

03907-0

03907-0

~~RECEIVED
COURT OF APPEALS
DIVISION ONE
MAY 21 2018~~

CASE No. 63967-6-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

In re the Marriage of:

RYAN KEANE,

APPELLANT,

v.

NICOLE KEANE,

RESPONDENT.

2018 MAY 21 11:13 AM
COURT OF APPEALS
DIVISION ONE

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR ISLAND COUNTY

APPELLANT'S OPENNING BRIEF

Eric Engel, WSBA # 35363
Stacey Swenhaugen, WSBA #41509
Engel Law Group, P.S.
600 University St., Suite 1904
Seattle, WA 98101
(206) 625-9800

Attorney for Appellant

TABLE OF CONTENTS

I. Introduction.....6

II. Assignments of Error

 a. Assignments of Error.....7

 b. Issues Pertaining to Assignments of Error.....8

III. Statement of the Case.....9

IV. Argument.....18

 1. THE TRIAL COURT ERRED IN FINDING THAT THE FATHER HAD ENGAGED IN A "HISTORY OF ACTS OF DOMESTIC VIOLENCE" AND IN AWARDING SOLE DECISION-MAKING TO THE MOTHER BASED ON ONE DOMESTIC VIOLENCE INCIDENT..... 18

 2. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING PRIMARY RESIDENTIAL CARE TO THE MOTHER BASED UPON HER HISTORIC STATUS AS THE PRIMARY CAREGIVER.....22

 3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DECLINED TO ORDER EQUAL RESIDENTIAL TIME

TO EACH PARENT UNDER BASED UPON THE PARTIES
HISTORY OF COOPERATION AND SHARED
PERFORMANCE OF PARENTING FUNCTIONS.....28

4. THE TRIAL COURT ERRED WHEN IT ENTERED AN
AWARD OF SPOUSAL MAINTENANCE AFTER
FINDING THAT THE FATHER DID NOT HAVE THE
ABILITY TO PAY.....31

a. The Trial Court Abused its discretion by
awarding maintenance based on untenable
reasons because the facts do not meet the
requirements of the correct standard under
RCW 26.09.090(f).....32

b. The Trial Court Failed to Make Any
Findings Necessary for an Award of
Maintenance.....34

V. Conclusion.....37

TABLE OF AUTHORITIES

Cases

<i>Caven v. Caven</i> 136 Wn.2d 800, 966 P.2d 1247 (1998).....	22, 21
<i>Dreyer v. Dreyer</i> 10 Wn.App. 624, 519 P.2d 12 (Div. III 1974).....	35
<i>Pope v. University of Washington</i> 121 Wn.2d 479, 490, 852 P.2d 1055 (1993).....	18
<i>In re Marriage of Combs</i> 105 Wn. App. 168, 19 P.3d 469 review denied, 144 Wn.2d 1013 (2001).....	23, 24, 25
<i>In re Parentage of J.H.</i> 112 Wn. App. 486, 49 P.3d 154 (2002) review denied, 148 Wn.2d 1024 (2003).....	22
<i>In re Marriage of Kovacs</i> 121 Wn.2d 795, 801, 854 P.2d 629 (1993).....	22
<i>In re Marriage of Littlefield</i> 133 Wn.2d 39, 46, 940 P.2d 1362 (1997).....	21, 33
<i>In re Marriage of Spreen</i> 107 Wn. App.341, 346, 28 P.3d 769 (2001).....	18

In re Marriage of Thomas

63 Wn. App. 658, 660, 821 P.2d 1227 (1991).....18, 22

In re Parentage of Schroeder

106 Wn. App. 343, 349, 22 P.3d 1280 (2001).....22

Marriage of Monkowski

17 Wn. App. 816, 818, 565 P.2d 1210 (Div. I 1977).....34, 35

Marriage of Wright

78 Wn.App. 230, 237, 896 P.2d 735 (Div. II 1995).....31, 33

Morgan v. Morgan

59 Wn.2d 636, 369 P.2d 516 (1962).....34, 35

Statutes

RCW 26.09.090.....32, 33

RCW 26.09.187.....17, 23, 25, 28, 29

RCW 26.09.191.....6, 17,19, 20, 21, 24, 29

RCW 26.50.010.....16, 19, 20

I. INTRODUCTION

Appellant, Ryan Keane, and Respondent, Nicole Keane, have one minor child, now age three (3). CP 456-460. Pursuant to a Petition for Dissolution of Marriage, a Guardian ad Litem ("GAL") was appointed on behalf of the minor child. RP 624. The GAL testified at trial, based upon her investigation and observations, that it would be in the best interests of the child to have equal residential time with each parent. RP 729-730. On July 23, 2009, the trial court adopted the mother's proposed parenting plan, awarding her the primary residential care of the child and allowing the father residential time with the child every other weekend and one mid-week overnight every week. CP 44-56. The trial court further awarded the mother sole decision-making authority under RCW 26.09.191(1), finding of a history of acts of domestic violence. Finally, the trial court made a finding that the father's monthly expenses exceeded his income, but ordered him to pay \$ 457.21 per month for spousal maintenance

through October of 2009 CP 3.

The father appeals the trial court's Findings of Facts and Conclusions of Law, as set forth in Paragraph 2.12 with regard to Maintenance, and Paragraph 2.19 with regard to the Parenting Plan. The father further appeals the trial court's Final Parenting Plan, as set forth in paragraphs 3.1 and 3.2 with regard to the residential schedule, and the restrictions placed upon his decision-making authority, as set forth in Sections 2.1, 4.2 and 4.3.

II. ASSIGNMENTS OF ERROR

a. Assignments of Error

1. The trial court erred in finding that the father had engaged in a "history of acts of domestic violence" as defined by RCW 26.50.010(1).
2. The trial court erred in awarding the mother sole decision-making authority based on a history of acts of domestic violence.
3. The trial court erred when it awarded primary residential care to the mother.
4. The trial court erred when it refused to award the parties equal residential time under RCW 26.09.187(3)(b).

5. The trial court erred when it required the Appellant, Ryan Keane, to pay \$457.21 per month in spousal maintenance.

b. Issues Pertaining to Assignments of Error

1. Did the trial court err in finding the father engaged in a "history of acts of domestic violence" as defined by RCW 26.50.010(1), when the court based its ruling on one incident that resulted in a 2008 protection order? (Assignment of Error 1)
2. Did the trial court err in awarding sole decision-making to the mother? (Assignment of Error 2)
3. Did the trial court abuse its discretion by awarding primary residential care of the child to the mother under RCW 26.09.187(3)(a)(i), based upon her history as the primary caretaker? (Assignment of Error 3)
4. Did the trial court abuse its discretion in finding that it was in the child's best interests to reside with the mother after finding that the mother exercised poor judgment in choosing to participate in the adult entertainment industry? (Assignment of Error 3)
5. Did the trial court abuse its discretion by declining to order equal residential time with each parent under RCW 26.09.187(b) when the Guardian ad Litem reported that the child would benefit from equal residential time and when the parties live within a close geographic proximity to one another?(Assignment of Error 4)

6. Did the trial court err when it required the father to pay spousal maintenance in the amount of \$457.21 per month under RCW 26.09.090(f), after making a finding that the father lacked the ability to pay? (Assignment of Error 5)

III. STATEMENT OF THE CASE

Ryan Keane and Nicole Keane were married on August 22, 2006. RP 60. Ryan had joined the Navy and was sent to boot camp shortly after the marriage. He was later stationed in Pensacola, Florida. RP 60-61. Nicole joined Ryan in Florida in November, 2009. RP 61. The parties' daughter, Callianara ("Calli") was born on January 20, 2007, and Ryan was present for her birth. RP 62-63.

In July of 2007, Nicole was arrested for domestic violence. RP 66. Nicole initiated a violent encounter by breaking various items around the parties' residence, including video tapes, decorations and furniture. RP 69-70. Amidst the property damage, Nicole began to hit, bite and scratch Ryan. RP 69, 72-23. Ryan called the police and both parties were questioned before Nicole's arrest. RP 71-73.

Nicole was put on a pre-trial diversion for her charges and was ordered to complete an alcohol evaluation, attend anger management classes and community service. The case was later dismissed.

The parties lived in Virginia in from August to November 2007. RP 75-77. During this time, the parties' relationship was "rocky". RP 76. The parties argued frequently and the neighbors called the police several times. RP 76. Nicole hit Ryan various times, but he never reported any violence to the police. RP 76-77. Nicole never reported any violence by Ryan to the police either. RP 77.

When the parties moved to Oak Harbor, Washington, in November 2007, they stopped for an overnight visit with Ryan's parents. RP 81. While there, Nicole ran away from the house following an argument. Ryan followed after her, but Nicole struck him in the face and bit his forearm. RP 84. Ryan later received a call from police officers, informing him that Nicole was at a nearby Walgreens. Ryan arrived to meet with her, and the police were not present. After Nicole refused to return to the house with Ryan, Ryan left. Shortly

thereafter, Ryan received another call from the police, who stated that Nicole was still at Walgreen's and wanted to talk to Ryan. Police officers later drove Nicole back to Ryan's parents' house. RP 82-88. At no time was Ryan questioned by police officers, and at no time was any allegation of domestic violence made against Ryan. RP 82-88.

The parties arrived in Oak Harbor on November 14, 2007. RP 88. Between that date and the date the parties separated on February 24, 2008, the police were called to their residence several times because of arguments between the parties. RP 94. No arrests were ever made and no allegations of domestic violence were ever made against Ryan within the context of police investigations. RP 94-95. After the parties' separated, Nicole obtained a domestic violence protection order against Ryan in April, 2008. Ryan maintains that Nicole was untruthful in her allegations to support any finding of domestic violence. RP 92-93, 120.

Ms. Keane filed for dissolution on April 22, 2008. CP 456-460. Cindy McDougall was appointed to serve as a Guardian ad Litem for

the child in the fall of 2008. RP 624. Mr. Keane was initially ordered to have supervised visitation with the child, but the Guardian ad Litem recommended that supervision be lifted. RP 668.

In the summer of 2008, Nicole began working in the adult entertainment industry; specifically, she set up a website where she posted sexually explicit pictures and videos of herself on www.shakinit.com. RP 403. Members of the public could purchase memberships that would allow them access to her videos, and Nicole received a portion of those profits. RP 409. Nicole alleges that she has stopped working in the industry, but recent downloads of new videos were made even in the midst of trial. RP 741-742. The Guardian ad Litem did recommend any restrictions on Nicole in light of her conduct in the adult entertainment industry, but did note concerns about the types of people Nicole was exposing her daughter to. RP 681. She had concerns about the child's possible exposure to "such an environment" and the "type of people that might enter into the situation". RP 681. Nicole is good friends with the administrator of

www.shakinit.com. RP 724. Additionally, Nicole has been known to have other adults moving in and out of her household, including people with questionable criminal backgrounds. RP 178-180, 638, 648-649. The Guardian ad Litem indicated that Nicole's friend, George Hannon, creates an uncomfortable and hostile environment at exchanges between the parties, and she has asked Nicole not to have him present. RP 705-706.

Nicole made several allegations against Ryan, including he had sexually abused the child, that he was suicidal, he liked to cut himself. Although Ryan admitted that he had cut himself in rebellion when he was 14 or 15 years old, he hasn't done it since. RP 129-131. The sexual abuse and child pornography allegations were raised for the first time at trial, and such allegations were a surprise to the Guardian ad Litem. RP 660-662.

The Guardian ad Litem reported the case involved a lot of "he said/she said" and her primary consideration was "the child's relationship with each parent". RP 662-663. The Guardian ad Litem

supervised two visitations with Ryan and reported his daughter responded well to him. RP 630. She reported the parenting styles of the parents seemed to mirror each other. 668. She also reported the child was "comfortable at Ryan's house, where her things and belongings were. Their interaction was positive. He provided appropriate meals at appropriate times, as well as diaper changing." RP 630. Although the Guardian ad Litem reported that Nicole had been the primary residential parent since the child was born, her observation was that the child was equally bonded to both parents. RP 728-279. Accordingly, she recommended that no restrictions be placed on either parent and that the parents share equal custody of the child. RP 729-730. She stated that "this is a rare case where this very young child would do well in this situation. I feel that she deserves to have that amount of time with both parents." RP 678-679. Additionally, from what the Guardian ad Litem has seen, the child "transitions very well" from parent to parent "as long as the parents don't create an environment that is chaotic." RP 678.

With regard to financial issues, Ryan offered evidence that that his monthly expenses totaled over \$390 more than his monthly net income. RP 768. Nicole testified that she could not find a job, largely because she alleged that Ryan had not allowed her to obtain her driver's license. However, Ryan testified that he had never done anything to prevent Nicole from obtaining her license, and it would have been helpful to him throughout their marriage if she was able to drive herself around. RP 768-769.

On July 23, 2009, Judge Alan R. Hancock issued an oral ruling on the final parenting plan, child support and spousal maintenance. Judge Hancock found that "both parties engaged in domestic violence against each other, but Mr. Keane more so than Mrs. Keane; however Ms. Keane's testimony about Mr. Keane's allegedly enraged and controlling behavior was substantially overblown". See Verbatim Report of Court's Oral Ruling, p. 4. He held that "Mr. Keane does have a history of acts of domestic violence as defined in RCW 26.50.010(1), based primarily on the issuance of the protection order

in April of 2008", but later when counsel for the father asked Judge Hancock to elaborate on what other events made up such a "history", he declined to do so. *Id.*, p. 10, 22.

Judge Hancock further stated Ms. Keane has "foolishly made pornographic videos to make money. Common sense and common experience suggests that this has the potential for bringing bad people into her life". *Id.*, p. 9. However, because Nicole seemed to be out of that business, she posed no risk to the child. *Id.*, p. 9.

While a finding of a history of domestic violence would place restrictions on Ryan's ability to make joint decisions for the child, the Court found that it would not be in the child's best interests to apply any restrictions to Ryan's residential time under RCW 26.09.191(n). Accordingly, Judge Hancock reviewed the factors listed under RCW 26.09.187(3) in determining the residential provisions. While the Court found that "both parents have shown themselves to be good parents" and both have "a strong and stable relationship with Calli", the court found that factor (i) relating to the relative strength, nature

and stability of the child's relationship with each parent weighs in favor of Nicole because she has historically been the primary caregiver. *Id.*, pp. 10-11. Further, the court found that, despite the Guardian ad Litem's recommendation, it would not be in the child's best interests to order a shared parenting plan because they do not have a satisfactory history of cooperation and shared parenting functions. *Id.*, pp. 13-14.

As to child support and spousal maintenance, Judge Hancock imputed Nicole's income to minimum wage and ordered a monthly child support transfer payment of \$384. After the court acknowledged Ryan's monthly expenses exceed his income, even after some downward adjustments and the elimination of his temporary spousal maintenance obligation, he the court entered an award of spousal maintenance in the amount of \$457.21 through October of 2009. *Id.*, pp. 17-18., CP 3.

IV. ARGUMENT

1. THE TRIAL COURT ERRED IN FINDING THAT THE FATHER HAD ENGAGED IN A "HISTORY OF ACTS OF DOMESTIC VIOLENCE" AND IN AWARDING SOLE DECISION-MAKING TO THE MOTHER BASED ON ONLY ONE DOMESTIC VIOLENCE INCIDENT.

Findings of fact are reviewed under the substantial evidence standard. *Pope v. University of Washington*, 121 Wn.2d 479, 490, 852 P.2d 1055 (1993). Evidence is substantial if it persuades a fair-minded, rational person of the truth of the finding. *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001); *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).

RCW 26.09.191 governs restrictions in permanent parenting plans. RCW 26.09.191 (1)(c) specifically restricts mutual decision making and designation of dispute resolution based upon domestic violence:

The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process

other than court action if it is found that a parent has engaged in any of the following conduct: (c) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

RCW 26.09.191(1)(c). *RCW 26.09.191(2)(a)(iii)* specifically restricts a parent's residential time based on domestic violence:

The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

RCW 26.09.191(2)(a)(iii). *RCW 26.50.010(1)* defines domestic violence as:

Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

RCW 26.50.010(1). The statute is silent as to what constitutes a history of such acts. Mere accusations of domestic violence, without proof, are not sufficient to constitute statutory basis for denying

mutual decision-making in a permanent parenting plan in connection with marriage dissolution. *Caven v. Caven*, 136 Wn.2d 800, 966 P.2d 1247 (1998), reconsideration denied.

In the present case, the trial court found that father had committed a history of acts of domestic violence based primarily upon the issuance of the protection order in April of 2008. The protection order was based one incident that occurred on February 24, 2008. Both parties gave oral testimony at trial, alleging past instances of domestic violence against the other. The mother was arrested for domestic violence in July 2007. The father was never arrested for domestic violence, and no evidence that the father had committed domestic violence, other than the existence of the April 2008 protection order, was ever presented. The court determined the father's residential time with the child should not be restricted under 26.09.191(n), but did award sole decision-making to the mother under RCW 26.09.191(1)(c). The court's decision to award sole decision-making to the mother was reversible error.

When the father's attorney asked the court to elaborate on the events that constituted a "history" of acts of domestic violence, the Court refused to do so. The trial Judge committed reversible error when he found that the father's decision-making authority should be restricted based in direct opposition to the Supreme Court ruling in *Caven v. Caven*, 136 Wn.2d 800. Given that there is no substantial evidence to support a finding of a *history* of domestic violence, it is clear the trial judge relied upon *mere accusations* of domestic violence made by the mother. *Caven* does not permit a finding of domestic violence based upon mere accusations. *Id.* The Court committed reversible error in finding that the father had engaged in a history of acts of domestic violence absent substantial evidence.

**2. THE TRIAL COURT ABUSED ITS DISCRETION IN
AWARDING PRIMARY RESIDENTIAL CARE TO THE
MOTHER BASED UPON HER HISTORIC STATUS AS
THE PRIMARY CAREGIVER**

Trial court parenting plans that do not constitute an abuse of discretion will be upheld. *In re Marriage of Littlefield*, 133 Wn.2d 39,

46, 940 P.2d 1362 (1997); *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).

The "best interests of the child" control when determining parenting plan. *In re Parentage of J.H.*, 112 Wn. App. 486, 49 P.3d 154 (2002), *review denied*, 148 Wn.2d 1024 (2003); *In re Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001). In making an initial determination of a permanent parenting plan, it is impermissible for the court to consider a presumption in favor of the parent who provided the majority of residential time under the temporary parenting plan. *In re Marriage of Combs*, 105 Wn. App. 168, 19 P.3d 469, *review denied*, 144 Wn.2d 1013 (2001). In determining permanent parenting plans, "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." *In re*

Marriage of Kovaks, 121 Wn.2d 795, 809, 854 P.2d 629 (1993). The focus is on prospective (not historical) parenting capabilities as determined by the seven factors of RCW 26.09.187(3)(a). *In re Marriage of Combs*, 105 Wn. App. 168, 19 P.3d 469, review denied, 144 Wn.2d 1013 (2001); *In re Marriage of Kovaks*, 121 Wn.2d 795, 809, 854 P.2d 629 (1993). RCW 26.09.187(3)(a) provides:

The 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 child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:

- (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 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;

(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.

Factor (i) shall be given the greatest weight.

RCW 26.09.187(3)(a). While the trial court considered each of the seven (7) factors required by statute in determining the residential schedule for the child, it focused primarily on the fact that the mother had been the primary residential parent, and that the father "has never had three consecutive overnights with the child". Verbatim Report of Court's Oral Ruling, p. 10-11. The Court stated that while both parents have a strong and healthy relationship with the child, and while both parties can provide for her emotional needs, the factors

weigh more heavily in favor of the mother because she has "a longer track record" Verbatim Report of Court's Oral Ruling, p. 10-12. Except for the consideration as to past performance of parenting functions under RCW 26,09.187(3)(a)(iii), the statute is silent pertaining to the court's consideration of who has been the primary caretaker. The trial court abused its discretion when it awarded the mother more residential time with the child based upon her status as the historical primary caretaker. Although the father had never had more than three overnights with the child, the caselaw is clear under *In re Marriage of Combs*, 105 Wn. App. 168, that the court cannot consider a presumption in favor of the parent who provided the majority of residential time under the temporary parenting plan. *In re Marriage of Kovaks*, 121 Wn.2d 795 makes it clear that a parent's historical role as the primary caretaker is not determinative. The trial court found that both parents "both have a good potential for future performance of parenting functions". Verbatim Report of Court's Oral Ruling, p. 11. Furthermore, based upon the relative strength, nature

and stability of the child's relationship with each parent--the factor that should be given the most weight--the Court and the Guardian ad Litem found that both parents have an equally strong relationship with the child. There is no reasonable basis for the court to have concluded, upon proper consideration of the factors, that the mother should be awarded primary residential care of the child.

Furthermore, there is substantial evidence to support the fact that the mother is engages in poor decision-making through her participation in the adult entertainment industry. Although the mother has historically been the primary residential parent, the court found that she "exercised poor judgment" in engaging in such behavior. Although she may not be involved in that activity anymore, it is certainly not within the child's best interests to continue under the physical and legal custody of a parent who exhibits such poor decision-making skills.

There is also substantial evidence to support the fact that the mother has allowed people with questionable pasts to have access to

her child. The Guardian ad Litem stated the mother's participation in the adult entertainment industry would likely lead to the child being exposed to some potentially dangerous people. The court abused its discretion in failing to consider the best interests of the child by virtually dismissing the mother's conduct by stating she is out of the business now and that she would be "well advised never to have anything to do with this kind of activity again...and also be well advised to carefully screen any people who have contact or potential contact with her child". *Id.*, p. 5. It was manifestly unreasonable for the Court to put so much weight on the mother's *past* performance of parenting functions with regard to her role as the primary caretaker, but also dismiss the issue of the mother's *past* participation in sexually explicit activities in the home where her daughter resides. If the Court is to base its ruling on the mother's historic conduct, the totality of the mother's historic conduct should be given equal weight.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DECLINED TO ORDER EQUAL RESIDENTIAL TIME TO EACH PARENT BASED UPON THE PARTIES HISTORY OF COOPERATION AND SHARED PERFORMANCE OF PARENTING FUNCTIONS.

RCW 26.09.187(b) relates to the court's ability to award equal residential time between the parents, stating:

Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.

RCW 26.09.187(b). In this case, the father argued it was in the child's best interest to reside primarily with him because of the mother's questionable conduct in the adult entertainment industry and psychosocial damage that could be done to the child as a result of the mother's decisions. In the event the child wasn't placed primarily with the father, he requested a parenting plan that designated equal

residential time to each parent. Based upon the GAL recommendations and the court's finding that both parties have a strong and stable relationship with the child, the court had the authority to find that it was in the child's best interests to share her time equally with both parents. The only factor contained in the statutory language, outside of the best interest standard, is that of geographic proximity. In this case, the parties reside in relatively close proximity to each other. The court abused its discretion in denying the father's request for equal residential time based upon the absence of agreement between the parties and the lack of a history of cooperation and shared performance of parenting functions – factors that no longer exist in the statutory language. The Guardian ad Litem, after thorough investigation, determined that this situation was one in which the parties could work together and share their parental responsibilities moving forward. She surmised that any conflict at exchanges between the parties was perpetuated by a third party accompanying the mother. Should this third party be restricted from

the exchanges, the conflict between the parties should dissipate. The GAL further testified that the parenting styles of the parties essentially mirror each other, based in part by the fact that the father has followed the recommendations of the mother as to the child's routine and schedule. There is no substantial evidence to find that the parties cannot cooperate in terms of parenting outside of third-party interference at the exchanges. Not only did the trial court abuse its discretion in considering factors outside of the statutory framework, but it erred in finding that the parties did not have the potential to successfully enter into a shared parenting arrangement moving forward.

4. THE TRIAL COURT ERRED WHEN IT ENTERED AN AWARD OF SPOUSAL MAINTENANCE AFTER FINDING THAT THE FATHER DID NOT HAVE THE ABILITY TO PAY.

A trial court's decision to award maintenance is reviewed for abuse of discretion. With regard to maintenance, the trial court abuses its discretion "if it bases the award or denial of spousal maintenance on untenable grounds for untenable reasons." *Marriage*

of Wright, 78 Wn.App. 230, 237, 896 P.2d 735 (Div. II 1995). It is manifestly unreasonable "if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it 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." *Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

a. The Trial Court Abused its discretion by awarding maintenance based on untenable reasons because the facts do not meet the requirements of the correct standard under RCW 26.09.090(f).

RCW 26.09.090 sets forth the legal standard for awarding maintenance in a dissolution proceeding, as well as the factors a trial court must consider when determining whether maintenance should be awarded. The statute provides:

(1) In a proceeding for dissolution of marriage domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent

domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

- a. The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
- b. The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
- c. The standard of living established during the marriage or domestic partnership;
- d. The duration of the marriage or domestic partnership;
- e. The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and
- f. The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner

seeking maintenance.

RCW 26.09.090. The facts of the present case do not meet the standard under subsection (g) of the statute because the court correctly found that the father's monthly expenses exceed his income, even with downward deviations to his expenses and without taking into account his temporary maintenance obligation. See Verbatim Report of Court's Oral Ruling, p. 17. Based on the facts of the case and findings made by the trial court as to the father's financial ability, it is impossible to assume that the father could afford additional maintenance payments, even if only for a short period of time. The award of maintenance, even if temporary, was based on untenable reasons and therefore constitutes an abuse of discretion under *Marriage of Wright* and *Marriage of Littlefield*.

**b. The Trial Court Failed to Make Any Findings
Necessary for an Award of Maintenance.**

Findings of fact "must glean from the record of the pertinent

facts of the case and thereby resolve conflicting evidence; they must apprise a reviewing court of the legal theories pursued [citation omitted], and must support the conclusions of law. *Marriage of Monkowski*, 17 Wn. App. 816, 818, 565 P.2d 1210 (Div. I 1977). Findings of fact which are couched in conclusory language are not sufficient. *Id.*, at 818-19.

In *Morgan v. Morgan*, 59 Wn.2d 636, 369 P.2d 516 (1962), the Supreme Court reversed the maintenance award, explaining:

[i]t is not clear what the basis was for the trial court's award of alimony. The only 'finding of fact' in support of that award was finding of fact No. 8: 'The court finds that the defendant wife is entitled to alimony, and that the circumstances of the parties justify an award of alimony at the rate of \$150 per month until her remarriage or until further order of this Court.'

Morgan, at 643.

In *Marriage of Monkowski*, this court also reversed the maintenance award, determining the court's finding was conclusory and legally insufficient:

Wife shall be awarded reasonable maintenance. Reasonable maintenance is the sum of \$1,000 per month for a period of

ten years. Husband shall pay to wife maintenance of \$1,000 per month for the next ten years commencing in September of 1975. Conclusion of law No. 7. The finding of fact which allegedly supports that conclusion is couched in identical conclusory language.

Marriage of Monkowski, at 818.

In the present case, the court's finding that "Maintenance should be ordered" is even more conclusory than the findings in *Morgan and Monkowski*. The finding does not refer to one single fact in support of it, and does not support a conclusion of law that maintenance is appropriate.

In *Dreyer v. Dreyer*, 10 Wn.App. 624, 519 P.2d 12 (Div. III 1974), the court held the trial court's award could not be affirmed as an award of alimony because "[t]here were no findings of fact concerning the necessities of the wife or of the ability of the husband to pay entered in this case." *Dreyer* at 627-628. The court went on to say the award, if treated as alimony, "was clearly unsupported by the findings of fact and the record." *Id.*

Again, there is no specific finding of fact as to the award of

maintenance in the present case. The trial court did address the issue briefly in its oral ruling, however, stating that this was a short-term marriage and that the parties did not have a high standard of living during the marriage. While the mother had a need for maintenance, the father's monthly expenses exceeded his income even after downward deviations to his expenses are made. After finding that the father does not have the ability to pay maintenance, the court somehow found that there was an ability to pay maintenance for only a short period of time. This finding was not supported by substantial evidence as determined by the court's oral ruling, or as specified in the Findings of Fact.

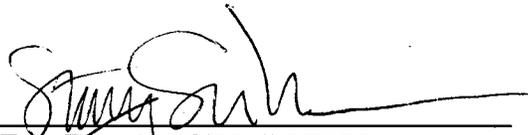
In light of the foregoing, the court should vacate the portion of the Decree requiring that maintenance be paid from August 2009 to October 2009, as well as the award of maintenance in the trial court's Temporary Order dated June 2, 2008.

IV.

CONCLUSION

The Appellant father respectfully requests that this Court reverse the trial court's award of maintenance, and remand back to the trial court for a modification of the parenting plan with regard to the provisions for residential time and decision-making authority.

Respectfully submitted this 21st day of May, 2010.

A handwritten signature in black ink, appearing to read "Eric Engel", written over a horizontal line.

Eric Engel WSBA # 35363
Stacey Swenhaugen #41509
Engel Law Group, P.S.
Attorneys for Appellant
600 University St., Suite 1904
Seattle, WA 98101