Under RAP 2.5(a), we decline to review this issue on appeal.

2. Failure to Impute Income

Reed argues that the trial court failed to impute income to Brown for voluntary unemployment or underemployment when calculating her income. However, the court did impute income to Brown. Reed actually appears to be suggesting that the court abused its discretion by disagreeing with him as to the *amount* of income to impute. Reed points to no facts or law suggesting that the trial court abused its discretion. Instead, he directs our attention to his presentation to the trial court of highly speculative calculations as part of his motion for reconsideration, which the trial court considered and rejected. We hold that the trial court did not abuse its discretion in rejecting Reed's proposed calculations.

3. Refusal to Deduct Reed's Business Expenses

Reed argues that the trial court erred by failing to deduct his net expenses from an apartment building from his income for purposes of calculating his child support obligation. But

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Reed did not raise this issue to the trial court before moving for reconsideration of the trial court's order, and the trial court did not abuse its discretion by refusing to deduct these expenses.

Among the expenses that the trial court shall deduct from a parent's income for purposes of setting child support obligations are "[n]ormal business expenses." RCW 26.19.071(5)(h). Reed argued at the hearing on his motion for reconsideration that the net expenses from the apartment should be deducted from his income as normal business expenses. Reed had previously provided some evidence of his business expenses before the court entered its child support order. But he specifically disclaimed any deduction of the net loss amount in a letter to the court in September 2012. He also claimed no business expenses in his original proposed worksheet. Only the proposed worksheet Reed presented on the day of the reconsideration hearing included a deduction of the expenses. Therefore, Reed did not raise the issue of the business expenses deduction before his motion for reconsideration.

At the reconsideration hearing, Reed explained that he could not have requested deduction of the business expenses because he never received recalculated worksheets from Brown after the trial court requested those worksheets in an October order. However, Reed already had disclaimed the business expenses deduction in his letter to the court and associated worksheet before the court issued that order. Moreover, the ordered changes to Brown's recalculated worksheets did not include consideration of Reed's business expenses. Reed therefore did not have a good excuse for failing to argue for the deduction, and the trial court did not abuse its discretion by refusing to deduct these expenses at the reconsideration stage.

4. Incorrect Start Date

Reed argues that the trial court abused its discretion by making the child support order effective retroactive to April 2009 instead of September 2009, the date of the previous trial. We disagree.

Reed states that "the court made clear that it would not allow materials that preceded the date of the trial" and that the order therefore could not have retroactive effect. Supp. Br. of Appellant at 15. But this both misstates the evidentiary limitations on remand and draws an incorrect legal conclusion. The trial court limited the evidence it would consider to what was available at the time of the 2009 trial and refused to allow materials that preceded the *2008 trial*. But even if Reed had stated that evidentiary limitation correctly, his conclusion would not follow because the effective date of the order did not depend on what evidence was allowed.

Reed also seems to argue that the date was arbitrary. A trial court abuses its discretion by acting arbitrarily. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004). But the court did not set an arbitrary date. At the culmination of the 2008 trial, the court scheduled a review of the temporary parenting plan for April 17, 2009. The court intended to enter a final support order at that review hearing. While the actual final order was greatly delayed by the reassignment, second trial, appeal, and remand proceedings, that order should have been entered in April 2009. Therefore, we find that the trial court did not abuse its discretion in setting the start date for Reed's adjusted child support obligations at April 2009.

C. ATTORNEY FEES

Reed challenges the trial court's award of $400 in attorney fees to Brown for responding to Reed's October 2012 motion for reconsideration of the final parenting plan. RCW 26.09.140

grants the trial court broad discretion in assessing attorney fees in the context of child support and parenting plan proceedings "after considering the financial resources of both parties." We review the amount awarded for attorney fees for an abuse of discretion. *Unifund*, 163 Wn. App. at 484.

In light of the considerable disparity between Reed's and Brown's financial resources and the fact that Reed incurred no overt cost for his pro se appearance while Brown was paying an attorney to represent her, $400 was not an unreasonable amount. We therefore hold that the trial court did not abuse its discretion in awarding Brown $400 in attorney fees.

For the reasons described above, we affirm the trial court's parenting plan, child support order, and award of attorney fees.

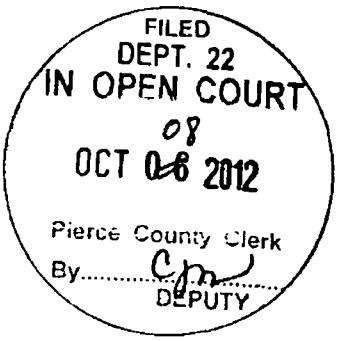
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, J.
MAXA, J.

We concur:

Bjorgen, A.C.J.
BJORGEN, A.C.J.

Melnick, J.
MELNICK, J.



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

CLYDE HARRISON REED, Petitioner, vs. CATHERINA YVONNE BROWN, Respondent.	Cause No: 07-3-03417-9 **AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

THIS MATTER having come before the above-entitled Court by way of remand by Division II, Court of Appeals, under appellate cause number: 40119-3-2, whereby Division II has requested that the Court amend its Findings of Fact and Conclusions of Law in order for the Court to consider the seven (7) enumerated factors listed in RCW 26.09.187 (3) (a) (i/VII). The Court of Appeals stated, "Accordingly remand is required for the trial court to consider these factors in deciding primary residential parent status".

FACTUAL BACKGROUND

That on or about the 14th day of September, 2012, the Court held a hearing whereby both parties could provide final argument based on the evidence that was considered at the original trial held by Judge John R. Hickman on September 14, 2009. Each party was allowed to provide closing argument, which incorporated the

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above-enumerated factors, for the Court to consider with regard to its designation of a custodial parent pursuant to the final parenting plan which was entered by the Court as a result of the September 2009 trial. That on or about the 14th day of September, 2012, the Petitioner, CLYDE REED, was present, pro se, and the Respondent, CATHERINA BROWN, was present with counsel, Desiree Hosannah. Based on the record and files contained therein, as well as oral argument of the parties and the pleadings submitted, the Court makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court first adopts, and incorporates hereto by reference, any and all findings of fact and conclusions of law, as well as the substantive provisions of the final *parenting plan which were entered on or about November 19, 2009.*

The Court further adopts, and incorporates by reference, the supplemental findings of fact and conclusions of law which were entered on November 19, 2009.

RESIDENTIAL ANALYSIS PURSUANT TO RCW 26.09.187 (3) (a)

Although this case came before the Court for establishment of a permanent parenting plan, pursuant to a petition for establishment of paternity, the RCW provisions regarding the establishment of a residential schedule, refers the Court back to RCW Chapter 26.09.187 (3) (a) in requiring the Court to make an analysis, under the above provision, as to the designation of a custodial parent in any pleadings entered regarding a final residential schedule and/or parenting plan. The Court, in following the directive of Washington State Court of Appeals, Division II, makes these additional findings of fact and conclusions of law in order to satisfy the requirement in a

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final parenting plan, which requires the incorporation of the below-listed factors. The Court will analyze each one of the factors individually as follows:

1. **The relative strength, nature and stability of the child's relationship with each parent.**

At the time of the original petition for establishment of a parenting plan and the trial thereon, the minor child, T.H.B., was approximately two years of age. The mother had been the primary parent since birth and the Petitioner, MR. REED, had been granted periodic visitation with said child. At the time this case came before this Court for trial, MR. REED had documented issues which he was having with the Respondent in being able to exercise consistent and regular visitation with his daughter. MR. REED, as a result of concerns regarding health issues (sensory integration), had not had overnight visitations for any substantial period and had seen the child mostly on day visits only. This Court finds, at the time of trial, that the child had a much more bonded relationship with the mother than the father due to the lack of consistent visitation. The Court did find in the "Supplemental Findings of Fact and Conclusions of Law" that the minor child's health issues were not legitimate in terms of restricting the father's access to the child. However, the Court did not find that this behavior rose to the level of a 26.09.191 restriction and/or violation. Thus, at the time of the original hearing, in September of 2009, the Court finds that the above factor, that is RCW 26.09.187 (3) (a) (i), would show that the mother had the stronger relationship.

2. **The agreements of the parties provided they were entered into knowingly and voluntarily.**

This provision simply does not apply since there was no agreed temporary or final parenting plan; this case being heavily litigated at all stages.

3. Each parent's past and potential for future performance of parenting functions, including whether a parent has taken greater responsibility for performing parental parenting functions relating to the daily needs of the child.

At the time of the trial, again the majority of the parenting functions had been performed by the Respondent due to the limited contact that the father was provided prior to the September 2009 trial. However, there was nothing that was brought to the Court's attention, during the trial, that would indicate that the Petitioner/Father parental past and potential future performance of parenting functions would be in anyway impaired or were a risk to the minor child. The Court believes that the Petitioner, MR. REED, would have taken a more active part in forming the parenting functions regarding the child's daily needs if that opportunity had been presented. There was nothing brought to the attention of the Court, or a finding made by the Court, that the mother's past, present or future performance of the parenting functions would be impaired in terms of the child's daily needs. However, the Court issued a warning that if additional "excuses" were found not to provide the father with his court-ordered visitation, that could have a potential impact on any future parenting plan. The Court finds that the mother did perform the majority of these functions, but that the father would be capable of fulfilling those roles once given the opportunity.

4. The emotional needs and developmental level of the child.

The child was approximately two years of age at the time the Court heard this matter. The child had been fulltime with the mother and there was no evidence to indicate that there was not a strong bond between mother and child or that she did not perform her normal parenting functions. The Court finds that there would have been a much stronger bond and emotional needs for the child as it relates to the mother and

that because of the young age of the child to transfer custody to the father, at that time, the Court finds would potentially confusing and may cause emotional damage to the child. In short, the child, because of age, would not have the easy adjustment of transfer of custody to the father as might occur for a child who could truly understand the relationships and the consequences of changing custody.

5. The child's relationship with siblings and with other significant adults, as well as the child's involvement in his/her physical surroundings, school or other significant activities.

Due to the young age of the child, this factor is probably less important than if the child was of school age. It is clear, from the evidence presented at trial, that the parents wanted their daughter to participate in preschool and preschool activities. The child had a strong relationship with the maternal grandmother since the maternal grandmother had been providing daycare for the child while the mother was at work or looking for employment. The Court cannot make a negative inference as to MR. REED and any relationships that the child may have with his extended family since MR. REED'S visitation was too limited to make such an assessment. The Court did express concerns about the grandmother being alone with the minor child due to some injuries that occurred during her babysitting the child, but that fact alone did not indicate any type of abuse or neglect.

6. The wishes of the parents and the wishes of a child who is sufficiently mature to express reason and independent *preferences as to his/her residential schedule.*

The wishes of the parents have been consistent throughout, in that each parent has attempted to be awarded primary custody of their daughter. This has lead to almost constant litigation since approximately 2008.

The wishes of the child are simply not relevant since the child was not capable, or mature enough, to express her preference as to a residential schedule.

7. Each parent's employment schedule and accommodations consistent with those schedules.

At the time of the hearing in September of 2009, the Court does not believe the mother was employed and, therefore, had availability to provide almost fulltime care for the child. The father did work full time and, due to the distances involved between the parties, this lead to the father having a larger burden of transportation interfering with visitation with the child. The father has consistently indicated that his job schedule would allow him to provide the necessary time with the child in order to be designated as the residential parent.

CONCLUSIONS OF LAW

That based on the fact that the mother has been designated the primary custodial parent by the Court, throughout this proceeding, and based on the evaluation of factors indicted above, as well as the other findings of fact and conclusions of law that were entered after the September 2009 hearing, the Court reaffirms its original decision in naming the mother the primary custodian for purposes of the parenting plan.

The Court finds that its decision, in September of 2009, would be in the best interest of the child and consistent with the Court's evaluation of the factors indicated in 26.09.187 (3) (a), especially in light of fact that the mother had consistently cared for the child since birth.

Although the Court did conclude and find that the mother's behavior was an obstacle in terms of the father exercising consistent visitation with his daughter, the

Court did not reach a conclusion that those actions, at that time, would be considered a violation of 26.09.191. The Court reaffirms that finding that was made as part of the entry of the original parenting plan in November of 2009.

DATED this 8 day of October, 2012.

cc mailed to Mr. Reed and Ms Hosannah 10/8/12

JUDGE JOHN R. HICKMAN

FILED
DEPT. 22
IN OPEN COURT
OCT 08 2012
Pierce County Clerk
By DEPUTY

No. 44151-9

COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

Clyde Reed Jr., Appellant

v.

Catherina Y. Brown, Respondent

BRIEF OF APPELLANT

Clyde H. Reed Jr
8216 SE 41st
Mercer Island, Wa
98040

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8. The trial court erred in its award of attorney's fees to the Respondent's attorney in response to Petitioner's Motion for Revision of October 18, 2012.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

The trial court ruled that the Respondent is designated as the primary residential parent based primarily on the fact that the Respondent has had primary residential status during the tenure of the temporary plan, since the child's birth. Does the Respondent's assignment of primary status during the tenure of the temporary plan justify the court's assignment of Respondent as permanent residential parent?

1. The trial court erred in concluding that the length of time spent by the Respondent with the child as primary residential parent during the tenure of the temporary parenting plan supports granting primary residential placement to the Respondent.

The trial court ruled that the strength, nature and stability of the relationship with the child favored the Respondent. Can the trial court so rule when the Respondent presented no evidence in support, beyond the inappropriate evidence that the Respondent has been the primary parent since birth? The trial court ruled that only evidence pertaining to the period after December 2008 and before November 2009 would be allowed. Can the trial court then not only accept, but repeat in its ruling, evidence pertaining to the period before December 2008?

2. The trial court erred in its judgment that the Respondent established that a greater bond existed between her and the child than between the Petitioner and the child; The trial court further erred in accepting, and in repeating in its judgment, that the Respondent had established a greater bond with the child because she had been the primary parent since birth--when the court had specifically required that no information regarding the period prior to December 2008 would be accepted.

Where there is a material issue identified by the Petitioner and called out by the Appellate Court in its original review of this case, may the trial court ignore that issue?

3. The trial court erred in failing to arrive at findings of fact regarding the likelihood of the Respondent seeking to relocate the child, away from the father, if Respondent is granted primary residential status.

Where the Appellate Court has required the trial court to undertake an independent review of the case, may the trial court simply attach an analysis of the seven enumerated factors to an undisturbed earlier decision?

4. The trial court erred in its interpretation of the Appellate Court decision of May 2012, in failing to carry out the Appellate Court mandate to undertake an independent review of the issues. is granted primary residential status.

Where the trial court has made a substantive factual error upon which its decision is partially based, may its decision be reversed?

5. The trial court erred in basing its ruling regarding primary residential status on a factual error--that the Petitioner did not have overnight visitation with the child.

The trial court equated the amount of time spent with the child, by virtue of the Respondent's unemployed status and assignment as primary parent during the temporary plan, with the quality of the bond with the child. Does the length of time spent with a child equal the strength, nature and stability of the relationship with the child?

6. The trial court erred in equating length of time spent with the child to the bond with the child.

The Petitioner submitted written materials addressing major issues material to the case. May the trial court simply ignore such materials?

7. The trial court erred in its failure to consider written materials submitted that provided evidence as to Respondent's efforts to restrict visitation by the father; the mother's failure to perform parenting functions; the abusive use of conflict by the mother; and the February 4, 2009 declaration regarding Respondent's domestic violence.

Trial court awarded attorneys fees to Respondent based on a motion that Respondent's counsel filed that was in violation of the court's local rules; the attorney's fees were awarded because the Petitioner had filed a motion for revision as a means of preserving the court's error for purposes of appeal. Where the trial court has provided no means for objecting to a ruling other than filing a request for reconsideration, and where the

Respondent's motion is improperly filed, may the trial court award attorney's fees against the Petitioner?

8. The trial court erred in its award of attorney's fees to the Respondent's attorney in response to Petitioner's Motion for Revision of October 18, 2012.

STATEMENT OF THE CASE

The initial trial proceeding in this case occurred in December 2008, in the court of Judge Sergio Armijo, as described in the brief in the first appellate review. After days of trial, the court indicated its readiness to make a decision, and indicated an intent to award extensive overnight visitation to the Petitioner. The Respondent, acting pro se, intervened with an assertion that the child suffered from a childhood illness, and that overnights with the Petitioner were contrary to medical advice. As a result, the court agreed to withhold action until April 2009 to allow for further medical evaluation, and declined to provide for overnight visitation for Petitioner, but provided continued temporary visitation pending final action. The case was transferred to the court of Judge Hickman, who, in preliminary proceedings, awarded overnight visitiation, admonishing the Respondent that she would have to provide direct reports from medical sources in support of a challenge to overnights for the Petitioner. Respondent could provide no such reports.

At the September 2009 trial in Judge Hickman's court, Respondent claimed that the Armijo Court had made a final decision on custody, awarding custody to the Respondent. Judge Hickman agreed, and confirmed a custody award to the Respondent, indicating that a final

decision on custody had already been made by Judge Armijo. Petitioner appealed to District II.

In May 2012, District II of the Appellate Court rendered a decision that, in part, confirmed that the trial court had erred in treating the action of the Armijo Court as a final decision and in failing to consider the seven enumerated factors of RCW 26.09.187 (3)(a) (i-vii), reversed the decision of the trial court, and required the trial court to use its independent judgment in coming to a decision on primary residential placement, based specifically on the seven enumerated factors of RCW 26.09.187 (3) (a)(i-vii). Appellate Court also indicated that trial court had not entered a final child support order, and directed it to do so. In proceedings on remand, the trial court directed the parties to provide financial information, including worksheets to the court, and indicated that the Court would schedule a proceeding to consider that information in making a decision on child support. The Court also indicated it would accept input from the parties as to how it should structure a process to address the seven enumerated factors. The court eventually indicated that it would hold a proceeding allowing each side to make "closing arguments"; each side would have 40 minutes to address both child support issues, and argument

in support of primary residential designation. That proceeding occurred on September 14 2012.

On October 8, 2012, the Court issued Amended Findings of Fact and Conclusions of Law which confirmed the Court's 2009 ruling awarding primary residential designation to the Respondent. The current appeal is based primarily on that ruling. The appeal also challenges the award of attorney's fees for Petitioner's motion for revision.

ARGUMENT

1. Trial court erred in concluding that the length of time spent by the Respondent with the child as primary residential parent during the tenure of the temporary parenting plan, supports granting primary residential placement to the Respondent.

At the September 14 2012 hearing, the Respondent offered extensive testimony to the effect that she had been the primary caregiver for TBR since birth; that she had been unemployed in 2009 and therefore greatly available to TBR (VRP 9/14/12 54). On October 8, 2012, Judge Hickman rendered his decision on the remand of this case, affirming his original position in the 2009 Parenting Plan that awards primary residential placement with the mother. The court provided an analysis based on RCW 26.09.187 (3) (a) (i-vii). "At the time of the original petition for establishment of a parenting plan and the child thereon, the minor child

was approximately two years of age. The mother had been the primary parent since birth, and the Petitioner...had been granted periodic visitation with said child. This Court finds, at the time of trial, the the child had a much more bonded relationship with the mother than the father due to the lack of consistent visitation." "At the time of the trial, again, the majority of the parenting functions had been performed by the Respondent due to the limited contact that the father was provided prior to the September 2009 trial." "The child had been fulltime with the mother and there was no evidence to indicate that there was not a strong bond between mother and child or that she did not perform her normal parenting functions. (CP 103-109)

The court ruling relies upon the fact that the mother had been "primary since birth" as the foundation of its ruling--that, in that time--through the tenure of the temporary parenting plan, the mother would have developed a stronger bond with the child than the father. The ruling does not indicate, in any way, that the testimony and materials provided demonstrate the strength, nature and stability of the relationship with the Respondent was greater than that with the Petitioner, based on testimony and materials presented (CP 110). Nor does the ruling assert that

testimony or materials presented favor the Respondent in the other enumerated factors of 26.09.187 (3) (a) i-vii.

However, the State Supreme Court was clear in its Kovacs decision as regards reliance on the fact of status as primary caregiver during the period prior to the conclusion of a final parenting plan (Marriage of Kovacs, 121 Wn.2d).

"It is thus clear from the legislative history that the Legislature not only did not intend to create any presumption in favor of the primary caregiver but, to the contrary, intended to reject any such presumption".
"The Parenting Act of 1987 (Laws of 1987, ch. 460) does not create a presumption in favor of placement with the primary caregiver."

The legislative history adds weight to the understanding that the Legislature thought clearly about the idea of preference for the primary caregiver, and rejected it in favor of specific criteria to be considered by the court. The Supreme Court, in its Kovacs decision, relates how the early version of the bill that eventually became 26.09.187, originally contained language granting the primary caregiver preference--but that the Legislature, purposefully and intentionally, removed such language, and replaced it with what is now 26.09.187 (3) (a) i-vii. Marriage of Kovacs, 121 Wn.2d 795, 801,854 P.2d 629. In relating this history, the Supreme Court is emphasizing its position, rejecting the preference for the primary

caregiver. It is saying that there are two things, separate and distinct: one is the primary caregiver preference, one is the seven enumerated factors. They are different things, not analagous or equivalent with one another. One--the seven enumerated factors--is endorsed by the legislature--and subsequently, by the Supreme Court; the other is explicitly and finally rejected.

If there were any remaining question, state law is explicit:

"In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan." RCW 26.09.191 (5)

In order to avoid just the outcome of having this trial court rely on the temporary plan, and the Respondent's status as primary residential parent during the tenure of the temporary plan, this Appellate Court, in its May 2012 decision in this case, was specific in admonishing to trial court against such rationale:

"Temporary parent plans are designed to maintain the status quo and drawing any presumption of parental fitness from the temporary plan is inappropriate. "

The trial court, however, ruled otherwise. "The mother had been the primary parent since birth, and the Petitioner...had been granted periodic visitation with said child. This Court finds, at the time of trial, the the child had a much more bonded relationship with the mother than the father

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due to the lack of consistent visitation." The trial court goes on to reference that there was no evidence proving the lack of a bond between the mother and the child. ""The child had been fulltime with the mother and there was no evidence to indicate that there was not a strong bond between mother and child or that she did not perform her normal parenting functions." The assertion that there was no evidence to prove the negative cannot be taken to mean that there was evidence to prove the positive--which positive evidence of the seven enumerated factors must, according to the Legislature, the Appellate Court and the Supreme Court, be the basis of the trial court's finding. The court's decision cites no such positive evidence in favor of the respondent.

The trial court's finding in this case is especially ironic in light of the narrative arc of the case. The early months of the case featured a refusal on the part of the Respondent to cooperate with the GAL, refusing to meet with her for a period of more than six months. Petitioner asked the court repeatedly for overnight visitation over the course of the first two years; Respondent resisted each such request. At the December 2008 trial, Judge Armijo was prepared to grant Petitioner extensive overnight visitation; Respondent declared to the court that the child was afflicted with a disease, and because of that no change to her overnight schedule should be

allowed--and Judge Armijo accepted that declaration--but never came to a final decision on the case. Judge Hickman--two months later--granted overnights to Petitioner, in spite of the attempt by Respondent to repeat the declaration of illness by the child, and the inappropriateness of allowing overnight visitation. Judge Hickman asked for documentation from medical authorities--Respondent could never provide any such. Respondent utilized an alternative diversion in September 2009--claiming that Judge Armijo had already decided custody, and the only thing remaining was child support and visitation--and attorney's fees. The entire time, the Respondent refused the orders of numerous courts, to change the birth certificate to include the father's last name--and she remains in defiance of the court in that regard today. The Appellate Court directed the trial court to correct the process--five years after this irregular process began. The entire time, Respondent was assigned primary residential status through the various strategies described above, accumulating calendar time with the child as an attempt at strategic advantage in the case. It is ironic that the Respondent asks the court to reward her for these distractions; it is an unreasonable ruling for the court to grant her primary residential status based on this history.

These methods are examples of the approaches that the Legislature sought to avoid with its Parenting Act of 1987. According to the Supreme Court, Washington's Parenting Act represents a unique legislative attempt to reduce the conflict between parents who are in the throes of a marriage dissolution by focusing on continued "parenting" responsibilities, rather than on winning custody/visitation battles. (Kovacs) Rather than carrying out the intent of the Act, the trial court's actions have the opposite effect, rewarding these methods through its grant of primary residential status, rather than addressing the intent of the legislature in its effort to discourage these tactics. The trial court's decision is based on a fundamentally wrong theory--that the designation as custodial parent during the temporary plan supports the designation as custodial parent for purposes of the final parenting plan. A judgment arrived at by means of a fundamentally wrong theory and lacking any findings supporting the proper theory may be reversed on appeal. 86 Wn.2d 156, Local Union 1296, International Association of Firefighters v. City of Kennewick.

The Appellate Court reviews a trial court's ruling on placement of children for an abuse of discretion. Marriage of Kovacs, 121 Wn.2d 795, 801,854 P.2d 629. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Kovacs, 121 Wn.2d at 801.

The trial court's decision is clearly based on untenable grounds. In basing its decision on the fact that the Respondent was the primary caregiver since birth, the Court used a rationale that is contrary to Supreme Court precedent, to specific legislative intent as expressed in state law and in legislative history, and to the clear words of the Appellate Court in its May 2012 decision. The action of the trial court represents a clear abuse of discretion, and should be reversed, and primary residential status awarded to the Petitioner.

2. The trial court erred in its judgment that the Respondent established that a greater bond existed between her and the child than between the Petitioner and the child; The trial court further erred in accepting, and in repeating in its judgment, that the Respondent had established a greater bond with the child because she had been the primary parent since birth--when the court had specifically required that no information regarding the period prior to December 2008 would be accepted.

In its October 8, 2012 decision, the trial court provided an analysis based on RCW 26.09.187 (3) (a) (i-vii). "At the time of the original petition for establishment of a parenting plan and the child thereon, the minor child was approximately two years of age. The mother had been the primary parent since birth, and the Petitioner...had been granted periodic visitation with said child. This Court finds, at the time of trial, the the child had a much more bonded relationship with the mother than the father due to the lack of consistent visitation." "At the time of the trial, again, the majority

of the parenting functions had been performed by the Respondent due to the limited contact that the father was provided prior to the September 2009 trial." "The child had been fulltime with the mother and there was no evidence to indicate that there was not a strong bond between mother and child or that she did not perform her normal parenting functions." (CP 103-109)

The ruling was based, according to the October 8 decision issued by the court (CP 103-109), on a September 14, 2012 hearing and on written materials submitted. The trial court required, at that hearing and in materials presented, that only the period between the end of the 2008 first trial in the Armijo court, and the September 2009 trial in the Hickman court, would be addressed in oral presentation and in materials submitted; nothing that preceded or followed those dates would be allowed (VRP 9/12/12 P15).

At the September 14 hearing, Petitioner presented evidence summarizing the testimony and documents from the 2009 proceeding in Judge Hickman's court regarding his parenting, testified to by witnesses that knew him personally over decades, and who had seen his relationship with TBR develop. (VRP 9/14/12 38-46) This testimony was extensive, detailed, and specific. It described TBR's reliance on Reed as a steady

base, the nurture that he provides to her, how the relationship has brought him joy, how he has been a model parent, how parent and child seem to have fun together. Of particular note is the testimony of Dr. Christin Larue, which Petitioner summarized, a bonding expert that had been qualified by the court as an expert witness at the 2009 trial. Her testimony had been based on a series of three visits with Petitioner and TBR over several years, and had been the subject of several reports submitted to the court and received as evidence in the 2009 trial. Her testimony addressed Petitioner's nurturing the child, taking care of the child's needs, both physical and emotional. (VRP 9/14/12 39) She concluded that petitioner was very nurturing, speaking to the nature of the relationship. Structure was also addressed, and she concluded Petitioner did a great job with structure, speaking again to the nature of the relationship. (VRP 9/14/12 40) Engagement was described, and Dr. Larue described TBR as very engaged by Petitioner, speaking to the strength and stability of the relationship (VRP 9/14/12 41). Challenge was the fourth element assessed, and Petitioner was described as doing a good job of providing an appropriate challenge, speaking to the strength and nature of the relationship (VRP 9/14/12 42). According to Dr. Larue, Petitioner's relationship with TBR had deepened and grown, and that TBR showed a

secure attachment to her father, speaking further to the strength and stability of the relationship (VRP 9/14/12 43). She was described as utilizing him as a secure base, speaking again to the strength and stability of the relationship (VRP 9/14/12 43).

Respondent presented no testimony regarding the strength, nature or stability of her relationship with TBR. All of her testimony had to do with 1) providing financials requested by the court (VRP 9/14/12 50); 2) the length of time that the mother had been the primary caregiver during the various iterations of the temporary plan (VRP 9/14/12 52); 3) the granting of overnight visitation to the father by the court; 4) incorrect references to GAL reports regarding incidents that preceded the December 2008 allowable testimony cutoff (VRP 9/14/12 53), 5) the Respondent's unemployed status, and her freedom to spend time with the child given that status (VRP 9/14/12 54) (failing to note the business owned and operated by the Respondent during this period, in fact substantially limiting her availability). Additionally, in asserting that she has been custodial parent since the child's birth, and has thus had opportunity to build a stronger bond with the child (VRP 9/14/12 52), Respondent is clearly in violation of the trial court's established rules for testimony and evidence allowed; the Court clearly, and on numerous occasions indicated

that any information regarding the period before the end of the 2008 trial (the child was born in February 2007) would not be allowed (VRP 9/14/12 p12)(VRP 8/3/12 p9). Referring to the period "since the child's birth" clearly precedes that cutoff. Court Rule ER 104 gives the court authority to rule on admissibility of evidence :

Questions of Admissibiity Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibiilty of evidence shall be determined by the court...."

Once having made such ruling, the Court should apply it in an evenhanded manner. Rather than ruling such testimony inappropriate, the court instead included explicitly that language in its ruling of October 8 2012 ("Mother had been the primary parent since birth and the Petitioner, Mr. Reed, had been granted periodic visitation with the child")--after requiring that no such testimony would be allowed. When Petitioner attempted to object to Respondent testimony in violation of the Court's ruling, the trial court refused to accept the objection, and indicated that it would not be accepting any objections, depriving Petitioner of opportunity to preserve error for purposes of appeal. (VRP 9/14/12 p52) Petitioner requests that the Appellate Court disqualify testimony regarding the period before December 2008, consistent with the trial court's procedural ruling; and

that any portion of the trial court's ruling that relies on, or refers to, the Respondent's care for the child prior to December 2008 be reversed. Without such provision, the trial court has cited no basis upon which to award custody to the Respondent, and Respondent has offered none. Petitioner requests that the Appellate Court reverse the award of custody and grant it to Petitioner.

Petitioner supplemented his testimony with material submitted in writing on 9/19/12. It detailed the 2009 testimony related to the seven enumerated factors, including an Attachment A, which provided a comparative analysis of the testimony given by the respective parties in 2009, side by side. This comparative analysis revealed 2009 testimony in favor of the Petitioner on strength, nature and stability issues, that heavily favored the Petitioner both in terms of quantum of evidence, and was overwhelmingly in favor of the Petitioner in terms of depth, richness, detail, analytical quality, and specific relationship to the enumerated factors. Respondent provided no supplemental information in writing to the Court.

The Court's October 8, 2012, reaffirming its original decision granting primary residential status to the Respondent, utilized a rationale that relied on testimony clearly ruled inadmissible by the trial court. Moreover, though the trial court addressed the matter of which parent had held

primary custody during the period of the temporary plan, the court does not address the matter of which party demonstrated, by testimony and materials submitted, the greater strength, nature and stability of the relationship with the child. The length of time that a parent spends with a child is a fundamentally different thing than the strength, nature and stability of the relationship with the child, and a finding addressing the length of time spent cannot be said to address the strength, nature and stabiity. The findings were completely silent on the extensive, rich and detailed information submitted by the Petitioner on the seven enumerated factors, including the strength, nature and stabilty of his relationship with the child. A trial court must enter finding of fact on all material issues in order to inform the appellate court of what questions were decided and the manner in which they were decided. 125 Wn.2d 413, Federal Signal v. Safety Factors. The Appellate Court reviews a trial court's ruling on placement of children for an abuse of discretion. Marriage of Kovacs, 121 Wn.2d 795, 801,854 P.2d 629. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Kovacs, 121 Wn.2d at 801. The trial court's decision in this case, based simply on the input received in the proceeding that it designed and managed, together with written materials, is manifestly unreasonable, in

that it directly contradicts the character, weight and quality of evidence provided. Petitioner provided extensive, rich and compelling evidence directly addressing the enumerated factors; Respondent provided none. It is further unreasonable in that it accepts, relies on, and repeats in its ruling, testimony from the Respondent that is in direct violation of the trial court's ruling regarding admissible input. It is unreasonable for the trial court to conclude in the favor of the party who has provided little or no testimony or evidence that speaks directly to the enumerated factors, in support of its position; in the absence of supporting testimony or documentation, and in its reliance on testimony that violates the court's ruling regarding admissible evidence, the unreasonableness of the court's decision constitutes an abuse of discretion.

3. The trial court erred in failing to arrive at findings of fact regarding the likelihood of the Respondent seeking to relocate the child, away from the father, if Respondent is granted primary residential status.

The seven enumerated factors include several that underline the importance of continuing and extending the child's opportunity for development of her relationship with her father, as well as with her surroundings. Yet the Respondent has made it clear that there is significant likelihood that she intends to relocate with the child if she is awarded primary residential status. In materials presented to the court to

supplement oral testimony, Petitioner summarized testimony provided by the Respondent addressing her intent to relocate (this was September 2009 testimony):

Why have you not been employed since October of 2008?

Brown: My position was eliminated at Space Labs healthcare due to the recession and the budgets, and its been difficult to find work locally. I have received offers outside of the state of Washington for several positions, but due to this litigation, have been unsuccessful in accepting the position

Brown: In terms of my career, with the recession, it will be tough to go back and have a position that I've grown accustomed to, especially in Washington state since there's not many positions here. Being out of my field, research, when new technology goes on--and its quick and rapid--for almost a year is a bad thing. THE COURT: Counsel, I just want to make it clear: is this a relocation trial?(VRP 9/16/09 P 350--*reference provided for convenience of the Court--this was submitted to trial court on* 9/19/12, *but wihout vrp reference).*

Brown: I hope to be able to find employment. I look on a daily basis locally for a job. I'm either told that I'm over-qualified for a position, or due to budget cuts that they're not hiring. Currently some research projects have been halted by the pharmaceutical and the bio-med companies locally.

So you're not intending to take the child and try to move out of state on purpose?

Brown: Gosh, no. I relocated my parents here so they can be close to me, so moving out of state is not my first option. However, its difficult to find work here, and I need to be able to feed myself and my daughter. (VRP 9/16/09 P 351--*reference provided for convenience of the Court--this was submitted to trial court on 9/19 2012, but wihout vrp reference).*

Tell me all of your out-of-state travel for 2009.

Brown: It's all here in the deposition.

Tell me all your out-of-state travel for 2009.

Brown: January 2009, I went to a job interview.

Where did you go?

Brown: California

And how long were you gone?

Brown: Two days. (VRP 9/16/09 P 440--*reference provided for convenience of the Court--this was submitted to trial court on 9/19/2012, but wihout vrp reference).*

At the time of the 2009 trial, Brown's clear intent was to seek work out of state and actively consider relocating with the child. These proceedings had originally been initiated by the Petitioner in 2007 when, in fact, the Respondent had purchased a plane ticket to take the child to Chicago where the Respondent had a job waiting. That intent was transparent to the Appellate Court, which, in its May 2012 decision, said "Accordingly, in light of Brown's asserted desire to move her and THB to Chicago, it is especially important that the trial court carefully consider all the enumerated factors in RCW 26.09.187 (3)(a) in determining THB's primary residential parent." Yet the trial court has not demonstrated that it has considered this matter. The findings and conclusions of the court in its October 2012 judgment are completely silent on this issue, in spite of the

detailed material summarized above that was submitted to the trial court. A trial court must enter findings of fact on all material issues in order to inform the appellate court as to what questions were decided on by the trial court, and the manner in which they were decided. 125 Wn.2d 413, Federal Signal v. Safety Factors.

Several of the enumerated factors of 26.09.187 (3) (a) i-vii are relevant to the question of relocation of the child. In addressing the strength, nature and stability of the respective relationships, Factor i.) underlines the importance of stability in the child's circumstances. There can be few greater instances of instability than rendering the child asunder from her father, from established relationships, from sources of stability and nurture--few greater examples than the removal of the child from the state as clearly intended by the mother. Factor v.) addresses the child's relationships with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities. To abruptly relocate the child, away from father, family, friends, school, support networks, recreational and developmental pursuits--clearly would be against the best interests of the child, and would be contrary to this factor. In her brief life, TBR has become an

accomplished skier in excursions with father through trips to Crystal Mountain; they also frequently kayak on Puget Sound. Those opportunities are unlikely to be available through a relocation. Factor iv.), the emotional needs and developmental level of the child, again requires the continuation of the support base that has grown around the child. As demonstrated by the testimony of Christin Larue, even at two TBR had come to see the father as a secure base, and showed a secure attachment. TBR has an attachment to her room at her father's home, and to the toys and items that he has provided her; she demonstrated "claiming" behaviors to these things, according to Dr. Larue. To remove her from this environment would clearly violate factor iv). In sum, the enumerated factors argue that, where there is a clear likelihood of removal of the child from the state by one parent, that any reasonable consideration of the seven enumerated factors by the court must show some level of consideration of this question, in order to demonstrate a meaningful analysis. The appellate court so admonished the trial court. Yet the trial court's analysis reflected no consideration of this matter. The failure to address the matter is contrary to the court's precedent in Federal Signal v. Safety Factors, and is thus untenable. The Appellate Court reviews a trial court's ruling on placement of children for an abuse of discretion.

Marriage of Kovacs, 121 Wn.2d 795, 801,854 P.2d 629. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Kovacs, 121 Wn.2d at 801. The trial court's action to ignore the Appellate Court's direction to give consideration to this question is manifestly unreasonable, and constitutes an abuse of discretion.

4. The trial court erred in its interpretation of the Appellate Court decision of May 2012, in failing to carry out the Appellate Court mandate to undertake an independent review of the issues.

In its May, 2012 decision, the Appellate Court indicated that the trial court had erred in treating the primary residential parent designation made in a temporary parenting plan as a final designation, and directed the trial court to use its own discretion and judgment in designating the primary residential parent in the final parenting plan. The Appellate Court reversed the trial court's designation of primary residential parent, and remanded to the trial court to "make its own independent determination on this issue". At the September 2012 proceeding, Petitioner described to the trial court in detail the unfortunate process (VRP 9/14/12 p 23)--relying on input from the Respondent--that led to the trial court's understanding that the Armijo Court had made a final decision on custody. Rather than

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construct a process to correct that error that would reexamine the assignment of primary residential status, utilizing the seven enumerated factors--the trial court's comments suggest that it intended to to simply attach the seven factors to its original decision. There is nothing in the record indicating that the trial court undertook a review of its 2009 court proceedings that led to the Appellate Court reversal. Yet the trial court, on remand, appears to see its responsibility as simply attaching to its original decision, language addressing the seven factors:

THE COURT: The other issue was the fact that I needed to make Findings of Fact and Conclusions of Law, I believe, in regards to the decision that I made. They were not disputing my parenting plan, but they -- because the Findings of Fact and Conclusions of Law were not entered at the time as to why or what the basis was for my parenting plan, they wanted me to do Findings of Fact and Conclusions of Law.
I will stand corrected by counsel since I was wrong on the memory of counsel, but I think the court wasn't requiring me to retry the case. It was just asking me to state a basis for the decision that I did make in terms of the parenting plan. (VRP 6/15/12 3)

...I think what I'm going to have to do is just simply look at the transcript and come up with some Findings of Fact and Conclusions of Law as to why I did what I did, unless I'm misinterpreting the Court of Appeals decision about retrying that issue (VRP 6/15/12 4).

...So far, other than the child support order, I'm trying to find where the Court of Appeals wanted me to do something regarding the parenting plan (VRP 6/15/12 7).

...I know it tells me I need to go back and incorporate these into a decision because I didn't articulate 26.09.187(3)(A) factors.

"In regards to the -- I think it's clear from the Court of Appeals that they want me to enter Findings of Facts and Conclusions of Law, based on the RCW submitted, as to why I entered the parenting plan that I did based on hearing the evidence I did (VRP 6/15/12 11).

However, simply attaching a rationale after the fact of the decision falls short of the Appellate Court's direction. The Appellate Court ruled that the Armijo Court did not make a final decision. The Appellate Court's reversal of the custody designation clearly placed the decision process at the starting point. The trial court's assumption that the Armijo Court did make a final decision, and choice to simply affirm a decision that was not made in its 2009 ruling, left the case in a no-decision status. An after-the-fact rationale in support of a no-decision, falls short of the Appellate Court's direction to the trial court to make an independent judgment based on the seven enumerated factors.

Moreover, the trial court addressed the respective issues of child support and primary residential custody in a fashion that is highly suggestive of a predetermined decision on primary residential designation. Any decision on child support is necessarily contingent on a ruling on custody; that is, the non-custodial parent pays the custodial parent. Worksheets, for example, explicitly require an understanding of which parent is to be primary residential parent, in order to complete the required information

entries and to perform the calculations. To the extent that the court signals that it will require information on financial status related to child support, such as worksheets, prior to or contemporaeous with determining primary residential status, it is signalling that there is an assumption in place regarding primary residential placement--and that the parties should prepare worksheets based on that assumption. The record provides no evidence--through court comment, through timing of requirements for financial documents, or otherwise--that the court considered that it would need to make a decision on primary residential status before making a decision on child support:

"Well, here's what I'm going to do. First of all, I've got to enter a child support order. I'm not going to enter it as to their financial conditions currently. I have to go back as if the support order was going to be entered on the day of trial. So, at a minimum, I want you each to provide me with paystubs and worksheets and financial information that you want me to consider in regards to making a child support order. I chose to keep the 2007 order in place. My problem was I didn't have anyone draft up an order reflecting that at the time...
...In regards to the--I think its clear from the Court of Appeals that they want me to enter Findings of Fact and Conclusions of Law...as to why I entered the parenting plan that I did based on hearing the evidence that I did..."(VRP 6/15/2012 p11)

This discussion of child support came before the trial court had made a decision on--or even made a clear decision on the process that it would utilize to address--the Appellate Court's requirements regarding primary residential status.

Further evidence of the court's disinclination to come to an "independent judgment" as regards the issue of primary residential designation comes in its treatment of events and evidence for the period following the 2009 ruling. There was a period of more than two years between the November 2009 ruling of the trial court, and the May 2012 decisiion of the Appellate Court, which remanded the case back to the trial court. Where there is a final ruling in place, state law (RCW 26.09.260) provides for a process whereby, when there is a substantial change in conditions, a non-custodial parent may seek a modification in the parenting plan, after having demonstrated that such substantial change has occurred. That process is confined specifically to cases where a final parenting plan is in place.

RCW 26.09.260 "...the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child...."

Yet the trial court, in describing how the parties were to address events and developments after the trial court's 2009 ruling, indicated that the parties had access to the "modification" process addressed by the code.

"I think anything that's happened since I made my initial ruling is potentially grounds for a modification if there's enough there to get through adequate cause, but there's no directive from the Court of Appeals

to me to reopen and re-discuss anything that's occurred from the date of decision till now. That's grounds for potential modification. By saying that, I make no judgment on that one way or the other, but that to me would be the proper basis to go forward." (VRP 8/3/12 P10).

The court's reliance on this section of code indicates the court's understanding regarding the circumstances under which such modification proceedings apply--where there is a prior custody decree or parenting plan in place. This approach strongly suggests that the trial court undertook to proceed on the assumption that a final decision was in place, and its only role was to attach an enumerated factors analysis to such decision.

The Appellate Court should consider the context of these Conclusions of Law reached by the trial court. The Appellate Court has confirmed that the trial court, in its 2009 consideration of this matter, did not consider the seven enumerated factors in its decision process at that time. Further, the trial court specifically defined the parameters of the case to be about child support, visitation, and attorney's fees (order in limine).

It is clear from the comments of the trial court that it never embraced the Appellate Court's direction to reach an "independent judgment" regarding primary residential designation--but rather constructed a rationale intended to attach a discussion about the enumerated factors to an existing, undisturbed ruling. It is appropriate for the Appellate Court, in light of the untenable, unreasonable actions of the trial court, to reverse the trial

court's ruling, to apply the law as required, to implement its May 2012 ruling requiring application of the seven enumerated factors, and to award the Petitioner primary residential status.

5. The trial court erred in basing its ruling regarding primary residential status on a factual error--that the Petitioner did not have overnight visitation with the child.

The trial court's October 2012 decision is based heavily on the understanding of the predominance of time that the respective parents had with the child. The Court notes as follows in its decision:

"Mr. Reed, as a result of concerns regarding health issues (sensory integration), had not had overnight visitations for any substantial period and had seen the child mostly on day visits only."

In March of 2009, after years of requests, the trial court awarded the Petitioner overnight visitation on alternating Tuesdays, and Saturday overnight to Sunday evenings on alternating weekends. It is factually incorrect to indicate that Petitioner had not had overnight visitations for any substantial period and had seen the child mostly on day visits only. To the extent that the trial court's ruling relies on this factual error, the ruling is untenable.

The Appellate court reviews a trial court's ruling on placement of children for an abuse of discretion. In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable or is base on untenable grounds.

Moreover, the trial court, while noting that the mother was unemployed, indicates that the mother was available almost fulltime to care for the child.

"...the Court does not believe the mother was employed and, therefore, had availability to provide almost fulltime care for the child."

The mother has been the sole owner of a dance business since prior to 2005, through today. The business features classes three or four nights weekly, weekend gatherings and events, as well as group excursions and activities. It is marketed on the web, and by means of postings and flyers. The Respondent, as sole proprietor, is responsible for the success of these various events, as well as for planning and organizing, materials and equipment, transportation of participants, and related functions. She is not, and has never been, available to provide fulltime care for the child; during prior periods of employment, and presumably in periods following the 2009 ruling, she both managed and operated the business, and engaged in fulltime work--and was thusly available significantly less. In 2009, she

frequently was not present for exchanges of the child with the petitioner, but asked others to conduct the exchanges. Petitioner was frequently directed to pick up the child from the homes of third parties--some of whom were unknown to the Petitioner--with whom the child had been staying. Respondent took at least two out-of-state trips in 2009, leaving the child behind; and on two occasions, during periods when the Respondent was responsible for the child, but the Respondent was not present, the child experienced significant injuries--both resulting in hospital visits. Petitioner has never been absent for an exchange, and has spent each available minute with the child, with exceptions only for work. Moreover, prior to the initiation of court action when the child was an infant, Petiitoner frequently stayed overnight with the child at the home of the mother, and frequently cared for the child while the mother was absent in order to attend to the demands of her business. To the extent that the trial court relies in its decision on an understanding of almost fulltime care for the child by the Respondent, the decision is based on an incorrect understanding, and is therefore untenable.

The Appellate court reviews a trial court's ruling on placement of children for an abuse of discretion. In re Marriage of Kovacs, 121 Wn.2d 795, 801,

854 P.2d 629 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable or is base on untenable grounds.

6. The trial court erred in equating length of time spent with the child to the bond with the child.

The trial court's decision includes the following language:

"The Court finds, at the time of trial, that the child had a much more bonded relationship with the mother than the father due to the lack of consistent visitation."

The trial court is presuming, in its conclusion, that the quantum of time spent with a child equates directly with the bond with the child. But there are many relationships that continue for extended periods, but that feature weak, shallow, troubled or inconsistent bonds. There are also many relationships where the parties--parent/child, or otherwise--may see each other less frequently, but that are characterized by a strong bond. It is factually incorrect to assume that a longer relationship is a stronger relationship. Petitioner raised this issue in his Motion for Revision of October 18, 2012; it was also raised in testimony on that motion on October 26, 2012 (VRP 10/26/2012 p2). A judgment arrived at by means of a fundamentally wrong theory and lacking any findings supporting the proper theory may be reversed on appeal. 86 Wn.2d 156, Local Union 1296, international Association of Firefighters v. City of Kennewick

Petitioner established by extensive testimony and evidence, in fact, that the strength, nature and stability of his relationship with the child were substantially greater than that between the mother and the child--despite extensive and improper efforts by the Respondent--as concluded by the trial court--to interfere with and restrict that relationship.

The Appellate court reviews a trial court's ruling on placement of children for an abuse of discretion. In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable or is base on untenable grounds.

The trial court's reliance on a presumption that equates the calendar time of a relationship with the strength of a relationship results in a decision that is based on a flawed presumption, and is therefore manifestly unreasonable and untenable, and constitutes an abuse of discretion.

7. The trial court erred in its failure to consider written materials submitted that provided evidence as to Respondent's efforts to restrict visitation by the father; the mother's failure to perform parenting functions; the abusive use of conflict by the mother; and the February 4, 2009 declaration regarding Respondent's domestic violence.

On September 19, 2012, Petitioner submitted supplemental written materials addressing key issues pertaining to the period identified the Court as appropriate for consideration. In particular, the Petitioner

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described earlier court findings regarding the Respondent's efforts to limit standard visitation by the Petitioner . That effort violates RCW 26.09.191 (3), indicating that such action may have an adverse affect on the child's best interests. There was no evidence presented contradicting this point. The materials further addressed earlier court findings confirming that the mother failed to address the child's health care needs through her failure to keep the child enrolled in occupational therapy, and how that failure demonstrates the Respondent's performance regarding enumerated factor 26.09.187 (3) (a) iii, past and potential for future performance of parenting functions. There was no evidence presented contradicting this point. The materials further addressed an incident near Northgate Mall, demonstrating the Respondent's abusive use of conflict, and placement of the child in a position of extreme emotional stress. There was nothing submitted contradicting this point. The materials further described a February 4, 2009 declaration to the court by the Petitioner addressing the Respondent's pattern of domestic violence against Petitioner. There was no evidence presented contrary to this information. The provisions of RCW 26.09.191 require the court to restrict the provisions of the parenting plan where there is a pattern of domestic violence; the materials submitted demonstrate a pattern of incidents by the Respondent, occurring over time.

The material further demonstrates the instability of the Respondent's lifestyle; and speaks to the enumerated factor 26.09.187 (3)(a)i, addressing the strength, nature and ***stability*** of the petitioner's relationship with the child. There was nothing submitted by the Respondent to contradict this information. The material further described, in tabular form, the significantly stronger testimony and evidence demonstrating the Petitioner's performance on the seven enumerated factors as compared to the Respondent's performance. There was nothing submitted which contradicted this information. Finally, the material included a comparative analysis of the testimony and information relative to the parties' strengths as parents--demonstrating, again, the overwhelming weight in favor of the Petitioner regarding abilities as parent. Again, there was nothing presented by the Respondent to counter this.

The trial court, in its findings, however, did not address any of this material, not even to dismiss it.

8. The trial court erred in its award of attorney's fees to the Respondent's attorney in response to Petitioner's Motion for Revision of October 18, 2012.

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On October 8, 2012, the Court issued its Amended Findings of Fact and Conclusions of Law, confirming its earlier ruling on primary residential designation. The ruling was not issued with the parties present; the Court mailed the ruling to the Petitioner, who received it two days later. There was no opportunity to offer objection in person, requiring the Petitioner to file a Motion for Revision to preserve error in case of appeal. Petitioner did so, filing such motion October 18, 2012. Petitioner emailed Respondent's attorney, on October 18th, providing her with a copy of the motion, and saying "Filed this morning. If this date is a problem, please let me know." Not hearing from the Respondent's counsel, Petitioner sent another email on October 22, four days later, asking her to confirm receipt, in that I had not heard from her. There was no response. Finally, Petitioner called Counsel's office, and the receptionist confirmed that she had received the email. The motion was set for the October 26, 2012 calendar. On the morning of October 26, before the 9 a.m. hearing, Petitioner happened to look at the Pierce County LINX system and, for the first time, saw that an Affidavit/Declaration of Respondent had been filed. Among other things, the Declaration requested $1500 in attorney's fees. Petitioner checked his email and confirmed that nothing had been sent to him from the office of Counsel. Petitioner attended the hearing, and

offered testimony regarding the Court's Amended Findings of Fact and Conclusions of Law. Petitioner described a list of objections to the ruling and the reasons for them.

Respondent's Counsel indicated support for the court's ruling, and requested attorney's fees. The Court awarded attorney's fees of $500, and directed the parties to work together to fill out an order. After several other unrelated motions were heard by the court, the court returned to the matter of the Respondent's response and request for attorney's fees. Petitioner referred to court rules (VRP 10/26/12 p11) that require as follows (PCLR 7(a)(4):

No motion shall be heard unless proof of service upon the opposing party is filed or there is an admission of such service by the opposing party. The court may also, in its discretion, impose terms upon the offending party.
(5) Opposing Papers. Any party opposing a motion shall file and serve responsive papers in opposition to a motion not later than noon, two court days before the date the motion is scheduled for hearing.
(6)**Reply.** Any papers in strict reply shall be served no later than noon, one court day before the date the motion is scheduled for hearing.

The requirement that an opposing party file responsive papers not less than two days before the motion was scheduled for hearing was clearly violated in that the Respondent's motion was filed on October 25, 2012, according to the LINX system, and the proceeding was held October 26,

2012. As noted, Respondent's Counsel made the claim to the court that 1) Petitioner had not consulted her on the date, and 2) that her staff emailed a copy of the motion to Petitioner. Both are factually incorrect. Petitioner produced an email for the court's perusal wherein he specifically asked whether the date was ok; Petitioner did not receive a reply. Petitioner also provided to the court a followup email, asking whether the first email had been received--again, no reply. Finally, he called the office of the Respondent's Counsel, and received confirmation that she had received the emails (VRP 10/26/2012 p13). Contrary to the rules cited above, no affirmation of service of the motion of October 25, 2012 was filed by the Respondent's counsel with the clerk or presented to the court, and the court requested no affirmation of service; no copy of the alleged email sent by staff was provided to the court by Respondent's counsel. Rather, Counsel refers to a motion that she claims was filed on 27 September, 2012, and indicates that it is identical to the motion of October 25, 2012 (VRP 10/26/2012 p12) The LINX system shows a September 27 2012 motion which was filed by the Petitioner, --nothing filed by the Respondent on that date. Petitioner is aware of no motion filed by the Respondent in 2012 which is "identical" to the October 25 motion. Had there been such an identical motion, service of such motion would not

relieve the Respondent of the requirement that she serve the specific motion in question, filed with the clerk on October 25, 2012, on the Petitioner. Failure to do so, and failure to file the October 25, 2012 motion two days before the court proceeding as required by court rules cited above, prevented Petitioner from providing a response one day prior to the court proceeding, as provided in the rules cited above.

Rather than sanction the Respondent's Counsel for failing to serve Petiitoner with the motion, or for failing to file the motion two days prior to the proceeding as required by Court rules, and even in light of emails handed to the court, demonstrating the falsity of Counsel's contention that Petitioner failed to consult her on timing of the hearing, the Court indicates that Petitioner is asking for "some offset on the attorney's fees based on the late filing of your response" (VRP 10/26/2012 p16-17). Petitioner did not ask for "some offset"; Petitioner challenged the propriety of the award of attorney's fees altogether, given the irregularity of the Respondent's Counsel's late filing, failure to serve the Petitioner, and reliance on having served Petitioner with some other motion on some other date.

Petitioner requests that the Appellate Court reverse the award of attorney's fees by the trial court on October 26, 2012, in light of the irregularity of the proceedings, the improper claims by Counsel, and the violations of Pierce County Local Rules as cited.

A trial court must enter findings of fact on all material issues in order to inform the appellate court as to what questions were decided on by the trial court, and the manner in which they were decided. 125 Wn.2d 413, Federal Signal v. Safety Factors. The trial court's failure to address these material matters constitutes an abuse of discretion, and supports the reversal of the Court's decision in this matter.

CONCLUSION

The litigation has extended for almost all of the now-six-year-old child's young life--specifically as a result of the challenged procedural path at the trial court level, the original, and recent, judgments of the court, and the tactics of the Respondent. While the case has been carried at great expense and burden to the Petitioner, most critically the impact has been to the child, who has suffered from the continuing deprivation of the love and support and development she is due, as demonstrated by the extensive trial evidence--at this most critical juncture in her life. The demands of justice

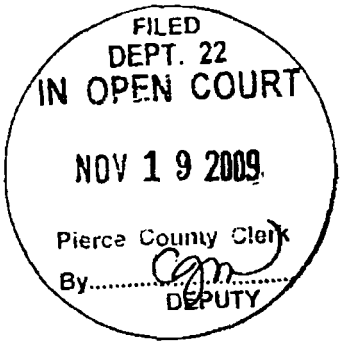
call upon the Appellate Court to speed these proceedings toward a just conclusion, to examine the evidence in the case, apply the law and court precedent, and to reverse the trial court and grant primary residential status to the Petitioner--in light of the trial court's challenged history on these questions. Continuing referral of the case back to the trial court for another years-consuming opportunity to attempt to meet the demands of the Appellate Court, the Supreme Court and the RCW, is profoundly unjust and contrary to the child's best interests. Any remand back to the trial court should be for the limited and exclusive purpose of addressing visitation and child support provisions. In case of such limited remand, Petitioner requests detailed, clear and robust instructions to the court specifically on the question of visitation and child support, particularly in light of the challenges in the previous review. Petitioner asks that those instructions direct the court to give appropriopriate weight to provisions of the law requiring whether one party or the other has engaged in abusive use of conflict, in denying reasonable access to the child to the other party, and in contempt of court.

Petitioner requests that the Appellate Court disqualify testimony regarding the period before December 2008, consistent with the trial court's procedural ruling; and that any portion of the trial court's ruling that relies

on, or refers to, the Respondent's care for the child prior to December 2008 be reversed.

COSTS

Petitioner requests that he be awarded costs for legal expenses and charges associated with bringing this case to the Appellate Court for the second time. Costs should include costs for preparing brief, clerk's papers, filing fee, transmittal of the record on review, reproduction costs, preparation of report of proceedings, and other appropriate costs.



Superior Court of Washington
County of Pierce

In re Parentage: Tuscany H. Brown Reed Clyde Mike Reed Petitioner, and Catherina Y. Brown Respondent	**No. 07-3-03417-9** **Supplemental Findings of Fact and Conclusions of Law**

I. Basis for Findings

The findings are based on:

[ ] agreement.
[ ] an order of default entered on _____ [Date].
[X] trial held on September 14-17, 2009

The following people attended:

[X] Petitioner [X] Respondent
[X] Petitioner's Lawyer [X] Respondent's Lawyer
[X] Other: Witnesses called by both parties.

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II. Findings of Fact

Upon the basis of the court record, the court ***Finds***:

2.1 Any sensory integration disorder of the child in this case is not a childhood disability.

2.2 The mother has used the sensory integration issue as a means to prevent the father from having standard visitation with the child.

2.3 ~~The mother has been inconsistent with the~~ There was no miscommunication, as was claimed by the mother, regarding her failure to keep the child enrolled in occupational therapy.

2.4 Contrary to the assertions of the mother, there have been no bad faith or intentional violations of any court order by the father between December 2008 to the present.

2.5 Actions by the father, while this case has been before Judge Hickman were not manipulative, controlling, or an extension of any pattern of domestic violence.

2.6 If a protection order is to be extended it shall not be on the grounds of anything that has happened over the last ten months.

2.7 There is no evidence in the record to support any restriction on the father's visitation including the records and decisions issued by Judge Armijo. The opposite is true.

2.8 There are no 26.09.19 restrictions but if either parent ~~using~~ uses false pretenses to limit visitation or create conflict they could suffer dire consequences.
The child shall not be left alone with the maternal grandmother due to her lack of mobility.

2.9 The child has a strong, loving relationship with both parents. Neither parent relationship with the child causes concern.

2.10 Other:
The lack of overnights did not damage the father/child ~~bond~~ bond

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III. Conclusions of Law

The court makes the following conclusions of law from the foregoing findings of fact:

3.1 Any sensory integration issues of the child is not a basis for any restriction on the father's visitation with the child.

3.2 There is no other basis for restrictions on father's visitation time with the child.

3.3 Any and all protection orders and restraining orders between the parties shall be amended to allow for communication and contact as necessary for the effectuation of the parenting plan, including:

a. email communication pertaining to parenting issues including scheduling, information sharing, joint decision making, etc.

b. pick-ups and drop-offs by the father from the mother's residences.

c. calls to the mother by the father on her cell phone regarding late transfers of the child

3.4 Each party shall pay their own attorney's fees.

3.5 Father will be given credit on child support payment for full payment of transcript from this proceeding.

3.6 There are no 26.09.19 restrictions at this time.

3.7 Other:

FILED
DEPT. 22
IN OPEN COURT
NOV 19 2009
Pierce County Clerk
By ..... DEPUTY

Dated: 11/9/09

Judge Hickman

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Presented by:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Parentage and Support of T.H.B., Child, CLYDE REED, Petitioner and Cross-Respondent, and CATHERINA BROWN, Respondent and Cross-Appellant.	No. 40119-3-II UNPUBLISHED OPINION
CATHERINA YVETTE BROWN, Respondent, v. CLYDE HARRISON REED JR., Appellant.	(Consolidated with No. 40122-3-II)

QUINN-BRINTNALL, J. — This case involves a consolidated appeal and cross appeal of a parenting plan and child support order (No. 40119-3-II), and a domestic violence protection

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order (No. 40122-3-II). Clyde Reed[1] challenges the entry of a protection order, the primary residential parent designation in a final parenting plan, an evidentiary ruling, and several findings of fact and conclusions of law. Although some of Reed's challenges lack merit, we find that the trial court erred in treating the primary residential parent designation made in a temporary parenting plan as a final designation. Accordingly, we remand this case to the trial court with direction that the court should use its own discretion and judgment in designating the primary residential parent in the final parenting plan as required by RCW 26.09.187(3)(a).

Catherina Brown's cross appeal challenges the trial court's decisions denying modification of a child support order and her attorney fees request. Because the trial court did not enter a final child support order, we cannot review Brown's alleged error. We remand for entry of a final child support order. In addition, we hold that the trial court did not err in denying Brown's request for attorney fees below and we deny her attorney fees request related to her cross appeal.

FACTS

Reed and Brown began dating in February 2005. Around July 2006, the couple conceived a child. Reed obtained health insurance coverage for Brown and provided her with significant financial support during her pregnancy. On February 14, 2007, Brown gave birth to a girl, T.H.B.[2]

After T.H.B.'s premature birth, Reed and Brown's relationship effectively ended. Reed continued to provide Brown with financial support, such as paying her mortgage and noncourt-

[1] Reed also goes by the name "Mike Reed." 3 Clerk's Papers (CP) at 424.

[2] T.H.B.'s birth certificate listed her last name as "Brown" and did not identify her father.

ordered child support. Brown agreed that Reed could see T.H.B. several times a week. In early August 2007, Brown told Reed that she intended to move to Chicago and relocate T.H.B. because of a job offer.

On August 10, 2007, in King County Superior Court, Reed objected to Brown's relocation of T.H.B. Eventually, the parties agreed to transfer Reed's case to Pierce County, where Brown and T.H.B. lived. Before transferring the case, King County Superior Court entered a temporary order identifying Brown's home as T.H.B.'s primary residence and establishing a visitation schedule for Reed. This order was to remain in effect until proceedings occurred in Pierce County. On October 10, the King County Superior Court completed the transfer of Reed's case to Pierce County.

Meanwhile, on August 14, in Pierce County Superior Court, Brown obtained a temporary domestic violence protection order (TPO) preventing Reed from having contact with her and T.H.B. Brown cited recent in-person and telephone interactions as grounds for the TPO, alleged past instances of physical abuse against her, and raised safety concerns for T.H.B. related to Reed's parenting decisions, such as allegedly taking a five-month-old child canoeing without a life jacket. On September 26, Pierce County Commissioner Marshall granted a one-year TPO, but provided that Reed could visit with T.H.B. in accord with the visitation schedule entered by King County Superior Court until a Pierce County family court ruled in Reed's case.

In family court, on November 1, Pierce County Commissioner Foley entered a temporary order that included (1) mutual restraining orders, (2) a temporary child support order that Reed

pay Brown $730 a month, (3) a temporary residential schedule/parenting plan,[3] (4) a prohibition on T.H.B. being removed from the State by either parent, and (5) a requirement that Brown file a paternity affidavit within seven days. On December 4, the family court appointed Kelly LeBlanc as T.H.B.'s guardian ad litem (GAL).

On May 21, 2008, Reed asked the family court for modifications to his visitation schedule. He also asked the family court to hold Brown in contempt for not complying with the November 1, 2007 temporary parenting plan terms, not filing the paternity affidavit, and not submitting to an evaluation with the GAL. The family court modified the temporary residential schedule giving Reed more visitation time, but reserved judgment on Reed's contempt motion. Brown responded to Reed's contempt allegations with her own allegations of Reed's lack of cooperation with the temporary parenting plan and paternity affidavit process

On July 29, the family court made minor revisions to Reed's visitation schedule. This order also included additional instructions on the filing of a paternity affidavit. The family court also amended the November 1, 2007 restraining orders to allow Brown and Reed to have contact at settlement conference proceedings. A three-day settlement conference in September 2008 did not succeed in settling the matter.

On September 25, 2008, Brown requested a renewal of the TPO in her domestic violence case. The superior court extended Brown's TPO through October 10, 2009.

On October 10, October 15, and November 5, 2008, Reed again proposed modifications to the visitation schedule and asked the family court to hold Brown in contempt for violating court orders and failing to comply with discovery requests. Reed sought overnight time with

[3] Commissioner Foley's temporary order incorporates by reference a temporary residential schedule/parenting plan that is not in our record.

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T.H.B. every weekend. He provided the family court with a home study report and a parenting program certificate of completion.

On November 19, the family court again made minor revisions to Reed's visitation schedule and ordered the GAL to provide more information about possible overnight residential time for T.H.B. with Reed. The family court reserved judgment on Reed's requests for discovery sanctions.

On December 2, 2008, the family law case proceeded to trial in Pierce County Superior Court before Judge Armijo. Reed testified about his relationship with T.H.B. and providing her care. Reed also testified that the GAL inspected his home for safety concerns and the only change she encouraged was the addition of a fence between his house and a lake. Reed stated that he planned to install a fence when the weather got better.

Reed described his relationship with Brown as a typical one with disagreements over things like laundry, errand running, and arriving to social events late. Reed called family and a prior girlfriend as character witnesses. These witnesses testified about Reed's excellent parenting skills and his tendency to react to anger by becoming "withdrawn [and] just kind of get[ting] quiet." Report of Proceedings (RP) (Dec. 2, 2008) at 55.

Judge Armijo examined Reed as part of the proceeding. At one point, he asked Reed, "What is it you want? I need to find out, what is it you want?" RP (Dec. 4, 2008) at 53. Reed responded,

> I would like to be a father to my daughter. That means I want a lot of time with her. I want to be in a position to guide her, to support her, to have fun with her. If I can get that in a legally noncustodial environment and I can get assurance that she's not going anywhere, that would be okay. But what I would really like is the ability to guide and influence my daughter throughout her young life. I would like custody. I would like custody.

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RP (Dec. 4, 2008) at 53-54. Reed repeated his wish to be T.H.B.'s custodial parent multiple times throughout the proceedings.

Brown testified and alleged a pattern of Reed's domestic abuse and violence. Brown blamed Reed's relocation petition for her lost employment opportunity when she could not move. Brown testified that her main concern for T.H.B. was overnight visitations with Reed because of safety concerns.

On December 8, 2008, Judge Armijo ruled from the bench. Before a lunch recess, Judge Armijo stated that T.H.B. should have substantial overnight residential time with both of her parents. But after reconvening, Brown argued that an occupational therapist and the GAL expressed a need for stability in T.H.B.'s schedule and that any changes should be gradual. Judge Armijo then decided to gradually increase Reed's visitation time and work towards residential overnights. Judge Armijo entered several written orders that same day. First, Judge Armijo entered a new temporary parenting plan. This temporary parenting plan designated Brown as T.H.B.'s custodial parent and granted Reed visitation time two evenings a week, every other Saturday, and every Sunday. Judge Armijo expressly provided for a review of the parenting plan on April 17, 2009.

Judge Armijo also entered a "Judgment and Order Determining Parentage and Granting Additional Relief." 2 Clerk's Papers (CP) at 378. This judgment declared that Reed is T.H.B.'s father, provided that T.H.B.'s last name would be "Brown-Reed," and assigned Brown as

T.H.B.'s primary residential parent.[4] 2 CP at 379-80. This order did not include any restraining orders, but it expressly directed that the TPO in Brown's domestic violence case be "modified in conformity with the temporary parenting plan."[5] 2 CP at 383. Finally, this order stated that Reed would be required to pay child support in accord with a separately-filed child support order.[6]

Over the next several weeks, the parties filed multiple motions in the family law case. Brown filed a reconsideration motion; Reed filed a motion to hold Brown in contempt and proposed revisions to the temporary parenting plan, again seeking residential overnight time with T.H.B.

On January 16, 2009, the family law case was reassigned to Judge Hickman.[7] On March 6, the trial court considered Reed's proposed parenting plan revisions. Ultimately, the trial court revised the parenting plan and granted Reed overnight residential time one night a week. The trial court decided that there was no evidence that T.H.B.'s health or safety was jeopardized while she was with Reed and that T.H.B.'s best interests were served by limited overnight visitations with her father.

[4] Reed alleged that when Brown signed the trial court's order, she also fraudulently changed the designation of T.H.B.'s last name. The order contains strikethroughs of "Reed" both times T.H.B.'s last name is written in the order. Only the initials "CB" appear next to the redactions. Brown denied altering the order.

[5] Brown filed a motion to modify the TPO in her domestic violence case per Judge Armijo's order, but a week later she withdrew the motion.

[6] A child support order signed by Judge Armijo is not in the record on review.

[7] All subsequent references to the "trial court" in these facts refer to actions taken by Judge Hickman unless noted otherwise.

In July 2009, Brown requested a temporary order requiring Reed to pay for daycare expenses, pay her attorney fees, and change the visitation exchange location. Also, in her domestic violence case, Brown received an extension of her TPO, making it valid through March 23, 2010.

On September 14, 2009, the trial court began a second trial on the parenting plan and child support issues. Although the parties asserted that Commissioner Foley's November 1, 2007 child support order was a final order, Reed had complied with it, and no party had challenged it, Judge Hickman refused to treat a document titled "Order of Child Support (ORS) Temporary" as a final order in the absence of any evidence of Judge Armijo's intent to adopt it as a final order.

In addition, the trial court considered several motions in limine. Relevant to this appeal, Brown moved to confine the evidence to events that occurred since the December 2008 trial. She argued that Judge Armijo's primary residential and custodial parent designations were final determinations and that res judicata barred review of any nonvisitation issues in the parenting plan. Reed agreed to Brown's limiting motion, noting that his "only exception would be if something was opened up that required that we needed to go back in time." 3 RP at 53. The trial court granted the motion, stating that it had an extensive record of events up through the December 2008 trial for its review and that it desired to hear information about events since that trial

At this second trial, Reed presented multiple witnesses and testified himself. In general, Reed presented evidence about his relationship with T.H.B., their routine when she visits, and his financial and home circumstances. He also introduced evidence about baby-proofing his home.

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Brown presented multiple witnesses and testified herself. In general, Brown presented evidence about her relationship with T.H.B., her mother's help in caring for T.H.B , and precautionary safety measures in her home. Brown testified about the financial strain, including filing for bankruptcy that she experienced related to this litigation and her inability to accept employment offers because she cannot relocate T.H.B. She described between $10,000 to $19,000 in debt for attorney fees and a $2,192.98 lien on her home associated with these costs.

Finally, Brown testified that she agreed that T.H.B.'s best interests were served by having some residential time with Reed. She stated that ideally Reed would have T.H.B. every other weekend and a midweek visit. Brown expressly testified that she did not have "any problems with [Reed's] parenting." 5 RP at 371.

Last, the trial court heard testimony about T.H.B.'s alleged sensory deficit problems. Reed testified that an occupational therapist described, but did not diagnose, T.H.B. as having problems coordinating information obtained from her senses. An occupational therapist testified about T.H.B.'s recent therapy experiences and the impact of sensory development problems. T.H.B.'s pediatrician provided expert testimony about T.H.B.'s good health and sensory development problems that make it hard for T.H.B. to interact correctly with her environment.

On October 2, Reed moved for the trial court overseeing Brown's domestic violence case to terminate the TPO based on his good behavior during the September family law case proceedings. The resolution of Reed's motion in the domestic violence matter is not in our record.

On October 9, the trial court issued rulings from the bench. Then, on November 19, the trial court reduced its decisions to writing in multiple orders. The trial court ordered Brown to change T.H.B.'s last name to Brown-Reed and to have the TPO in her domestic violence case

modified to conform to the findings of fact and conclusions of law entered in the family law case. The trial court also ordered Reed to pay child support, but a final child support order is not in the record on review.

The trial court also entered a final permanent parenting plan designating Brown as the custodial and primary residential parent but granting Reed substantial residential visitation rights. The parties were required to pursue mediation before returning to the trial court if any disputes over the parenting plan occurred.

The trial court also entered "Supplemental Findings of Fact and Conclusions of Law." 4 CP at 618. The trial court found that T.H.B. did not have a childhood disability and that Brown had used the alleged sensory deficit disability "as a means to prevent [Reed] from having standard visitation with [T.H.B.]." 4 CP at 619. The trial court also found that Reed had not intentionally violated or acted in bad faith on any of the trial court's orders since December 2008. Moreover, based on its observations at trial, the trial court found that Reed's actions were "not manipulative, controlling, or an extension of any pattern of domestic violence." 4 CP at 619. The trial court also found that no evidence, including Judge Armijo's decisions and the record before him, supported restrictions on Reed's visitation rights; in fact, "[t]he opposite is true." 4 CP at 619. The trial court ordered the parties to pay their own attorney fees.

On November 24, Reed asked the trial court to reconsider certain parts of the final parenting plan. Specifically, Reed asked for some changes to the start and end times in the residential schedule, residential time every other year on T.H.B.'s birthday, and that the parties are not required to attempt mediation to resolve disputes. Brown objected and requested attorney fees. The trial court denied Reed's motion and Brown's requested attorney fees.

On December 4, Brown moved to modify the TPO in her domestic violence case in light of Reed's visitation rights under the permanent parenting plan. The trial court overseeing the domestic violence case approved these changes on December 17.

On December 18, Reed filed two separate notices of appeal. One notice of appeal concerned Brown's TPO case. Reed attached to this notice of appeal Brown's September 9, 2009 motion to renew the TPO and the December 17, 2009 order making changes to the TPO. Reed's second notice of appeal concerned the November 19, 2009 orders entered in the family law proceedings. We consolidated Reed's appeals. On December 31, 2009, Brown filed a cross appeal in the family law case.

ANALYSIS

REED'S APPEALS

A. DOMESTIC VIOLENCE PROTECTION ORDER

Reed assigns error to the TPO limiting his contact with Brown. He argues that res judicata and the "priority of action rule"[8] precluded the creation and extension of a TPO. Brown responds that Reed's challenge to the TPO relies on evidence outside the record on review.[9] We agree with Brown that Reed failed to perfect the record for our review and cites to evidence which we cannot consider.

[8] The "priority of action rule" provides that the first forum to obtain jurisdiction over a case retains exclusive authority over the case to the exclusion of other coordinate courts. *Am. Mobile Homes of Wash., Inc v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 316-17, 796 P.2d 1276 (1990).

[9] Brown also argues that Reed failed to include in his notice of appeal any orders from her domestic violence case. Reed filed two different notices of appeal on December 18, 2009, including one challenging decisions in Brown's domestic violence case, Pierce County Cause No. 07-2-02403-0.

The party seeking review has the burden to perfect the record so that, as the reviewing court, we have all relevant evidence before us. *Bulzomi v Dep't of Labor & Ind.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994). An insufficient appellate record precludes review of the alleged errors. *Bulzomi*, 72 Wn. App. at 525. Pro se litigants are held to the same standard as attorneys and must comply with all procedural rules on appeal. *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

The record does not clearly indicate that Brown presently has a TPO against Reed. Reed's notice of appeal included a September 23, 2009 extension of a TPO through March 23, 2010, and a December 17, 2009 order modifying the terms of the TPO but not changing its expiration date. And although Reed moved to terminate the TPO in October 2, 2009, the record does not include any information about the resolution of this motion.

Reed has not established the existence of a current TPO for which we can grant his requested relief. By not perfecting the record to show that a present legal issue exists for which we can provide a remedy, Reed's appeal of the TPO fails. *See Bulzomi*, 72 Wn. App. at 525.

Moreover, Reed's arguments rely on a December 18, 2008 transcript from a Tacoma Municipal Court proceeding that was not included in Reed's statement of arrangements and is not a part of the record on appeal. In addition, Reed cites to clerk's papers that are not in the record.[10] We cannot review legal issues that rely on evidence outside the record on appeal. *In re Marriage of Wintermute*, 70 Wn. App. 741, 744 n.3, 855 P.2d 1186 (1993), *review denied*, 123 Wn.2d 1009 (1994).

[10] The clerk's papers in the record include pages 1 through 744 and 921 through 944. Reed requested clerk's papers 745 through 920 but did not pay Pierce County for them, despite several invoices. Thus, the county did not send clerk's papers 745 through 920 and, consequently, Reed's citations to the missing clerk's papers are to evidence outside the record on review.

B. PARENTING PLAN APPEAL[11]

Reed assigns numerous errors to the trial court's final parenting plan and findings. First, Reed argues that the trial court erred by treating Judge Armijo's December 2008 decision designating Brown as the primary residential parent as a final determination on this issue. Next, he contends that the trial court erred by excluding evidence of events that occurred before the December 2008 trial. Then, Reed argues that the trial court should have entered certain findings of fact against Brown's position and in favor of his position. Last, he challenges the trial court's conclusions of law, alleging that the findings of fact do not support them. Because the trial court erred by treating Judge Armijo's designation of Brown as the primary residential parent for purposes of the *temporary* parenting plan as a *final* determination on this issue, we reverse the designation and remand to the trial court to make its own independent determination on this issue.

As an initial matter, Brown argues that Reed did not include in his notice of appeal, or assign error to, the December 8, 2008 judgment and order determining parentage and granting additional relief or the final parenting plan. Although Reed did not include the December 8, 2008 temporary judgment and orders in his notice of appeal, when the trial court entered its final order in October 2009, it relied on the December 2008 orders as having resolved certain parenting plan issues, namely primary residential parenting and custodial parenting status. Accordingly, any errors in the December 2008 order prejudicially impact the final parenting plan and those alleged errors are before us for review. RAP 2.4(b).

[11] Unless otherwise noted, all references to the "trial court" in this part of our analysis refer to rulings by Judge Hickman when he presided over family law proceedings.

Also, although Reed failed to perfect his challenge to the final parenting plan by failing to attach it to his notice of appeal, as required by RAP 10.4(c), technical violations of the Rules of Appellate Procedure do not per se bar our review. RAP 1.2(a). And to the extent that Reed failed to specifically assign error to the December 2008 orders and the final parenting plan as required by RAP 10.3(g), we may exercise discretion and review the merits of an issue when the nature of that challenge is clear in the appellant's brief. *Green River Cmty Coll., Dist No. 10 v. Higher Educ Pers. Bd.*, 107 Wn.2d 427, 431, 730 P.2d 653 (1986); *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 614, 1 P.3d 579, *review denied*, 142 Wn.2d 1010 (2000).

1. PRIMARY RESIDENTIAL PARENT DESIGNATION

Reed argues that the trial court erred by treating Judge Armijo's December 2008 designation of Brown as the primary residential parent as a final decision. Because the record does not indicate that Judge Armijo considered the enumerated factors in RCW 26.09.187 as required by law when formulating a final—as opposed to temporary—parenting plan, we agree.

We review a trial court's ruling on placement of children for an abuse of discretion. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Kovacs*, 121 Wn.2d at 801. Because of the trial court's "unique opportunity to personally observe the parties," we will only disturb a custody designation when both the written findings of fact and the trial court's oral opinions express a failure to consider the statutory factors of ch. 26.09 RCW in determining primary residential parentage. *Murray v. Murray*, 28 Wn. App. 187, 189, 622 P.2d 1288 (1981).

Temporary parent plans are designed to maintain the status quo and "[d]rawing any presumption" of parental fitness "from the temporary plan is inappropriate." *Kovacs*, 121 Wn.2d at 809. But in making determinations for purposes of the final parenting plan, the trial court should consider the seven enumerated factors listed in RCW 26.09.187(3)(a):

> (i) The relative strength, nature, and stability of the child's relationship with each parent;
> (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
> (iii) Each parent's past and potential for future performance of parenting functions . . ., including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
> (iv) The emotional needs and developmental level of the child;
> (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
> (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
> (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Judge Armijo did not err in failing to consider these seven factors in determining the temporary residential parenting plan as consideration of these factors is not required in formulating a temporary plan. However, the trial court did err in treating Judge Armijo's designation of Brown as the primary residential parent (in the temporary plan) for purposes of the *final* parenting plan as, in doing so, the trial court failed to consider the RCW 26.09.187(3)(a) factors as required by law. Accordingly, remand is required for the trial court to consider these factors in deciding primary residential parent status.

Moreover, although we are aware that, under the current terms of the parenting plan, both parties have nearly equal residential time with T.H.B., designation of custody pursuant to RCW 26.09.285 does create certain legal implications. In our recent decision in *In re Marriage of*

Fahey, 164 Wn. App. 42, 54-59, 262 P.3d 128 (2011), *review denied*, 173 Wn.2d 1019 (2012), for instance, we held that a trial court did not err in employing a rebuttable presumption favoring the primary residential parent's relocation decisions where the nonprimary residential parent actually exercised custody more than half of the time. Thus, although RCW 26.09.285 envisions that the designation of a primary parent "shall not affect either parent's rights and responsibilities under the parenting plan," there are situations "for the purposes of all other state and federal statutes which require a designation or determination of custody" where the designation carries weight. Accordingly, in light of Brown's asserted desire to move her and T.H.B. to Chicago, it is especially important that the trial court carefully consider all the enumerated factors in RCW 26.09.187(3)(a) in determining T.H.B.'s primary residential parent.

2. EVIDENTIARY RULING

Next, Reed contends that the trial court erred by excluding evidence of any events between the parties that occurred before the first family law trial in December 2008. We hold that Reed both waived and failed to preserve any error for review

In his reply brief, Reed concedes that he agreed to a pretrial motion to limit evidence at the September 2009 family law trial to events that occurred after the December 2008 trial. Accordingly, Reed waived any challenge to the trial court's evidentiary ruling that he now attempts to challenge on appeal.

Reed argues that, even if he agreed to refrain from *presenting* cumulative evidence at the second trial, he did not agree that the trial court did not have to *review and consider* the pre-December 2008 evidence. Reed cites a trial court colloquy asserting that it proves the trial court did not review and consider all the evidence admitted at the December 2008 trial. But, in context, the trial court stated that it reviewed only Judge Armijo's orders to determine which

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issues had or had not been preserved for the second trial. *See* 6 RP at 516 (stating, "I think I just want to read [the ruling] one more time *to make sure I cover the issues that [Judge Armijo] didn't cover*. But to go back and read the transcript, no way ") (emphasis added).

Moreover, the trial court's final written order on the limiting motion states that "[t]he court having heard argument on [Brown's] Motion in Limine; It is hereby ordered, [a]djudged, and decreed that the Motion in Limine is granted and the issues, evidence, and testimony shall be after the date of the prior trial of December 8, 2008."[12] 3 CP at 594. The trial court's written ruling on its face limits consideration of the evidence at the second trial to post-December 8, 2008 circumstances and events. Reed did not object to the trial court's written order and, thus, he has failed to preserve any error in the evidentiary ruling for us to review. RAP 2.5(a).

3. ENTERING ADDITIONAL FINDINGS OF FACT

Reed asserts that the trial court erred by failing to enter certain findings of fact. He argues that substantial evidence supports findings that Brown's lifestyle does not provide a stable environment for raising T.H.B , that Brown failed to adequately provide for T.H.B.'s care constituting neglect and nonperformance of parenting functions, and that Reed's bond with T.H.B. is stronger than Brown's. Reed requests that we either enter appropriate findings of fact or remand to the trial court for entry of these specific findings.

Appellate courts are "not a fact-finding branch of the judicial system of this state." *Berger Eng'g Co. v. Hopkins*, 54 Wn.2d 300, 308, 340 P.2d 777 (1959) The function of

[12] To the extent that the trial court's oral decision conflicts with its written decision, the written decision controls. *Ferree v. Doric Co* , 62 Wn.2d 561, 567, 383 P.2d 900 (1963). An oral decision "is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." *Ferree*, 62 Wn.2d at 567.

ultimate fact finding is exclusively vested in the trial court. *Edwards v. Morrison-Knudsen Co*, 61 Wn.2d 593, 598, 379 P.2d 735 (1963). We do not weigh evidence or substitute our judgment for that of the trial court. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

We cannot enter Reed's requested factual findings, which are based on disputed evidence admitted at trial. In addition, remanding to the trial court to enter specific findings of fact would usurp the trial court's exclusive role of evaluating the persuasiveness of evidence and the credibility of witnesses. *Morse v. Antonellis*, 149 Wn 2d 572, 574, 70 P.3d 125 (2003); *Burnside v. Simpson Paper Co*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994). We will not do this.

BROWN'S CROSS APPEAL

A. CHILD SUPPORT ORDER

Brown challenges the trial court's refusal to modify Reed's child support obligation. We cannot evaluate Brown's claim because no final child support order has been entered in this case. We remand for the entry of a final child support order.

Brown's notice of appeal and briefing discuss Commissioner Foley's temporary child support order entered on November 1, 2007. This temporary order was presumably superseded by a final order entered by either Judge Armijo or Judge Hickman. After the December 2008 trial, Judge Armijo entered final written orders, including a "Judgment and Order Determining Parentage and Granting Additional Relief" that stated Reed would pay child support "as set forth in the Order of Child Support . . . which is filed separately." 2 CP at 380. But the record on review does not include a separate child support order entered and signed by Judge Armijo. A review of Pierce County's publically accessible Legal Information Network Exchange (LINX) case-tracking system suggests that Judge Armijo did not enter the referenced child support order.

During the second trial, before Judge Hickman, Brown moved to modify Reed's child support obligation, citing Commissioner Foley's November 1, 2007 order as if it were Judge Armijo's final child support order. On appeal, Reed also refers to the November 1, 2007 temporary child support order as a final order entered by Judge Armijo. But Judge Hickman ruled that the November 1, 2007 order was a temporary order and that nothing in the record suggested that Judge Armijo intended to treat the temporary order of child support as the final child support order. Moreover, Judge Hickman expressly stated that he considered a final child support order to be "in play" at the second family court trial. 3 RP at 61.

But according to our review, when Judge Hickman entered final orders on November 19, 2009, he also did not enter a final child support order. The final "Judgment and Order Establishing Residential Schedule/Parenting Plan [and] Child Support" states that "Clyde H. Reed shall pay child support as set forth in the order of child(ren) support which was *signed by the court on this date*." 4 CP at 622-23 (emphasis added). Our review of Pierce County's LINX system suggests that Judge Hickman did not enter the referenced final child support order.

To the extent Brown argues that we can treat Commissioner Foley's November 1, 2007 temporary child support order as a final order based on Judge Hickman's oral rulings that he didn't "see any reason to change the existing child-support order," we disagree. 6 RP at 546. An oral decision "is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Because Judge Hickman's November 19, 2009 judgment and order specifically references a child support order *entered on that same day*, we cannot presume that

Judge Hickman adopted the temporary decision as his final order. Remand to Judge Hickman for entry of a final child support order is, thus, appropriate.

B. DENIAL OF TRIAL COURT[13] ATTORNEY FEES

Brown also challenges the trial court's denial of her request for attorney fees. She argues that the trial court abused its discretion by not considering her dire financial situation and litigation costs from when she had representation. We discern no error.

We review a denial of attorney fees for an abuse of discretion. *In re Marriage of Freeman*, 169 Wn.2d 664, 676, 239 P.3d 557 (2010). The party challenging the award must show that the trial court's decision is untenable or manifestly unreasonable. *In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994), *review denied*, 126 Wn.2d 1011 (1995).

As an initial matter, on appeal, Brown cites RCW 26.26.625[14] as the grounds for her trial attorney fees. This statute concerns attorney fees in adjudicating parentage under the Uniform Parentage Act of 2002, ch. 26.26 RCW. Although, the litigation below tangentially related to a parentage determination because a paternity affidavit had not been filed, the parties never actually disputed Reed's status as T.H.B.'s father. The primary dispute in this litigation concerned the final parenting plan and, thus, RCW 26.26.625 cannot support an attorney fees award in this case.

[13] References to the "trial court" in this section of the analysis refer to rulings by Judge Hickman at the end of the family law proceedings.

[14] Brown actually cites RCW "26.25.625(3)" in her brief. Br. of Cross-Appellant at 9. Ch. 26.25 RCW concerns cooperative agreements between the state and Indian tribes for child support services and does not contain a section 625. Given the context, Brown likely meant to cite RCW 26.26.625(3).

Moreover, regardless of the party's financial circumstances, the trial court's unchallenged findings of fact support its denial of attorney fees in this case. Unchallenged findings of fact are verities on appeal. *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). The primary reason for Reed's litigation concerned his visitations rights: the trial court's findings imply that Brown's actions contributed to the length and cost of this litigation. Moreover, based on our review of the record, Brown often refused to comply with trial court orders about changing T.H.B.'s legal last name to "Brown-Reed" and modifying the domestic violence TPO, which contributed to the length of the litigation. Accordingly, the trial court did not abuse its discretion when denying Brown attorney fees.

APPELLATE ATTORNEY FEES

A request for appellate attorney fees requires a party to include a separate section in his or her brief devoted to the request. RAP 18.1(b). This requirement is mandatory. *Phillips Bldg Co v An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996). The rule requires more than a bald request for attorney fees on appeal. *Thweatt v Hommel*, 67 Wn. App. 135, 148, 834 P.2d 1058, *review denied*, 120 Wn.2d 1016 (1992). Argument and citation to authority are required under the rule to advise this court of the appropriate grounds for an award of attorney fees as costs. *Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 313, 869 P.2d 404, *review denied*, 124 Wn.2d 1015 (1994). Pro se litigants are held to the same standard as attorneys and must comply with all procedural rules on appeal. *Olson*, 69 Wn. App. at 626.

Under RAP 18.9(a), we can award attorney fees for the filing of frivolous appeals. An appeal is frivolous when the appeal presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987).

A. REED'S APPEALS

Reed and Brown both requested attorney fees in Reed's appeals. Reed included a single sentence requesting attorney fees without citation to authority and, thus, did not comply with the mandatory requirements of RAP 18.1(b). Accordingly, we deny Reed's request for attorney fees.

Brown complied with the requirements of RAP 18.1(b) and requests fees arguing Reed's appeal is frivolous.[15] Although some of Reed's arguments are devoid of merit, Reed successfully argues that Judge Hickman erred in failing to make an independent determination of Reed's fitness to be the primary residential parent independent of Judge Armijo's earlier ruling in the temporary order. Accordingly, we deny Brown's request for attorney fees.

B. BROWN'S CROSS APPEAL

Reed did not request attorney fees related to Brown's cross appeal Brown requested appellate attorney fees and complied with RAP 18.1(b), but failed to cite a proper statutory authority for this court to award fees. Brown cites only the Uniform Parentage Act attorney fees provision, RCW 26.26.625(3), as grounds for an award. As previously discussed, this statute cannot support attorney fees in Brown's cross appeal. We deny Brown's appellate attorney fees request in her cross appeal.

[15] Brown also cites the Uniform Parentage Act attorney fees statute, RCW 26.26.625(3), as grounds for fees on appeal. As already explained, this statute does not apply under the facts of this case and cannot support any attorney fee awards.

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In accordance with this opinion, we remand to Judge Hickman for entry of a final child support order and an independent determination of T.H.B.'s primary residential parent and affirm in all other respects.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, J.

PENOYAR, C.J.

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COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

Clyde Reed, Appellant

v

Catherina Brown, respondent

AFFADAVIT OF SERVICE
Court of Appeals No. 44151-9-II

COMES NOW the undersigned under penalty of perjury under the laws of the State of Washington, declare as follows:

That on the 7th day of January, 2015, I served upon Desiree Hosannah, attorney for the respondent, the following documents in the above-referenced case:

1. Motion for Discretionary Review, Washington Supreme Court

SIGNED AND DATED THIS 7th day of January 2015 AT Tacoma, WA.

\\CLYDE REED, Pro Se