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WASHINGTON STATE
SUPREME COURT

No. 73508-0-I

94077-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

TINA M. SHIBLEY, Respondent

v.

ERIC R. SHIBLEY, Appellant

PETITION FOR REVIEW TO THE WASHINGTON STATE SUPREME COURT

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 JAN 24 PM 2:10

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Appendix

I. Identity of Petitioner

Eric Shibley, Respondent, Appellant below.

II. Decision Below

In Re the Marriage of Shibley, Appellant, Case #73508-0-I, filed December 27, 2016 (see **Appendix 1**).

III. Issues Presented for Review

A. Whether a parent can be awarded majority residential care of a child where that parent has the will but not the ability to provide the child a safe environment.

B. Whether the decision of the Court of Appeals in in conflict with *Schultz v. Schultz,* 66 Wash.2d 713 at 715, 404 P.2d 987 (1965) and *Shaffer v. Shaffer,* 61 Wn. 2d 699 at 702, 379 P.2d 995 (1993).

IV. Statement of the Case

The parties were married on May 6, 2008 in Nashville, Tennessee (CP 22). They have one child Eric Ryan Shibley, Jr., age 4. (CP 25, 583). He will be referred to as "Ryan."

Eric Shibley, (hereafter to be referred to as "Eric") worked at all times pertinent here as a medical doctor. When they married, Tina Shibley (hereafter to be referred to as "Tina") was disabled due to a traumatic head injury, chronic depression and some suicide ideation. (CP 23, 1153). They separated on April 26, 2013. (CP 21). She suffered another head injury due to a car crash in November 2013. (CP 1291). She suffers severe

migraine headaches which continued monthly after Ryan was born. (CP 954, 1199, 1366). As of the time of trial she was not allowed by the Department of Vocational Rehabilitation to work more than 10 hours per week. (RP 1323, and RP 1383).

When Ryan was 2 years old, the parties lived in a mobile home in Marysville, Washington. (RP 957). While Eric would be at work, neighbors would often see Ryan wandering around the neighborhood and have to bring him back home. Within the cul de sac was a long steep cliff with no guard rail. (RP 975; trial exhibit 38). One of the neighbors, expressed concerns to Tina who answered that Ryan could get around on his own. (RP 633-634). He would also walk around with unchanged, soiled, or leaky diapers. (RP 646). Tina admitted not only to spanking Ryan, but hitting him with a wooden spoon. (RP 182, 632, 1318).

Each parent sought majority residential care of the child which was awarded to Tina Shibley. The court awarded Eric Shibley, residential time every other weekend from Friday through Sundays, face time privileges mid-week, and an equal sharing of the winter, mid-winter and spring breaks, and up to two weeks of vacation each summer. There were no restrictions placed upon his residential time. (CP 6-8).

All evidence as to Tina Shibley's parenting skills came from her and her mental health service providers: Dustin Johnson (RP 801-803 and 815) and Wendy Begle (RP 273). Ms. Shibley's motivation and efforts to improve were ably demonstrated and not challenged on this appeal. However, each of them provided evidence of her inability to control Ryan's behavior even on a busy street in downtown Anacortes. None of them presented any evidence that she could. What was challenged on appeal was that there was finding and no evidence that Tina Shibley had the capability to keep Ryan safe; to control his behavior that she was not able to control, whereas Dr. Shibley was able and did keep him safe.

The Court of Appeals affirmed the parenting plan ordered by the trial court. It determined that there was substantial evidence that Tina exhibited good parenting skills, had made strong improvements in her mental health since the separation and that she had worked hard to address both her and Ryan's challenges. (slip opinion page 11).

V. Argument: Reasons Why Review Should Be Accepted

The Court of Appeals failed to find that she was unable to effectively meet Ryan's needs posing risks to Ryan's physical and psychological health as compared to Eric Shibley.

The Court of Appeals decision, leaving primary residential care of Ryan with Ms. Shibley is contrary to the State Supreme Court's decision in *Schultz v. Schultz,* 66 Wash.2d 713 at 722, 404 P.2d 987 (1965):

> "Mental disturbance may also render a parent ineligible for child custodial responsibilities. *Atkinson, supra*...
>
> ...While it is hoped that the respondent's condition will improve and that she will not suffer a relapse, the award of custody cannot rest on hoped-for recovery..."

The Court of Appeals conflated the genuine efforts made by Tina to overcome her mental and behavioral disabilities with her inability to provide Eric the care he needed.

As of the time of trial, Ryan was exhibiting rebellious and physically violent behavior when in her care, and that of her day care provider. In contrast to Eric's relationship with Ryan, and with those who would care for Ryan when in Eric's residential care. (RP 1021, 1272, and 655).

The trial court noted that Dustin Johnson works with her on a daily basis (OD 4 and RP 797). He admitted that as to depression, even though she takes medication, she wears her emotions on her sleeve; struggles with feelings of helplessness, particularly around this situation; he's seen the

effects of that on her (RP 826). The court also relied upon the testimony of Wendy Begle.

Begel observed Tina frequently during the first nine months until February 2014. (RP 860). She saw Tina once a week for three or four months for an hour helping with parenting strategies then every other week for about a year. (RP 866-867).

However, the reason for the frequent visits by Begel is that Tina has challenges and needs the help. (RP 894). Begel discussed the challenges that Tina has as one of the causes of Ryan's behavior. (RP 896). Thus Begel admitted that Tina's weakness is being really firm and believable. "That's something that is still a bit of a struggle. She works on it all the time. She recognizes it is an issue and she works on it." (RP 875). "At first she was pretty scattered and emotional." (RP 876). Even with that aid she was unable to keep him from respecting boundaries designed to keep Ryan from getting into harm's way.

Begel observed that at the park he ran quickly so we grabbed him and took away the privilege of riding the truck; he had to hold one of our hands the rest of the way. (RP 872). After he ran away from her she advised Tina to make him hold your hand and take the truck away, so she

worked on that. (RP 873). She was very worried that Ryan runs out into the street. (RP 878).

Her problems are severe at times. She has headaches daily and migraines at least once per month. (RP 445).

In September 2014, as Ryan had driven off on a big wheeler and when caught, she did not run to him first, which she stated she should have done. She fought him for the big wheel which she took from him, and he ran away from her. The police had to be called (RP 1273-1274; 1303, 1304). This occurred by a busy thoroughfare, Commercial Ave in Anacortes. He traversed the parking lot of a restaurant before being caught (RP 1346 and 1350-1351). When she would try to hold his hand but he would wiggle out. She couldn't make him stop. (RP 1330). He was found in the parking lot of a Mexican restaurant (RP 1275). Eric, by comparison, never lost Ryan. (RP 1101).

Ryan had run off from her at least four times previously. (RP 1305). He ran away from her while they waited at a bus stop before her deposition in 2014 when he was three years old. (RP 1329-1330). She was holding his hand and he wiggled out and ran into a hospital. She told him to stop and he refused. (RP 1303; 1330; 1332-1334).

Tina had two car seats for Ryan. He would unbuckle his seat belt while more than once, while Tina would drive the car. Ryan would do this with one particular car seat but not the other. She could not recall how many times. She would not use the other. (RP 1309). She still uses the car seat from which he disconnects the seat belt the last time being about a month before trial. It would take 10 – 15 minutes for her to get him back into his car seat because he liked to chase and play games although the last occurrence it took less than a minute (RP 1310-1312).

Tina admitted that her brain injury, depression, and migraines, impair her ability to effectively protect him. (RP 882-3).

Eric never had a problem with getting him to stay in a car seat. Even when the police came in May as Eric was coming out of the post office, Ryan was in his car seat. (RP 374).

VI. Conclusion

The trial court was so profoundly impressed with Tina's willingness to understand her limitations, to learn from all of the professional support systems available to her, and her desire to give Ryan what he needs (O.D. 3). It acknowledged those efforts and that willingness by rewarding her with majority residential care ignoring her

inability to set boundaries to his behavior and protect him. An award of custody of a child cannot be used as a reward or punishment for the conduct of the parents. Thus, the decision is also contrary to the State Supreme Court decision of *Shaffer v. Shaffer*, 61 Wn. 2d 699 at 702, 379 P.2d 995 (1993). In the face of evidence that those failed efforts due to her mental and physical infirmities, were not good enough to control his behavior to keep him safe, it is also contrary to the holding in *Schultz v. Schultz, supra* at 72 (1965).

The Court of Appeals made the same mistake affirming the decision. Thus, this court is asked to grant this petition for review.

DATED this 20 day of January, 2017.

Respectfully submitted,

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

ERIC R. SHIBLEY, Appellant, v. TINA M. SHIBLEY, Respondent.	)	No. 73508-0-I DIVISION ONE UNPUBLISHED OPINION FILED: December 27, 2016

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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SPEARMAN, J. — Eric Shibley appeals the trial court's orders establishing a parenting plan and determining the amount of child support in the dissolution of his marriage to Tina Shibley. He argues that the trial court abused its discretion when it limited his residential time with and decision-making authority for their son. He also contends that the trial court improperly deviated from the standard child support calculation without making the necessary factual findings. We affirm in part, reverse in part, and remand for a determination of a reasonable child support award based on actual estimates of the cost of the child's needs.

FACTS

Tina and Eric Shibley were married in 2008 in Nashville, Tennessee. In 2010 they relocated to Washington and their son, Ryan, was born. Tina's ability to work was limited by a traumatic brain injury she suffered in a car accident in 1998. She also suffered from migraines and depression.

The couple separated in 2013 when Tina and Ryan went to a domestic violence shelter. Eric filed for dissolution on June 27, 2013. On August 13, 2013, Snohomish County Superior Court entered a temporary order that granted equal residential time to each parent, appointed a guardian ad litem, and authorized joint decision-making. In December 2013 the parties executed a stipulated order in which they agreed to update each other on Ryan's health and follow the recommendations of his health care providers.

Trial began on March 15, 2015. The court heard testimony from Eric, Tina, the Guardian Ad Litem, various medical and care providers who worked with Ryan or Tina, the party's experts, the party's employers or employees, and law enforcement personnel. On April 1, 2015, the trial court ordered that Ryan reside with Tina and limited Eric's residential time based on findings of neglect, abusive use of conflict and not acting in the child's best interest under RCW 26.09.191(3)(a)(e).

Eric stipulated that his monthly income was $30,000 gross, $20,592 net; Tina stipulated that her income was $410 gross, $379 net. For the child support payment, the trial court determined Eric's net monthly income based on his testimony and stipulation and arrived at a value of $15,581. The court found that Tina's monthly income was $331.46. Their combined income was higher than RCW 26.19.020's top support schedule tier of $12,000. The trial court considered Ryan's "[s]pecial medical, educational, or psychological needs," and awarded a

transfer payment of $3,000 per month. CP at 34-37. Eric appeals the order for child support and parenting plan.[1]

DISCUSSION

Parenting Plan

We review a trial court's parenting plan for an abuse of discretion. In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A decision is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

Regarding parenting plans, the trial court's discretion is "cabined by several provisions in chapter 26.09 RCW," including RCW 26.09.191(3)(g). In re Marriage of Chandola, 180 Wn.2d 632, 642, 327 P.3d 644 (2014). This statute bars the trial court from "'preclud[ing] or limit[ing] any provisions of the parenting plan' (i.e., restricting parental conduct) unless the evidence shows that '[a] parent's . . . conduct may have an adverse effect on the child's best interests.'" Id. A court may consider the following factors when imposing discretionary restrictions:

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[1] As part of the decree of dissolution, the trial court made a distribution of marital property and awarded Tina her reasonable attorneys' fees. The judgment representing the property distribution and award of fees was originally included in this appeal, but has been resolved as part of Eric's Chapter 11 bankruptcy action, cause no. W.D. Wash. 15-13725-CMA.

> (a) A parent's neglect or substantial nonperformance of parenting functions;
>
> ...
>
> (e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;
>
> ...
>
> (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

RCW 26.09.191(3)

The trial court limited Eric's residential time based on (3)(a) (neglect of parenting functions), (3)(e) (abusive use of conflict), and (3)(g) (conduct adverse to the child's best interests).[2] Eric argues that the restrictions under RCW 26.09.191(3) are not supported by the evidence.[3]

The court cited several bases for its findings of neglect,[4] including that Eric had left Ryan "alone in a locked car in eighty-one degree weather." CP at 26. Eric was issued a criminal citation on May 1, 2014 for leaving a child unattended in a vehicle. The trial court also found neglect in Eric's failure to "acknowledge [Ryan's] behavioral and emotional problems, and the fact that [he] obstructed the

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[2] Eric argues that no restrictions should have been placed on his residential time because there were no findings under RCW 26.09.191(1) and (2). This argument has no merit. Subsections 1 and 2 impose mandatory restrictions if such findings are made; subsection 3 gives the court the discretion to restrict residential time if any of the factors are found. It does not require a court to make findings under the other subsections in order to exercise this authority.

[3] He also argues that the only substantial nonperformance of parenting functions was a result of Tina absconding with Ryan and not disclosing her whereabouts or letting Ryan contact him for five months. But because Tina did not argue substantial nonperformance and the trial court did not impose restrictions on that basis, we do not address the argument.

[4] Eric also relies on Travis v. Bohannon, 128 Wn. App. 231, 115 P.3d 242 (2005) to argue that the trial court's findings do not rise to the level of negligence. The case is not helpful because it discusses the elements of negligence in a tort setting. Because Eric cites no other relevant authority, we reject the argument.

respondent in her ability to get the child therapy." CP at 26. Tina testified that Eric was not on board about therapy, and described how Eric "did not think [Ryan] needed it, that the problems with Ryan were my fault and that I was in violation of the agreed order." Verbatim Report of Proceeding (VRP) at 1280-82. In his deposition, Eric testified that Ryan "does not have [a] problem with me, so ... I don't think he needs [therapy or counseling]." CP at 433. A letter from Eric's counsel also declared his "philosophical opposition to children being involved in counseling." Ex. 154. Tina had to resist Eric's motion to suspend the agreed parenting order after Ryan's doctor recommended counseling. The trial court's bases for finding neglect under RCW 26.09.191(3)(a) are sufficiently supported by the record.[5]

Eric next argues that the findings of abusive use of conflict are either insufficient or not supported by substantial evidence. He further argues that they either do not constitute abusive use of conflict or did not endanger his son's psychological health. Generally, courts find an abusive use of conflict where one parent inserts the child into a parental conflict, which could psychologically damage the child. In re Marriage of Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002).

[5] Eric argues that the trial court's finding that he left Ryan "in his workplace without appropriate supervision" was based on no evidence. Br. of Appellant at 24. In his deposition, Eric testified that Ryan would sometimes go to work with him and stay with one of his staff members. CP 187-88. The GAL found "inconsistency" in the number of hours worked that Eric reported, suggesting that he may have been working more hours than he admitted, and that the "question then arises as to what [Ryan] is doing and who is watching him while Eric is working (i.e. a medical assistant, or daycare." Exhibit (Ex.) 17, at 24. Eric testified at trial that his staff members watch Ryan while he is working. VRP 1120-1. This evidence supports the trial court's finding.

We review a trial court's findings of fact for substantial evidence and review de novo whether those findings of fact support the trial court's conclusions of law. In re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). Evidence is substantial when there is a sufficient quantum of evidence "to persuade a fair-minded person of the truth of the declared premise." Burrill, 113 Wn. App. at 868. An appellate court may not substitute its findings for the trial court's where there is ample evidence in the record to support the trial court's determination. Kovacs, 121 Wn.2d at 810. We defer to the trier of fact for the purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. Thompson v. Hanson, 142 Wn. App. 53, 60, 174 P.3d 120 (2007),

The trial court found:

> [T]he petitioner engaged in the abusive use of conflict by failing to pay child support after the court ordered him to do so; refused to discuss health care with the respondent after the court ordered him to do so; obtaining new physicians for the child without notifying the respondent; selling the mobile home in violation of the court's order; threatening Dr. Shushan, the pediatrician, with a 'personal jihad' in front of the child; the litigation tactics that he allowed to continue which included abusive letters from petitioner's counsel belittling the respondent's concerns about the child's health, as well as her own mental state; and disclosing respondent's journals and private medical records without her permission when he is a licensed physician well-versed in HIPPA.

CP at 26. The record supports the finding that Eric failed to pay child support when ordered, resulting in entry of judgment for back support. There is also evidence that Eric refused to discuss health care with Tina after being ordered to do so. Eric testified that he took Ryan to two physicians and a new dentist and three different counselors without notifying Tina. Eric explained that he didn't tell Tina because, in

his view, he "ha[d] to be asked" and Tina had not done so. CP at 1129. Eric also took Ryan to be vaccinated without telling Tina what vaccinations he received. The record also reveals that Eric disclosed Tina's personal journals and medical records without her permission and engaged in litigation tactics that belittled Tina's mental health and her concerns about the Ryan's health.

Eric argues that these findings do not support the trial court's conclusion that his purported use of conflict endangered Ryan's psychological development. We disagree. The trial court found that Eric had 'engaged in erratic and disturbing behavior that put the child in danger, and in the middle of conflict," and his "emotional outbursts have an impact on the child." Id. Testimony from Ryan's physician, Dr. Shushan, supports this finding. Dr. Shushan testified that she recommended that Ryan "receives psychological counseling as soon as possible given the tremendous strife and disruption in the family. This has a great impact on his behavioral and psychological well-being and he ... would benefit from regular, appropriate pediatric counseling on an ongoing basis." VRP (3/19/15) at 578.

Dr. Shushan also testified about Eric's angry outbursts towards her, demanding that she take back her recommendation and that he would wage a "personal jihad against her" if she did not. Eric also threatened to subpoena her for deposition and file a complaint against her with the medical board. VRP (3/19/15 at 584). She also testified that people in her office could hear Eric yelling "halfway down the hallway" and that during this time Ryan was sitting on the floor in her office and he "seemed quite comfortable with the volume of what was happening."

VRP (3/19/15) at 584-85. The GAL testified that Eric also got into a yelling match with Ryan's therapist in front of Ryan.

Additionally, the police report stated that after being retrieved from the hot car, Ryan "was very upset watching his Father throw himself on the concrete parking lot. Eric ... was yelling and crying at a very loud level. Ryan started to cry many times watching his Father." Ex. 148. Officer Wood testified that Ryan was "looking in our direction a majority of the time," while Eric refused to provide identification and was "pleading with me, begging me saying, you know, I throw myself on my knees to you." VRP (3/18/15) at 343. He recalled the supervising officer telling Eric to stop because "he was making such a big scene in front of the child." VRP (3/18/15) at 345.

Finally, the trial court found that placing Ryan in multiple day cares for short periods of time was conduct expressly adverse to his best interests under RCW 26.09.191(3)(g). The record contains ample evidence in support of this finding, including Eric's own testimony conceding that Ryan was "[i]n multiple daycares before when he was 3, between 3 and 4 years of his age[.]" VRP (3/23/15) at 1013. See also Ex 17, at 19-21 (GAL report summarizing interviews with day care providers in Everett, Marysville, Normandy Park, and Puyallup about the frequency of visits and concerns about Ryan's behavior).

There is substantial evidence in the record to support the trial court's findings that Eric exhibited neglect of parenting functions, engaged in the abusive use of conflict which created a danger of serious damage to the child's psychological development, and otherwise engaged in conduct that was expressly

adverse to the child's best interests under RCW 26.09.191(3)(a), (e), (g). We conclude that the trial court did not abuse its discretion when it placed restrictions on Eric's residential time with Ryan.[6]

Eric next argues that the trial court erred when it awarded sole decision making authority to Tina regarding criminal matters, getting tattoos, military service and marriage before the age of 18. He contends that these matters are beyond the scope of the trial court's authority under RCW 26.09.184(5)(a). These particular areas of decision-making authority are listed under Section 4.2 "Major Decisions" of the Amended Parenting Plan.[7] CP at 11.

RCW 26.09.187(2)(b)(iii) requires the trial court to award sole decision-making ability to one parent if one of the two is opposed to mutual decision-making and the opposition is reasonable in light of specified statutory factors, including the existence of a limitation under RCW 26.09.191. Here, the trial court awarded sole decision-making authority to Tina based on the factors listed in RCW 26.09.191(3).[8]

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[6] Eric argues that the court should have entered findings as to Tina's abusive use of conflict that endangered their son's psychological development. But he cites no authority in support of the argument and we reject it.

[7] The trial court used an Administrative Office of the Court approved form, WPF DR 01.0400 Mandatory (6/2008) – RCW 26.09.016; .181; .187; .194, for the parenting plan that contained a list of these "Major Decisions" and space to allocate decision-making authority to one or both of the parties. CP at 11.

[8] Although not assigned as error by either party we note that the trial court checked the box for restricting decision-making authority under RCW 26.09.187(2)(b)(i), which mandates restrictions based on findings under RCW 26.09.191(1) or (2). We conclude that this is a scrivener's error because the trial court expressly found that RCW 26.09.191(1)(2) "[d]oes not apply." CP at 5. In any event, the error is harmless because the award of sole decision-making authority to Tina is warranted based on the trial court's finding that one parent is opposed to mutual decision making based on the criteria set out in RCW 26.09.187(2)(b)(iii), (c).

Here, Eric does not argue that the trial court erred when it awarded sole decision-making authority to Tina based on RCW 26.09.187(2)(b)(iii), only that the trial court had no authority to grant sole decision-making to one parent in areas other than those set forth in RCW 26.09.184(5)(a), which states that "[t]he plan shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious upbringing." While the statute mandates that the court allocate decision-making authority in specified areas, nowhere does it prohibit the court from including provisions relating to decision making in other unspecified areas absent an agreement. Rather, the statute merely provides that the parties "may" incorporate an agreement for decision making in either of these specified areas or other areas.

Lastly, Eric argues that primary residential placement should have been awarded to him because the trial court did not appropriately weight the statutory factors. Under RCW 26.09.187(3)(a), a trial court "shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances." The residential schedule shall be consistent with any restrictions imposed by RCW 26.09.191, and the court is required to consider the following factors:

> (i) The relative strength, nature, and stability of the child's relationship with each parent;
>
> ...
>
> (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including

> whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
>
> ...

RCW 26.09.187(3)(a). Factor (i) shall be given the greatest weight.

The parenting schedule must be based on statutory factors and the parties' circumstances at the time of trial. Littlefield, 133 Wn.2d at 56. Eric asks us to reweigh the evidence and find in his favor. He argues that the trial court failed to consider the parties' future ability to perform the necessary parenting functions. To the contrary, there is ample evidence in the record that the trial court evaluated both parties for their future ability to serve in a parental capacity. There is also substantial evidence in the record that Tina exhibited good parenting skills, had made strong improvements in her mental health since the separation, and that she had worked hard to address both her and Ryan's particular challenges.

Child Support

We review an award of child support for abuse of discretion. In Re the Marriage of Griffin, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). Under the state-wide child support schedule, a court must set the child support obligation of each parent according to a standard calculation. Sacco v. Sacco, 114 Wn.2d 1, 3-4, 784 P.2d 1266 (1990); In re Marriage of Lee, 57 Wn. App. 268, 275, 788 P.2d 564 (1990). The standard calculation is defined as "the presumptive amount of child support owed as determined from the child support schedule before the court considers any reasons for deviation." RCW 26.19.011(8). Thus, after determining the presumptive amount of child support owed, a court may, in its

discretion, deviate from the standard calculation. In re Griffin, 114 Wn.2d at 776; RCW 26.19.075(1)(a). A trial court must first determine the income of each parent, considering monthly gross income from all sources. RCW 26.19.071(1) (3). From the monthly gross incomes, the court makes deductions to arrive at each parent's monthly net income. RCW 26.19.071(5).

The economic table in RCW 26.19.020 establishes the basic child support obligation amount for combined monthly net incomes of up to $12,000. Upon written findings of fact, the trial court may exceed the presumptive amount of support for higher incomes. RCW 26.19.020. When determining the amount of support for monthly incomes over the presumptive statutory maximum, a court should not apply a "mechanical extension of the economic table" but follow RCW 26.19.001's requirement that the amount of support be based on the child's needs and commensurate with the parents' income, resources, and standard of living. McCausland v. McCausland, 159 Wn.2d 607, 617, 152 P.3d 1013 (2007).

The trial court's findings of fact must explain why the amount of support ordered is both necessary and reasonable. In re Marriage of Daubert and Johnson, 124 Wn. App. 483, 495-96, 99 P.3d 401 (2004), abrogated on other grounds by McCausland, 159 Wn.2d 607. Factors to be considered in determining the necessity for support include but are not limited to the special medical, educational and financial needs of the children. Daubert, 124 Wn. App. at 495-96. Cursory findings are not sufficient. Id.

The trial court found the parents' combined monthly net income exceeded $12,000, and ordered more support than the preset amount for $12,000 because:

> the mother is unable to work full time due to a physical injury from which she is continuing to recover. The father is a physician, whose income far exceeds the top threshold for support calculations, which income allows for a higher standard of living for the child than that which would be obtained from the standard calculation. The child in this case is also in need of ongoing counseling and behavioral therapy, as well as educational support to reach the typical developmental level for his age. A transfer payment in excess of the standard calculation is just and necessary under the circumstances to assist the child in receiving that behavioral therapy and educational support.

CP at 36. The trial court used the parties' stipulated gross incomes to calculate a gross child support obligation of $1447.24 per month. The court ordered Eric to pay $3,000 per month instead, because of the "[s]pecial medical, educational, or psychological needs of the child." CP at 37. The trial court further found:

> Eric Ryan Shibley is a child who has significant behavioral problems, and potentially undiagnosed ADHD and developmental delays. He has been receiving therapy from an unlicensed therapist for the past 12 months in violation of the Court's orders relating to joint decision-making between the parties relative to medical treatment. The child has been placed in numerous drop-in daycares by the father, and several longer-term daycares and preschools by the mother. He has been expelled from one or more of those day cares due to his violent, out of control behavior. The court finds that the lack of stability in his life, along with the high conflict between the parties during this dissolution proceeding, has exacerbated the stress on this child, and that he is in need of therapy and treatment per the recommendations of his pediatrician, Dr. Shushan.

CP at 37.

Eric argues that the trial court did not make sufficient factual findings to support an award greater than the amount on the worksheet. According to him, the

trial court failed to consider and implement the factors listed in Daubert and make findings that were beyond "cursory." The "special medical, educational, or psychological needs of the child" is one of the factors listed in Daubert and in RCW 26.19.075, for consideration when deviating from the standard calculation. The trial court reviewed the testimony regarding Ryan's psychological needs and made detailed findings that supported the necessity and reasonableness of additional therapy and support. These findings are far more detailed and specific than those we rejected in Daubert. We conclude they are sufficient to justify an award greater than the standard calculation.

Noticeably absent in the court's findings, however, are estimates of the cost of Ryan's proposed treatment. In Daubert, the appellate court remanded for findings about the reasonableness of the support amount, stating that "[w]ithout cost estimates, the court had no basis to determine an amount to award for the opportunities sought and had no basis to make findings about the reasonableness of that amount." Daubert, 124 Wn. App. at 498. While the findings regarding Ryan's behavioral issues may be sufficient to justify a greater award, we are unable to find support in the record for a payment of $3000. Without estimates of the cost of treatment, we have no basis to determine whether the amount of support is necessary and reasonable. We therefore reverse and remand to the trial court for a determination of a reasonable and necessary child support award based on cost estimates of Ryan's special medical, educational, or psychological needs.

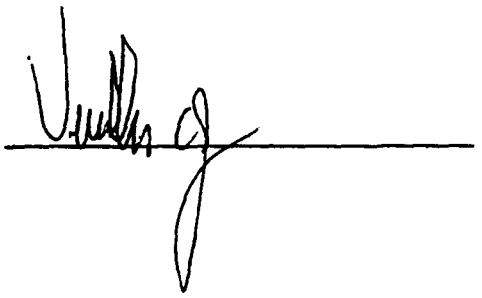
Tina requests an award of fees and costs on appeal under RCW 26.09.140. The statute permits an appellate court to order a party to pay for the cost of

maintaining the appeal of a dissolution proceeding and attorneys' fees in addition to statutory costs. Tina has submitted an affidavit of financial need. Eric has not requested fees or costs and the parties have jointly provided the order confirming Eric's Chapter 11 bankruptcy plan. Based on the financial information before us, we find that while Tina has the financial need, it does not appear that Eric has the ability to pay. An award of fees is discretionary. We hold that each party shall bear his or her own costs and attorney fees on appeal.

Affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

Spearman J.

WE CONCUR:



Leach, J.

No. 73508-0-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

In re the Marriage of:	)	
	)	
ERIC R. SHIBLEY,	)	
	)	
Appellant,	)	DECLARATION OF
	)	SERVICE
v.	)	
	)	
TINA M. SHIBLEY,	)	
	)	
Respondent,	)	
	)	

I, Lester Feistel, state and declare as follows:

I am a Paralegal in the Law Offices of Anderson, Fields, Dermody, Pressnall & McIlwain, Inc., P.S. On the 23rd day of January, 2017, I placed true and correct copies of the Petition for Review with Seattle Legal Messengers for delivery on January 24, 2017 to:

Elizabeth A. Helm
Northwest Justice Project
401 Second Ave. S., Suite 407
Seattle, WA 98104

Kimberly Elizabeth Loges
Attorney at Law
1752 NW Market St
Seattle, WA 98107-5264

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 JAN 24 PM 2:40

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED at Seattle, Washington, ~~on this~~ 23rd day of January, 2017.

Lester Feistel
Anderson, Fields, Dermody, Pressnall & McIlwain, Inc., P.S.
207 E. Edgar Street
Seattle, Washington 98102
(206) 322-2060