

WD 511-2 TWg

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No. 65317-2-I

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

In re the Marriage of:

JOHN EDWARD PENNINGTON

Respondent

And

ANNE LAUGHLIN PENNINGTON

Appellant

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. INTRODUCTION.

John and Anne Pennington married on September 16, 2007 and separated eight (8) months later in May of 2008. At the time of their separation, Anne was pregnant with the parties' daughter, Katelin, who was born on July 1, 2008, shortly after Anne, at the urging of her mother, obtained a domestic violence protection order against John. Because of the entry of the domestic violence order, John was not present at Katelin's birth and had no ability to participate in naming her. John had no contact with Katelin up to the time of trial and had no input into any decisions regarding her care.

Following a five (5) day trial in late January and early February 2010, the trial court's unchallenged findings included a finding neither Anne nor John were entirely credible. Specifically, the trial court found John was not credible regarding the personal counseling he was engaged in and that it didn't "believe" Anne's allegations regarding domestic violence. Therefore, the trial court entered a parenting plan containing unchallenged findings of limitations under RCW 26.09.191(3) for *both* parties and ordered a phased in residential schedule between John and Katelin, the appointment of a case manager to oversee the parties' interaction and to facilitate John's introduction to Katelin, and retained jurisdiction over the case. The trial court's parenting plan was designed to integrate John and Katelin (while maintaining Anne as the primary parent) and to give the parties one year to work with a case manager before engaging in joint decision making.

On appeal, Anne raises finite and discrete issues picking apart the trial court's final orders. Her main challenge is to the trial court's decision to implement joint decision making in February 2011, one year after entry of the final parenting plan. She also alleges the trial court had no authority to change Katelin's name, and no authority to order the inclusion of additional child related topics (such as participation in extra-curricular activities) in those decisions requiring joint decision making. This Court should reject Anne's challenges to these fact-based discretionary decisions and affirm the trial court's orders.

II. RESTATEMENT OF ISSUES.

1. Did the trial court abuse its discretion by ordering joint decision making one year after the entry of the final parenting plan when, during that year, a case manager would be monitoring both parties' compliance with the court's orders for treatment/counseling, working with the parties' on their communication with each other regarding parenting information or concerns, and notifying the court of any noncompliance as the court retained jurisdiction over the matter?

2. Did the trial court have the authority to order the child's name changed from Katelin Pennington Laughlin to Katelin Laughlin Pennington when Anne Pennington raised the issue of the child's name in her response to the petition for dissolution thus placing the issue before the trial court?

3. The trial court heard testimony that the parties already divided their joint 2007 tax refund, and that both parties filed separately

for tax year 2008 and kept the refunds they each received. Did the trial court abuse its discretion by failing to give Anne a money judgment to compensate her for a share of the parties joint 2007 tax refund and John's individual 2008 tax refund?

4. In her response to John's petition for dissolution, Anne "denied" John's proposed property division that included a payment of \$5,000.00 to her for reimbursement for improvements she made to his separate property. Was the trial court required to award Anne \$5,000.00 following trial simply because John pled this amount in his initial petition?

5. Did the trial court abuse its discretion when it denied Anne's motion for reconsideration/clarification seeking an increase in child support?

6. Should this Court reject any future request Anne may make for attorney fees and costs on appeal when she has failed to comply with RAP 18.1?

III. RESTATEMENT OF THE CASE.

A. Background of John and Anne's Relationship and Pretrial Proceedings.

John and Anne Pennington began dating in 2005, and married on September 16, 2007. RP 48, 50, 462. Anne told John she was pregnant on November 1, 2007. The couple experienced conflict over money and over John's daughter Grace (age 4 at the time of John and Anne's marriage) who lived with them. RP 50-55, 64, 238. John was awarded primary care

of Grace shortly after the parties started dating in 2005 following a bitter and contentious dissolution trial and post-trial proceedings in Snohomish County went on to span several years. RP 45-50. Anne was very familiar and involved in those proceedings; she helped John deal with his ex-wife Valerie, appeared in court with him in October 2007 and March 2008, and was very supportive of John's efforts to become Grace's primary parent. RP 49-50, 654; Trial Exhibit 90, p. 29 (transcript of Snohomish County proceedings). Unfortunately, the conflict between the parties escalated after Anne became pregnant. RP 580-581.

Anne left the home on May 9, 2008, after a heated argument regarding the couple and Grace attending a gathering of Anne's family. RP 66-69, 527-529, 601. Prior to their separation, Anne did not tell anyone that John was abusive to her or Grace and gave no indication she was fearful of John. See RP 61-62 (parties discuss purchase of wedding picture book in March 2008); RP 65 (Anne sends John pictures from family reunion in May 2008); RP 203 (Anne discusses protection order after she moved out); RP 216, 233 (Anne did not mention domestic violence to friends); Trial Exhibit 65 (psychological evaluation of Marcia Hedrick). John initially filed a petition for legal separation on May 28, 2008, after Anne refused to communicate with him regarding their marriage or their unborn child. RP 160, 163; CP 1-9. At the same time he

filed the petition, John wrote a letter to Anne attempting to let her know he cared about her and their unborn baby, and was concerned about their health and support. RP 157-160, 163.

Anne responded to John's petition for legal separation by seeking a domestic violence protection order on May 30, 2008. CP 10-25. Unbeknownst to John, Anne's mother, Linda Laughlin, found an attorney for Anne shortly after the parties' separation on May 9, and Anne and Linda met with the attorney on May 20, 2010. Anne thereafter sought the protection order at the urging of Linda. RP 613. After being served with the temporary protection order, John filed a response on June 10, 2010, asking that the protection order be dismissed. CP 33-97. On the same date, John filed an amended petition for dissolution. CP 26-32. Anne's request for a protection order protecting her and the unborn child was granted on June 12, 2010. CP 98-101.

In John's amended petition for dissolution, paragraph 1.3 and 1.15 identifies the parties' unborn child as "infant Pennington," as he did in the original petition for legal separation. CP 3, 7, 26, 30. Anne filed a response to the petition on July 11, 2010 (after Katelin's birth). In her response, Anne "denies" paragraphs 1.3 and 1.15 and states "the infant's last name will be Pennington-Laughlin." CP 110-111.

The couple's daughter, Katelin, was born on July 1, 2008. RP 147. Anne named the baby Katelin Pennington Laughlin. RP 607, 752. John found out about Katelin's birth a month later during a hearing in Snohomish County Superior Court related to Valerie's relentless efforts to wrest custody of Grace from John. Trial Exhibit 90, p. 36. Thereafter, John's attorney sent a letter to Anne's attorney asking about the baby, and Anne's attorney sent a letter advising the "baby" had been born. RP 147-148; Trial Exhibit 113.

Anne named the baby Katelin, a combination of the names Katella and Linda – Anne's grandmother and mother. RP 607. John was not given any opportunity to participate in naming Katelin at her birth.¹ RP 51. In August 2008, Anne became embroiled in John's ongoing custody case regarding Grace. By then, Anne was no longer supportive of John, and she appeared in Snohomish County Superior Court to provide information to the court that Grace was "in danger." Trial Exhibit 90, pp. 7-8, 14-15, 17-20; *see also* RP 247-48 (Valerie files modification action and appeal based on Anne's allegations). In September 2008, John was criminally charged as a result of Anne's domestic violence allegations. RP 82.

¹ It is unclear from the record whether or not Katelin's birth certificate was ever produced to confirm whether or not John was even listed as Katelin's father.

Because of his fears that Valerie would continue to use Anne's allegations, and any court findings supporting those allegations, against him in the ongoing custody dispute regarding Grace, John made a decision not to seek any kind of visitation with Katelin. RP 248-249. At trial, John elaborated on this decision:

This has been the most difficult part of this whole thing for me because I want to see that baby and I have wanted to since day one. And I knew that once the protection order had been issued against me, that I had to essentially lay low and wait for the fight that was coming over Grace's custody. ...

But my hope had been that this would all just calm down and that I would just stay back and let [Anne] cool down from whatever it was that she was going through and that the time would be there when we could have temporary orders and we could start the process of visitation, and the child support that's associated with it, all of it.

And the motions and the accusations and the allegations kept coming and coming, to the point that it was not in my best interest to seek temporary orders knowing, because of the allegations – especially when they evolved to criminal allegations that were later dismissed by the prosecutor – that I would be required to have supervised visitation.

When I had – in my mind and in my attorney's mind when I had supervised visitations [with Katelin], my ex-wife [Valerie] was going to take that, run to the Snohomish County Court and say, 'He shouldn't even be around a baby, so he sure shouldn't be around his daughter...'

So, the hardest thing I've had to do was basically not seek visitation with [Katelin]. After asking for pictures, after wondering what she looked like...

Valerie will stop at nothing to get Grace from me. As soon as Anne filed this, I have been dragged through court so many times in Snohomish County, and now the appeals court.

RP 250-51. The trial court agreed with John's fears stating: "John's fears about the ally he created turning enemy are not unfounded..." CP 373 (unchallenged finding).

The criminal prosecution against John was finally dismissed on May 28, 2009. Trial Exhibit 10. However, shortly thereafter, Anne filed a motion to renew her May 2008 domestic violence protection order, for 99 years, asserting violations of the existing order. She also contacted the Bellevue police in hopes of stimulating another criminal prosecution. RP 83-85, 176; Trial Exhibit 84. John agreed to the extension of the domestic violence protection order through the dissolution trial even though the extension prevented him from seeing Katelin. RP 83.

B. Trial Proceedings.

By the time of trial in January 2010, Katelin was 18 months old. Anne had never shown Katelin a picture of John nor talked to Katelin about John. RP 602-603. Anne's allegations at trial were that John had committed acts of domestic violence and that he abandoned Katelin so that restrictions should be imposed under RCW 26.09.191(1). RP 24-27; CP 510-512. John alleged Anne's domestic violence allegations were fabricated and retaliatory. RP 14-19; CP 341-47. Both parties spent the majority of the five (5) day trial litigating the issue of whether John committed acts of domestic violence sufficient to support findings against him under RCW 26.09.191(1).

Based on its findings following trial, the most important information for the trial court was contained in the psychological reports

for both parties performed by Dr. Marcia Hedrick. Trial Exhibit 65 (Anne's evaluation); Trial Exhibit 129 (John's evaluation). Debra Hunter, the Guardian Ad Litem, also completed a report. Trial Exhibit 25. Ms. Hunter adopted Dr. Hedrick's recommendations for treatment for both parents to address concerns regarding the parties need to address their personality issues that created a risk of continued conflict. Trial Exhibit 25, p. 25; *See also* Exhibit 65, p. 9; Exhibit 129, p. 10.

At the conclusion of the case, the Court did not find restrictions for either party under RCW 26.09.191(1), instead, the trial court's *unchallenged* findings contained in the final parenting plan state the following:

2.2 Other Factors (RCW 26.09.191(3))

The petitioner's involvement or conduct may have an adverse effect on the child's best interests because of the existence of the factors with follow:

The absence or substantial impairment of emotional ties between the parent and the child due to the fact that the respondent [sic] has had no contact with the child.

Other:

Anger management and control issues that indicate that the Petitioner would benefit from additional extended therapy to address the behaviors identified in the psychological reports and parenting evaluations. See supplemental findings of the court.

The respondent's involvement or conduct may have an adverse effect on the child's best interests because of the existence of the factors with follow:

The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development by exposure to conflict and rigidity. This may

be related to a long term issue referenced by evaluators and therapists. See supplemental findings of the court.

CP 376-377. The trial court's unchallenged supplemental findings show the court found "that neither petitioner nor respondent are entirely credible." CP 372. The trial court found John was not credible when testifying about the personal counseling he was engaged in to address the issues identified by Dr. Hedrick. Therefore the court ordered him to engage in "a far more rigorous treatment modality." CP 373; CP 386-87. The trial court did not believe Anne's testimony regarding "issues related to domestic violence" and found there was insufficient evidence to support "mandatory 26.09.191 restrictions." CP 373.

C. Final Orders.

On February 11, 2010, the trial court entered final orders. CP 364-371 (Findings of Fact and Conclusions of Law); CP 372-374 (Supplemental Findings of Fact); CP 375-398 (Final Parenting Plan); CP 415-424 (Decree of Dissolution); CP 399-403 (Child Support Worksheet); CP 404-414 (Order of Child Support); CP 415-424 (Decree of Dissolution); CP 425 (Order Retaining Jurisdiction). In the final parenting plan, the trial court entered a schedule "phasing in" John's residential time and requiring a case manager for a period of one year; ordering both parties to participate in therapy; giving Anne sole decision making until

February 2011 and then requiring joint decision making. CP 375-398. The trial court set John's child support at \$741.47 per month. CP 407. In the Decree, the trial court ordered the Katelin's name to be changed to Katelin Laughlin Pennington, and divided the parties' property. CP 419, 421-424. The trial court's unchallenged finding was that the property division outlined in the Decree was "fair and equitable." CP 371.

Anne brought a motion for reconsideration/clarification raising the same issues she now raises on appeal. CP 428-29 (Motion for Reconsideration); CP 430-455 (Memorandum of Law); CP 456-458 (Second Memorandum of Law). John responded, and Anne filed a reply. CP 459-485 (Memorandum in Response); CP 486-489 (Second Memorandum in Reply); CP 490-507 (Memorandum in Reply). The trial court heard the matter without oral argument, and issued a decision denying the motion on April 19, 2010. CP 286. This appeal timely followed.

IV. ARGUMENT.

A. The Trial Court's Decision To Allocate Decision Making Authority Between John And Anne Was Well Within Its Discretion.

In matters dealing with the welfare of children and the provisions of parenting plans, trial courts are given broad discretion. *In re Cabalquinto*, 100 Wn. 2d 325, 327, 669 P.2d 886 (1983), *appeal after*

remand, 43 Wn. App. 518, 718 P.2d 7 (1986). This broad discretion is necessary “because of a trial court’s unique opportunity to observe the parties to determine their credibility and to sort out conflicting evidence.” See *In re Marriage of Woffinden*, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982), *rev. denied*, 99 Wn.2d 1001 (1983). Accordingly, appellate courts review the trial court's disposition of parental visitation issues for manifest abuse of discretion. *George v. Helliard*, 62 Wn. App. 378, 385, 814 P.2d 238 (1991). Abuse of discretion is defined as discretion exercised on untenable grounds or for untenable reasons. *In re Marriage of Kovaks*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993).

When exercising its discretion, the trial court is guided by the policies behind the Parenting Act.

In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

RCW 20.09.002; *In re Marriage of Possinger*, 105 Wn. App. 326, 334-335, 19 P.3d 1109, *rev. denied*, 145 Wn. 2d 2008, 37 P.3d 290 (2001).

These overall legislative policies are more fully fleshed out in the statutory parenting plan objectives found in RCW 26.09.184. These objectives include setting forth “the authority and responsibilities of each parent with respect to the child, consistent with the criteria in RCW 26.09.187 and 26.09.191,” and protecting the “best interests of the child consistent with [the overall policies] found in RCW 26.09.002.” RCW 26.09.184(1)(d), (g). Thus, under the Parenting Act, the best interests of the child continues to be the standard by which the trial court exercises its discretion to determine and allocate parenting responsibilities. *Possinger*, 105 Wn. App. at 336 (2001).

Here, Anne argues that the trial court abused its discretion regarding its allocation of decision making authority between the parties. She makes three arguments, all of which should be rejected on appeal.

1. The Trial Court’s Decision To Reject Anne’s Request For Findings That John Engaged In Conduct Requiring Sole Decision Making Under RCW 26.09.191(1) Cannot Be Reviewed On Appeal.

Anne initially argues the trial court *should have* found John engaged in “willful abandonment for a substantial period of time or substantial refusal to perform parenting functions” under RCW

26.09.191(1)(a). Appellant's brief, pp. 20-22. Such a finding would have precluded the trial court from ordering joint decision making under RCW 26.09.187(2)(b)(i) and RCW 26.09.191(1).

As Anne recognizes in her opening brief, the absence of a finding requested by a party is the "equivalent of a finding against that party on that issue." *In re Marriage of Olivares*, 69 Wn. App. 324, 334, 848 P.2d 1281, *rev. denied*, 122 Wn.2d 1009, 863 P.2d 72 (1993), *overruled on other grounds*, *In re Estate of Borghi*, 167 Wn.2d 480, 219 P.3d 932 (2009). Here, contrary to Anne's statements in her brief, John did offer testimony to explain he did not willfully abandon Katelin. It was Anne's claims of domestic violence, the criminal prosecution resulting from those claims, the use of those claims by his former wife to attempt to wrest custody of Grace away from John, and Anne's participation in and support of his former wife's attempts to change custody that prevented John from being at Katelin's birth and weighed heavily on John's decisions to forego any request for visitation until trial. RP 250-251; Trial Exhibit 90 (transcript from Snohomish County wherein Anne appears as a witness at the request of Valerie Pennington); *see also* RP 160, 163 (attempts to provide medical insurance), RP 86 (wasn't provided baby's name to change life insurance policy).

The trial court considered all the evidence on this issue and rejected Anne's request for this finding. This court must defer to the trial court on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999). As such, the trial court did not abuse its discretion by not ordering sole decision making when there were no mandatory limitations required by RCW 26.09.191(1).

2. The Trial Court Appropriately Ordered A Transition From Sole To Joint Decision Making After One Year Because Anne's Objection To Joint Decision Making Was Not Reasonable Where No Limitations Existed Requiring Sole Decision Making And The Transition Allowed The Parties To Engage In Individual Counseling And To Work With A Case Manager.

Anne's second argument is that the trial court erred in ordering joint decision making authority based on RCW 26.09.187(2). That statute provides:

(b) SOLE DECISION-MAKING AUTHORITY. The court shall order sole decision-making to one parent when it finds that:

...

(iii) One parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in (c) of this subsection.

(c) MUTUAL DECISION-MAKING AUTHORITY. Except as provided above, the court shall consider the following criteria in allocating decision making authority:

(i) The existence of a limitation under RCW 26.09.191;

(ii) The history of participation of each parent in decision making in each of the areas in RCW 26.09.184(5)(a);

- (iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(5)(a); and
- (iv) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

RCW 26.09.187(2)(b), (c)

Here, only Anne was opposed to mutual decision making. Therefore, the trial court had to evaluate whether her opposition was reasonable under the criteria outlined in RCW 26.09.187(2)(c). Anne argues her opposition to joint decision making was reasonable considering both RCW 26.09.187(2)(c)(i) (existence of limitations) and (iii) (demonstrated ability/desire to cooperate). Appellant's brief, pp. 23-24.

Anne's argument based on RCW 26.09.187(2)(c)(i) is nonsensical when considering *all* the evidence presented to the trial court and not the one-sided version appearing in Anne's opening brief. The trial court found limitations under RCW 26.09.191(3) existed not only for John (as argued in her brief) but also for Anne based on her "abusive use of conflict." CP 376. The trial court's supplemental findings state: "[w]hen Anne Laughlin testifies to issues related to 'domestic violence' the court doesn't believe her." CP 373. These unchallenged findings are verities on appeal. *In re Marriage of Brewer*, 137 Wn.2d 756, 976 P.2d 102 (1999). The trial court necessarily had to weigh the limitations it found existed for both parties under RCW 26.09.191(3), not just the limitations for John,

when deciding whether to allow joint decision making under RCW 26.09.187(2)(c)(i).

Anne's argument that the existence of *any* limitation under RCW 26.09.191 will weigh against joint decision making under RCW 26.09.187(2)(c)(i) is also flawed. This argument simply ignores the significant differences between the nature of the limitations imposed based on findings under RCW 26.09.191(1) and RCW 26.09.191(3). Again, as discussed above, the trial court rejected Anne's request for findings against John under RCW 26.09.191(1) that would mandate sole decision making. Instead, the trial court found limitations on both parents under RCW 26.09.191(3). This subsection clearly allows a trial court the discretion to impose limitations on any aspect of a parenting plan, but it does not mandate limitations. *In re Marriage of Katare*, 125 Wn. App. 813, 825-28, 105 P.3d 44 (2004), *rev. denied*, 155 Wn.2d 1005 (2005). Thus, the trial court appropriately weighed RCW 26.09.187(2)(c)(i) in favor of joint decision making despite Anne's objection.

Similarly, RCW 26.09.187(2)(c)(iii) also weighs in favor of joint decision making. Anne argues joint decision making should not have been ordered because she and John have no demonstrated ability and desire to cooperate as required by this factor. First, Anne's allegations regarding domestic violence and the entry of a domestic violence protection order

protecting Anne and the parties' then unborn child shortly after the parties' separation makes it questionable whether this factor should even be applicable in this case. It is difficult to imagine how a party to a case where her/she is alleged to have committed acts of domestic violence would have the opportunity to engage in the type of cooperative behavior this factor calls for. Second, Anne's argument again focuses solely on John's shortcomings with barely any recognition of her own. Appellant's brief, pp. 25-26.

Considering all the evidence before the trial court, it is clear Dr. Hedrick's opinion regarding Anne, as it related to future interaction and cooperation between the parties, was equally as guarded as her opinion regarding John. Dr. Hedrick stated:

[Anne's previous therapist] provided significant information about Ms. Laughlin's difficulties with anxiety and a tendency to 'get riled up and escalated.' This pattern was evident during this evaluation in that Ms. Laughlin tended to ascribe consideration significance to ambiguous incidents that could also be viewed as benign, with no apparent consideration of an alternative interpretation. ... This issue is that she can't know the truth of the matter, but presents the data as though it is unambiguous in its meaning. Attributing meaning to ambiguous events in a high conflict divorce situation is likely to escalate conflict as individuals attempt to prove or disprove events and intentions.

Trial Exhibit 65, p. 9. Based on Dr. Hedrick's evaluation, the Guardian Ad Litem stated: "An important message for the mother is that it is critical she strive to be a healthy parent, emotionally and psychologically.

Her behavior borders on abusive use of conflict.” Trial Exhibit 25, p. 23.

To address Anne’s tendencies toward distorting facts and escalating conflict, Dr. Hedrick suggested:

...[i]t would seem beneficial to Ms. Laughlin if she were to address with a therapist ways in which to minimize distortions and magnifications of threat and thereby reduce the potential for conflict.

Id. The Guardian Ad Litem agreed with this recommendation. Trial Exhibit 25, p. 24.

Here, the trial court clearly considered Dr. Hedrick’s reports for both parties and specifically weighed the emotional and psychological issues regarding the parties’ ability to work together before moving from sole decision making in favor of Anne to joint decision making. The trial court carefully crafted a parenting plan that (1) gave both parties the opportunity to avail themselves of the counseling Dr. Hedrick suggested to would benefit both parties, and (2) gave both parties the benefit of working with a case manager, as suggested by the Guardian Ad Litem and agreed to by both parties, to work with the parties to “facilitate and direct appropriate communication between parties regarding parenting information or concerns.” CP 386; Trial Exhibit 25, p. 23 (GAL report recommending case manager)

Finally, because the trial court properly weighed the criteria in RCW 26.09.187(2)(c) in favor of joint decision making, Anne attacks the trial court's decision to impose joint decision making one year later and argues the delay is inappropriately speculative. Appellant's brief, pp. 27-28. Anne cites two cases as authority for her argument: *Storgaard v. Storgaard*, 26 Wn.2d 388, 174 P.2d 309 (1946) and *Schultz v. Schultz*, 66 Wn.2d 713, 404 P.2d 987 (1965). However, these cases make it clear that a trial court cannot base a *custodial* decision on speculation regarding parental fitness. See *Storgaard*, 26 Wn.2d at 391 (trial court erred in awarding custody to based on hope that mother would stop neglecting children when evidence showed mother has seriously neglected children for years); *Schultz*, 66 Wn.2d at 716-17 (trial court cannot award custody based on hope mother's mental illness will improve). In the instant case, the trial court's decision related only to allocating decision making authority, not custody.

Here, the trial court appropriately found there was no basis to mandate permanent sole-decision making under RCW 26.09.187(2)(b). The trial court continued sole- decision making for a period of one year to give John a period of time to transition into Katelin's life. CP 391. The trial court weighed the factors in RCW 26.09.187(2)(c) and concluded joint decision making would be appropriate after John integrated into

Katelin's life, and the parties had the opportunity to work with a case manager and engage in the individual treatment recommended by Dr. Hedrick. Finally, the trial court retained jurisdiction to address any issues that might arise during the year transition period. CP 394, 425. Under the circumstances, the trial court appropriately and carefully exercised its discretion regarding the allocation of decision making responsibilities.

3. The Trial Court's Broad Discretionary Powers Allow It To Include Extracurricular Activities, Marriage, Driving Privileges, And Other Topics Not Specifically Outlined In RCW 26.09.184(5)(a) In Decisions That Are Subject To Joint Decision Making.

Anne asserts the trial court only had the authority to allocate joint decision making for Katelin's educational, health care, and religious upbringing. She claims the trial court could not order joint decision making for other child related decisions such whether to allow the child to obtain a driver's license, enlist in the military, marry, obtain a tattoo or piercing, or participate in extracurricular activities. Appellant's brief, pp. 28-29. Anne cites RCW 26.09.184(5)(a) as authority for her argument.

This statute provides:

(5) ALLOCATION OF DECISION-MAKING AUTHORITY.
(a) The plan shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan, consistent with the criteria in RCW 26.09.187 and 26.09.191. Regardless of the allocation of

decision-making in the parenting plan, either parent may make emergency decisions affecting the health or safety of the child.

RCW 26.09.184(5)(a).

Anne argues the word “shall” in the first sentence of this statute limits the extent of the court’s authority to address issues other than education, health care, and religion absent agreement of the parties. She provides no other analysis or citation to authority for her argument. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977). As such, this Court should decline to address this argument.

In the event this Court does consider this issue, Anne’s argument fails. The first sentence of RCW 26.09.184(5)(a) only indicates what decision-making topics the “[parenting] plan” shall contain. Although the language in the second sentence indicates the “parties may” agree to include other topics, the statute does not expressly prevent a trial court from including other topics in the absence of the parties’ agreement.

Nor would interpreting the statute to limit the trial court’s authority in this way be consistent with the remaining sections of RCW 26.09.184 or with the Parenting Act itself. “In fashioning a parenting plan, the trial court seeks to maintain the child’s emotional stability, to clearly establish

the parents' responsibilities and to minimize the child's exposure to harmful parental conflict.” *In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 489, 899 P.2d 803 (1995) (citing RCW 26.09.184(1)(b), (d), (e)) *see also In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004) (statutes relating to the same subject matter are to be construed and read together so that a harmonious total statutory scheme emerges).

In *Jensen-Branch*, this Court reviewed the trial court’s allocation of decision making authority for religious decisions and stated:

[e]ach case must be decided on its own facts, as every child is different. Also, a child's needs may vary over time based on his or her continued growth and development. Restrictions imposed at a vulnerable time in a child's life may not be necessary at a later time, either as a result of the child's maturation or because the parents have become more stable as they learn to cope with their own feelings about the separation and divorce. Decision-making orders must be fashioned so as to protect children from harmful exposure to parental conflict...with the best interests of the children the paramount concern. RCW 26.09.002; RCW 26.09.184(1)(e).

Jensen-Branch, 78 Wn. App. at 491. Although *Jensen-Branch* specifically focused on the allocation of decision making authority for religious decisions, this Court’s continued recognition of the trial court’s authority to act in any way necessary to foster the best interests of the child is instructive. By allocating decision making authority for other traditional child related decisions at the outset of Anne and John’s parental relationship, the trial court clearly established a framework for both

parents to work within. Given the high conflict involved in this case, having clearly defined topics requiring joint decision making will minimize future conflict which could lead the parties back to court. The trial court did not abuse its discretion by including these other topics.

B. The Trial Court Had The Authority To Change Katelin's Name From Katelin Pennington Laughlin To Katelin Laughlin Pennington When Anne Specifically Raised The Issue Of The Child's Name In Her Response To The Petition For Dissolution.

On appeal, Anne solely argues the trial court lacked the *authority* to order Katelin's name change in a dissolution proceeding under RCW 26.09. Appellant's brief, pp. 17-19. Anne cannot object on appeal to the trial court's decision to change Katelin's name from Katelin Pennington Laughlin to Katelin Laughlin Pennington when Anne was the party who initially placed the issue of the child's name before the trial court by requesting the child's name be "Pennington Laughlin." CP 111; *see also* RP 29 (opening statement indicates child's name "is Katelin Pennington Laughlin not Katelin Laughlin Pennington). To the extent the trial court should not have considered this issue, Anne invited the error. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (under the doctrine of invited error, a party cannot complain about an alleged error at trial that he set up himself).

However, if this issue is properly before this Court, the cases cited by Anne do not prevent the trial court from changing the child's name under the unique factual circumstance here. In *Hurta v. Hurta*, 25 Wn App. 95, 605 P.2d 1278 (1979), the parties' dissolution decree had already entered at the time of the child's birth and the decree did not contain a provision regarding the child's name. The father sought to modify the decree of dissolution to change the child's name. *Id.* at 96. This Court vacated the order changing the child's name under the dissolution statutes stating:

[t]here is no provision in the dissolution statutes RCW 26.09.010 et. seq. for change of a child's name; application must be made under RCW 4.24.130...

Id.

Hurta should be limited to its facts. Here, unlike the parties in *Hurta*, the parties identified the child's name as an issue before the trial court in their initial pleadings. CP 103, 109 (petition); CP 111 (response). Anne's counsel addressed the issue in his opening statements, RP 29, and both counsel addressed it in closing argument. RP 706-707, 712, 714, 751. The parties testified about naming the child. RP 51, 146, 526, 602. Thus, the issue was properly before the trial court and an express request under RCW 4.24.130 was unnecessary to give the trial court the authority to change Katelin's name. *See Daves v. Nastos*, 105 Wn.2d 24, 711 P.2d

314 (1985) (name change can be heard in paternity action if pleadings request the relief).²

C. The Trial Court's Property Division Was Within Its Discretion.

A trial court has broad discretion when dividing property in a dissolution action and an appellate court will not reverse the trial court's decision without a showing of manifest abuse of discretion. *Olivares*, 69 Wn. App. at 328. The essential consideration in the distribution of property is whether the final distribution is fair, just, and equitable under the circumstances. *Id.* at 329. Here, Anne does not challenge the trial court's finding that the property division set forth in the decree was "fair and equitable." CP 371. Instead, she devotes scarcely over two (2) pages in her brief to argue the evidence did not support the trial court's decisions regarding two discrete property issues – tax refunds for 2007 and 2008 and compensation for improvements Anne made to John's separate property home. Appellant's Brief pp. 29-31.

² On appeal, Anne does not argue the trial court erred by failing to consider what was in Katelin's best interests prior to ordering the name change. *See Hurta*, 25 Wn. App. at 96; *Daves*, 105 Wn.2d at 29-30. In fact, she specifically argues the "best interests" standard is of no moment because of the trial court's fundamental lack of authority to authorize a name change in a dissolution proceeding. Appellant's brief, pp. 18-19. Anne cannot raise any new argument related to the trial court's consideration of Katelin's best interests in her reply brief. RAP 10.3(c); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Without addressing these individual issues, this Court could choose to summarily affirm the trial court's treatment of these assets as follows. When dividing property, the trial court must consider the criteria outlined in RCW 26.09.080. Of importance in this case, is RCW 26.09.080(3) which requires a trial court to consider the length of the marriage. Few Washington cases analyze the statutory requirement that the court consider the length of the marriage in making a just and equitable disposition of the property and liabilities of parties. However, Judge Robert W. Winsor, while on the bench of the King County Superior Court, suggested that parties involved in short-term marriages (those lasting five (5) years or less) should be placed in the same position they were prior to the marriage. Winsor, Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions, Wash. St. Bar News, 14, 16 (Jan. 1982). Although Judge Winsor's recommendations are not binding upon this Court, many family law practitioners and Superior Court Judges adopt this approach when making decisions regarding property division.

In the instant case, the parties were married just shy of eight (8) months when they separated on May 9, 2008. CP 104, 110. The trial court decision's to leave both parties with the tax refunds they received one or more years prior to trial and to give Anne the opportunity, post-trial, to obtain reimbursement upon proper proof (rather than award her

money based on her speculative trial testimony) was not an abuse of discretion, particularly when Anne does not argue the overall property award was unfair to her.

1. The Trial Court Appropriately Refused To Award Anne Further Reimbursement For Any Community Interest In The Parties' 2007 Joint Tax Refund and John's 2008 Separate Tax Refund.

Anne claims the trial court abused its discretion by not dividing the 2007 and 2008 tax refunds equally between the parties and forcing John to reimburse her for her share. Appellant's brief, pp. 30. However, a trial court is not required to make an equal division – it must make an equitable one. *In re Marriage of Nicholson*, 17 Wn. App. 110, 117, 561 P.2d 1116 (1977). In this case, John testified that he and Anne decided to file jointly for tax year 2007, despite the fact they had only been married for a little over three months, because it would give Anne back more money than if she filed married separate. John further testified that Anne had borrowed money from him in 2007, that she used part of the tax refund she received to pay him back in \$500.00 increments, and that the issue was resolved. RP 653. Anne admitted to owing John money, admitted that she paid him back in \$500.00 increments payments, but denied that she received any part of the 2007 tax refund. RP 468, 556-557. No evidence existed to demonstrate any part of the 2007 refund still existed. The trial court

weighed the evidence presented, and did not order any reimbursement. This Court cannot reweigh the evidence now to find an abuse of discretion. *Greene*, 97 Wn. App. 714.

Anne's argument regarding the 2008 refund suffers the same fate. The parties separated on May 9, 2008. RP 66-69, 601; CP 104, 110. There is simply no merit to Anne's argument that the parties' marriage wasn't "defunct" until July 2008; they were living separate and apart as of May 9, 2008, Anne sought a domestic violence protection order on May 28, 2008, and John sought a dissolution on June 10, 2008. RP 554, CP 10-25; CP 26-32. As such, the majority of John's earnings in 2008 (May through December) were his separate property. RCW 26.16.140. John testified he filed his 2008 taxes separately, and that he received a larger refund in 2008 because he was able to write off all the attorney's fees he incurred to defend himself in the criminal prosecution resulting from Anne's domestic violence claims. RP 653. Ironically, Anne testified that she also chose to file her taxes separately in 2008, that she claimed Katelin as an exemption, and that she received a refund which she kept. RP 552-554. Under these circumstances, the trial court did not abuse its discretion by leaving each party with the refund they had already received after choosing, independently, to file separate returns. Although John may have received the entirety of whatever community interest the parties had in the

refund, the trial court awarded Anne the parties' community living room furniture and wedding gifts which John testified were worth \$25,000. *See* RP 647-48 (wedding gifts worth \$5,000.00; living room furniture worth \$20,000.00). In this fashion, Anne was appropriately compensated for any small community interest she may have had in John's 2008 tax refund.

2. The Trial Court Did Not Abuse Its Discretion When It Provided Anne With The Opportunity To Obtain Reimbursement For The Improvements She Made To John's Separate Property.

Anne claims that the trial court was *required* to award her at least \$5,000.00 to compensate her for the improvements she made to John's separate property solely because John's amended petition for dissolution proposed a reimbursement of this amount as part of his proposed property division. Appellant's brief, pp. 31; *See* CP 28 (petition for dissolution). Anne's argument ignores the effect of her response denying John's proposal was equitable. CP 111. By denying John's proposal, Anne effectively raised a counterclaim and the issue was properly before the trial court to resolve. *See In re Marriage of Parker*, 78 Wn. App. 405, 409, 897 P.2d 402 (1995), *rev. denied*, 128 Wn.2d 1016, 911 P.2d 1342 (1996) (response to dissolution petition containing alternative property division is a counterclaim). The trial court had the authority to exercise its

discretion after listening to the evidence presented at trial and resolve this issue based on that evidence instead of the original pleadings.

At trial, Anne testified regarding her “estimate” that the cost of the improvements to John’s home for painting and “putting in” a pond were “over \$10,000.00.” RP 466. When asked how these “improvements” increased the value to John’s property, she testified “it’s hard to say. But I would say it was upwards of \$15,000.00.” RP 467; *see also* RP 538 (on cross-examination Anne states she has “no idea” how much the improvements increased the value). John testified that the pond was already part of the house when he purchased it, but it wasn’t finished. RP 78. John testified that Anne surprised him by finishing the pond right before their marriage, and the only expenses her knew of were for plants from Molback’s in the amount of \$500.00. RP 79. Both John and Anne testified that they worked on painting the home together, and Anne acknowledged John also helped with the outdoor work. RP 78-80, 116, 463-466, 539. Given the speculation and conflict involved in this testimony, the trial court would have been well within its discretion to resolve the testimony solely in favor of John and provide Anne with no chance of obtaining reimbursement. *See In re Marriage of Lindemann*, 92 Wn.App. 64, 70, 960 P.2d 966 (1998), *rev. denied*, 137 Wn.2d 1016 (1999) (if trial court has “direct and positive evidence” of increased value,

reimbursement is appropriate). The trial court did not abuse its discretion by giving Anne the opportunity to obtain reimbursement for the expenses she incurred prior to marriage upon proof of those expenses. CP 422. By doing so, the trial court was doing its best to place Anne back in the position she was in prior to marriage.

D. The Trial Court Did Not Abuse Its Discretion By Failing To Increase John's Child Support Obligation Following Anne's Motion For Reconsideration.

Like the trial court's other fact-based discretionary decisions involved in this appeal,

[t]he amount of child support rests in the sound discretion of the trial court. [The appellate] court will not substitute its own judgment for that of the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances.

In re Marriage of Fiorito, 112 Wn. App. 657, 663-64; 50 P.3d 298 (2002). Here, the trial court originally set John's child support obligation at \$741.47. CP 407. In doing so, the trial court denied John's request for a deviation based on his obligation to support Grace (a whole family deviation) after finding John had the demonstrated ability to supplement his regular salary with independent contracts with FEMA. CP 403. The child support order also provided for a review of the transfer payment when Anne became employed as the trial court set Anne's income based upon her then unemployment income. CP 410; *see* RP 475 (Anne's

unemployment income was \$2,600.00 monthly); CP 399 (child support worksheet setting Anne's income at \$2,600.00).

In her motion for reconsideration following trial, Anne notified the trial court the support calculation was incorrectly based upon the support schedule in effect prior to October 1, 2009. CP 432-433. Although John acknowledged the error, he requested the trial court leave the transfer payment at \$741.00 per month. John requested a deviation based on costs of medical insurance for Katelin, costs for the court ordered counseling as a requirement for visitation, and his inability to supplement his income with FEMA contracts because of the time commitments associated with counseling. Additionally, John asked the trial court to consider Anne's ability to earn additional income through tutoring. CP 460-461.

RCW 26.19.075 lists the *non-exclusive* factors a trial court can consider when exercising its discretion to order a deviation from the standard calculation of support. Contrary to Anne's assertion, the trial court did have evidence upon which to base its finding that Anne had unreported income. RP 604. Therefore, considering all these circumstances, and in light of the fact the trial court anticipated a review once Anne became employed, the trial court's decision to deny Anne's motion for reconsideration and leave John's transfer payment at \$741.00 was neither unreasonable nor an abuse of discretion. *See In re Marriage*

of *Burkey*, 36 Wn. App. 487, 489, 675 P.2d 619 (1984) (denial of motion for reconsideration will not be reversed absent a showing of manifest abuse of discretion).

E. This Court Must Deny Anne’s Request For Attorney Fees On Appeal Because She Has Failed To Comply With RAP 18.1.

To receive an attorney fees award on appeal, a party must devote a section of the brief 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). Argument and citation to authority are required under the rule to advise the appellate 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, *rev. denied*, 124 Wn.2d 1015, 880 P.2d 1005 (1994). Here, Anne simply “reserves her right to obtain attorneys fees and cost for this appeal.” Appellant’s brief, p. 34. This is grossly insufficient under RAP 18.1(b) and, as such, her request to “reserve” this right should be denied. *See Thweatt v. Hommel*, 67 Wn. App. 135, 148, 834 P.2d 1058, *rev. denied*, 120 Wn.2d 1016, 844 P.2d 436 (1992) (rule requires more than a bald request for attorney fees on appeal).

VII. CONCLUSION.

For the foregoing reasons, Respondent John Pennington respectfully requests this Court affirm the trial court’s fact-based

discretionary decisions regarding the discrete issues presented here. The trial court appropriately and thoughtfully exercised its discretion to fashion a parenting plan that was in Katelin's best interests.

Respectfully submitted this 15th day of October, 2010.

BREWE LAYMAN

By



Karen D. Moore, WSBA 21328
Attorney for Respondent

CERTIFICATE OF SERVICE

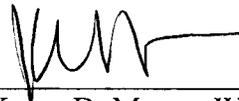
I hereby certify under penalty of perjury under the laws of the State of Washington that on the 15th day of October, 2010, I caused a true and correct original and one copy of the foregoing document to be delivered to the following:

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

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

H. Michael Finesilver (fka Fields)
Anderson, Fields, McIlwain & Dermody
207 East Edgar St
Seattle, WA 98102
BY: Email and US Mail

Dated this 15th day of October, 2010 at Everett, Washington.



Karen D. Moore, WSBA 21328