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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Parentage of:

A.M.

Child,

JOHN KARL FISCHER,

Respondent,

and

THERESA A. MCDONALD,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE DEAN LUM

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

The mother agreed in writing to have the trial court decide certain disputed matters on documentary evidence. Nevertheless, she now claims on appeal that she was deprived of her constitutional right to a trial with live testimony. The mother does not claim that her agreement was procured by fraud or mistake. Nor does the mother claim that the resulting parenting plan was not in the child's best interests, or that the trial court abused its broad discretion in crafting the parenting plan. Instead, the mother complains that she has one day less each month with the child than she advocated at trial – even though there is substantial evidence that she agreed to that schedule in advance of trial. The trial court did not abuse its discretion in enforcing the parties' agreement by deciding disputed issues, largely related to child support, on documentary evidence, and by incorporating the parties' other agreements into its parenting plan.

The mother's challenge to the parenting plan appears to be a thinly veiled attempt to avoid a child support obligation, based on her claim that she agreed to a "50/50 schedule." However, any hope that the mother may have to avoid child support based on an

equal residential schedule is flawed, because it ignores the fact that she too sought child support based on an equal residential schedule, and that the trial court has discretion to order one parent to pay child support to the other when the child resides equally with both parents. ***State ex rel. M.M.G. v. Graham***, 159 Wn.2d 623, 635-36, ¶¶ 21-22, 152 P.3d 1005 (2007). Perhaps recognizing the trial court had authority to order her to pay child support, in an effort to reduce her obligation the mother attacks entirely discretionary decisions. But the trial court did not abuse its discretion in declining to impute income to the father, and in awarding the tax exemption to each party in alternating years.

This court should affirm the trial court's orders and deny the mother's request for attorney fees on appeal.

## **II. RESTATEMENT OF FACTS**

### **A. The Parties' Son Was Born After They Ended Their Short-Term Relationship.**

Respondent John Fischer, age 55, and appellant Teresa McDonald, age 42, are the parents of a son born February 13, 2008. (CP 583-84, 1103, 1109) Dr. Fischer is a dentist in La Conner, Washington, with an annual gross income of approximately \$125,000. (CP 260-61) Ms. McDonald is an executive at Nintendo

with an annual gross income of \$150,000, including bonuses. (CP 493) Ms. McDonald previously worked at Amazon.com earning an annual gross base income of \$160,000. (CP 238)

Both parties have children from prior relationships. (CP 103, 104) The parties had been dating three months when Ms. McDonald announced she was pregnant. (CP 105, 1180) Although they stopped dating soon thereafter, Dr. Fischer was supportive of Ms. McDonald during her pregnancy, assisting her in preparing for their child's arrival and providing financial support and support around her home. (CP 1180-81) On February 13, 2008, after a long labor, the parties' son was born by caesarean section. (CP 1181) Dr. Fischer was present for his birth and remained at the hospital until their son was released three days later. (CP 1181-82)

**B. The Mother Initially Resisted Liberal Visitation Between The Father And Son Based On Claims That The Son Had Serious Medical Issues.**

Dr. Fischer regularly visited the parties' son in Ms. McDonald's home. (CP 1182-83) Ms. McDonald's home was not a "neutral environment" and limited Dr. Fisher's activities with their son. (CP 1183) Ms. McDonald refused any visitation outside of her

home, and refused to allow Dr. Fischer to take the child overnight. (CP 1183)

On December 5, 2008, when their son was 10 months old, Dr. Fischer filed a petition to establish a parenting plan. (CP 1103-07) Ms. McDonald originally asked the court to limit Dr. Fischer's residential time to 7½ hours per week, supervised in her home, claiming that the father (who has two older children) must "demonstrate his ability to adequately care for the child's special needs." (CP 24-26; *See also* CP 11-12) Otherwise, Ms. McDonald claimed that their son's "health and well-being could suffer to the point of him being seriously ill, hospitalized or worse." (CP 1191)

Ms. McDonald's concerns related to the son's severe reflux (GERD), and alleged food allergies. (CP 1193) After consulting with the son's pediatrician, Dr. Fischer was able to confirm that the son's GERD, food allergies, and the fact that he was still breastfeeding were not "obstacle[s] to overnight visits." (CP 1197)

On January 16, 2009, the court entered a temporary parenting plan providing for the father's first three weeks of visits to occur in the mother's home, and thereafter unsupervised in his home every Sunday, with a mid-week evening visit every

Wednesday. (CP 34) On May 7, 2009, the court increased the father's residential time to include one overnight on the weekend in alternating weeks. (CP 45) The court also appointed Jude McNeil to evaluate parenting. (CP 49)

**C. The Parenting Evaluator Recommended That The Father Be Designated Primary Parent Due To Concerns About The Mother's Psychological Issues That Caused Her To Exaggerate The Child's Medical Condition.**

Underlying the parenting dispute was Ms. McDonald's claims that Dr. Fischer was unable to care for their son and deal with his medical issues, which included allergies that the mother claimed were severe but that all medical professionals referred to as "mild." (See CP 167-68, 1128, 1132-34, 1139) The court-appointed parenting evaluator, Jude McNeill, agreed with Dr. Fischer's concern that Ms. McDonald was creating these concerns in an effort to obstruct his visitation with their son, and expressed her own concern that the mother's exaggeration of the son's medical issues had an underlying psychological component. (CP 1138-42) After interviewing the child's doctors and the psychologist who conducted psychological evaluations of the parents, Ms. McNeill reported that Ms. McDonald may have a "type of vulnerable child syndrome," and expressed concern that she "lack[s] insight," and

that she has “engaged in trying to limit [Dr. Fischer]’s time with the child due to her concerns.” (CP 1139) Ms. McNeil expressed concern that Ms. McDonald has a “tendency to overreact” and had used the son’s physical symptoms as a means of restraining Dr. Fischer’s access. (CP 1140)

Ms. McNeill concluded Ms. McDonald had engaged in the abusive use of conflict, and that her behavior was harmful to the child. (CP 1140) Ms. McNeill recommended the child be placed primarily with Dr. Fischer, who the evaluator found was “more able to meet the developmental and emotional needs . . . because in his father’s care he will be more able to focus on his emotional medical and developmental needs.” (CP 1146, 1148) Ms. McNeil recommended that Dr. Fischer have sole decision-making over non-emergency health care decisions. (CP 1146) Finally, Ms. McNeill recommended that Ms. McDonald participate in individual therapy to address the concerns noted in the evaluation conducted by the psychologist. (CP 1147)

**D. The Parties Agreed On A Nearly Equal Residential Schedule And Agreed That The Trial Court Could Decide By Motion Child Support And Who Should Be Designated Primary Parent.**

Shortly after Ms. McNeill issued her report, the parties began negotiating an agreed parenting plan. In light of the parenting evaluation, Dr. Fischer had “serious reservations” about a residential schedule that provided “significant” time with Ms. McDonald. (CP 233) Dr. Fischer also was adamant that he have sole decision-making on medical issues, in order to keep their son “reasonably safe from [Ms. McDonald]’s consistent attempts to create and exaggerate his medical issues.” (CP 233) In order to reach agreement, Dr. Fischer proposed a schedule that provided him 16 of 28 overnights, based on a repeating two week schedule. (CP 258) He proposed that Ms. McDonald be evaluated by Dr. Bruce Olson to address issues raised in the parenting evaluation, and thereafter follow any treatment recommendations with a provider within her insurance plan:

- 1) In the first week, the child shall be with the mother from Sunday at 4 p.m. until Tuesday at 5 p.m. The child shall reside with the father from Tuesday at 5 p.m. until Friday at 7:30 p.m.

In the second week, the child reside with the mother from Friday at 7:30 p.m. until Tuesday at 5 p.m. The

child reside with the father from Tuesday at 5 p.m. until Sunday at 4 p.m.

- 2) The parties shall share equally in the transportation. Receiving parent to provide.
- 3) The father to have sole non-emergency medical decision-making. (John will not transfer his primary medical care to a practice near John's home, but may use a secondary pediatrician near his home.)

Father will be declared the primary residential parent....

- [4] The mother to be evaluated by Bruce Olson for treatment of issues raised in the parenting evaluation, PhD and follow all recommendations

In order to address the mental health issues raised in the parenting evaluation, Terri will be addressed by [] Bruce Olson, PhD and will comply with all follow-up treatment recommended as a result of the assessment. Terri shall immediately identify treatment providers within her insurance plan. If no agreed upon provider can be identified, a provider shall be selected by Dr. Freedman. Terri may seek review of the medical decision making after treatment.

(CP 258)

Ms. McDonald agreed to allow Dr. Fischer to have sole decision-making on medical issues and countered his residential schedule by proposing a "50/50 schedule with each parenting having two weekends per month," and neither parent being designated the primary parent. (CP 256) She agreed to be evaluated by Dr. Olson, but sought additional language regarding

the follow up treatment provider, to ensure that it was covered by her insurance:

Your paragraph 1: Terri will agree to a 50/50 schedule with each parent having two weekends per month.

Paragraph 2: acceptable as written

Paragraph 3: Any use of secondary pediatrician near John's home is for emergency care only – John will inform Terri if Andy is going.

No designation of primary parent and if that is not acceptable to the court, then alternate each year between the parties.

The reason for sole decision-making “with respect to medical and daycare providers” should be added.

Paragraph [4]: Add at the end of Dr. Freedman the following “within Terri's medical coverage and geographic location.” Terri simply cannot afford to commit to mental health treatment that at this point is unknown in scope and duration without insurance coverage.

(CP 256)

In response, Dr. Fischer revised his previously proposed residential schedule to provide him with 15 (instead of 16) of 28 overnights. (CP 255) He still sought to be designated as primary parent, and he asked that Ms. McDonald follow up on her research on her insurance and treatment providers:

- 1) Agreed, if the schedule is as proposed in our prior email, but in the second week of each month, John doesn't pick up Andy Tuesday night, but may pick up Andy Wednesday as early as he is able.

- 2) Agreed.
- 3) Not agreed, but John will maintain Andy's primary care physician in the Seattle area, pending agreement or further court order.  
Primary parent shall be the father.
- [4] Your client should gather this information today, so we don't need to argue about this.

(CP 255)

Ms. McDonald did not object to Dr. Fischer's newly proposed residential schedule. She responded that she "has accepted all of his other terms" except Dr. Fischer's request that he be designated primary parent:

The father being designated primary parent is the deal breaker. If John will accept the language of neither parent as primary (with the fall back as the parents alternate) I believe we could settle this case. If John is adamant that to settle, he must be the primary despite the fact that Terri *has accepted all of his other terms*, then we, unfortunately cannot avoid trial.

(CP 254, emphasis added) After Ms. McDonald "accepted all of [Dr. Fischer's] other terms," the parties exchanged final emails agreeing that the trial court would determine the remaining outstanding issues on which they did not agree – designation of the primary residential parent and child support – and that these matter would be decided "via motion/affidavit." (CP 250)

**E. The Trial Court Adopted The Agreed Residential Schedule, Designated The Father The Primary Parent, And Awarded Child Support.**

Approximately one month later, on February 3, 2010, the parties appeared before King County Superior Court Judge Dean Lum. Ms. McDonald asked that Dr. Fischer be ordered to pay child support to her, and that she be granted the tax exemption for their son every year. (CP 87) Ms. McDonald also asked the court to impute income to Dr. Fischer, arguing that he was not fully employed because he saw dental patients only four days per week. (CP 88) Ms. McDonald asserted that neither parent should be considered the “primary parent.” (CP 86) Finally, even though the residential schedule was not one of the issues that the parties agreed was still disputed, Ms. McDonald for the first time proposed a residential schedule that was different than the one the parties had agreed to, claiming that her proposal was “exactly a 50/50 schedule.” (CP 89)

Dr. Fischer asked the trial court to designate him the child's primary parent. Dr. Fischer argued that because it was agreed that he had sole decision-making on healthcare, “the child's doctors will have a far easier time sorting out and coordinating the child's health

care, when the person designated to have sole decision making for medical, is also designated to be the sole primary custodial parent.” (CP 229) Dr. Fischer asked the trial court to adopt the parties’ agreed residential schedule. (CP 242-43) Finally, Dr. Fischer stated that while he was not necessarily seeking child support, he left the decision to the discretion of the trial court, if it “deems that [child support is] necessary for the child’s best interests.” (CP 239)

The trial court adopted the residential schedule set forth in the parties’ agreement, and designated Dr. Fischer as the child’s primary parent. (*Compare* CP 254, 255 with CP 573-74, 576) The trial court also adopted the parties’ agreement that Ms. McDonald be evaluated by Dr. Bruce Olson, and that any follow up treatment provider be covered by the mother’s health insurance. (*Compare* CP 256, 258 with CP 580)

The trial court found that “the child is in need of support and support should be pursuant to Washington State Child Support Schedule.” (CP 566) The trial court found Ms. McDonald’s “actual monthly net income” was \$7,578, Dr. Fischer’s “actual monthly net income” was \$7,371, and denied Ms. McDonald’s request to impute income to Dr. Fischer. (CP 583, 584) The trial court ordered Ms.

McDonald to make a monthly transfer payment of \$756. (CP 584)

The court awarded each party the tax exemption in alternating years. (CP 587)

Ms. McDonald appeals.

### III. ARGUMENT

**A. The Trial Court Properly Enforced The Parties' Agreement. It Ratified Those Matters On Which They Agreed And Decided Those Matters That Were Still Disputed, And Did So In The Manner In Which The Parties Agreed.**

The mother's appeal hinges on her inaccurate claim that the trial court "signed and filed final orders in the case which were at odds with the parties' stipulations and with the Judge's oral decision." (App. Br. 13) Wisely, the mother does not substantively argue her latter point, as it is beyond question that the trial court retains its authority to alter, modify, or abandon its oral ruling at any point before entering its final judgment:

A trial judge's oral decision is no more than a verbal expression of his informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered modified or completely abandoned. It has no final or binding effect, unless formally incorporated into findings, conclusions and judgment.

***DGHI Enterprises v. Pacific Cities, Inc.***, 137 Wn.2d 933, 944, 977

P.2d 1231 (1999) (*quoting Ferree v. Doric Co.*, 62 Wn.2d 561,

566-67, 383 P.2d 900 (1963)). Instead, the mother's challenge focuses solely on her claim that the trial court entered orders inconsistent with the parties' agreements, and that as a consequence she was entitled to a trial with live testimony.

Nowhere in the mother's appellate brief does she state in what way the trial court "resolve[d] the agreed upon issues differently than proposed by the parties." (App. Br. 17) For this reason alone, the court should reject her appeal. See ***Estate of Lint***, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to comb the record and construct arguments for counsel). And if the mother attempts to set forth ways in which the final orders allegedly differ from the parties' agreement in her reply brief, this court should refuse to consider them. "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

In any event, the trial court adopted the parties' agreement, and only resolved those issues that were disputed. The mother's claim to the contrary is wrong as a matter of fact, and thus the

mother's constitutional challenges that she was deprived of due process fail as a matter of law.

**1. The Mother Is Bound By Her Agreement To Have The Trial Court Decide Matters On Documentary Evidence.**

The mother was not “robbed of her constitutional right to a meaningful opportunity to be heard” because the trial court decided disputed matters without live testimony. (App. Br. 18) The mother cannot challenge the form of trial when she agreed that the trial court would decide the issue of designation of the primary residential parent and child support by “motion/affidavit.” (CP 250)

The mother does not deny that she agreed that the trial court would consider the matters before it on documentary evidence. Nor does the mother claim her stipulation to the form of trial was procured by fraud or overreaching by her trial attorney. This case is different from *Marriage of Ebbighausen*, 42 Wn. App. 99, 102, 708 P.2d 1220 (1985) (App. Br. 20), where the father's trial counsel purported to waive his right to testify in a custody hearing without the father's consent. Furthermore, the issue in *Ebbighausen* was not whether the father was entitled to present live testimony, but whether father's counsel could stipulate to grant sole custody to the

mother without the father's expression agreement and without a hearing. 42 Wn. App. at 103-04.

In this case, it is undisputed the mother agreed that the trial court could consider disputed matters on documentary evidence. This is not a case, as in *Ebbighausen*, where a party claims that counsel acted without the client's express permission. See *Adoption of Coggins*, 13 Wn. App. 736, 739, 537 P.2d 287 (1975) (attorney is authorized to stipulate to, and waive, procedural matters to facilitate hearing or trial, but it must be with the client's permission); *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 305, 616 P.2d 1223 (1980) (attorney can stipulate to waive trial by jury with consent of client). The mother is thus bound by her stipulation, and cannot challenge the agreed form of trial on appeal. See *Nguyen v. Sacred Heart Medical Center*, 97 Wn. App. 728, 735-736, 987 P.2d 634 (1999) (stipulation made by counsel binding on client when not the result of fraud or overreaching by attorney).

Further, the mother is wrong when she claims that the "orders as entered [without live testimony] deprive [her] of fundamental interests in her parental relationship with her child, in her liberty, and in her wages." (App. Br. 18-19) The trial court's

orders give the mother nearly equal residential time, and the limitation on her decision-making for the son's every day healthcare was indisputably agreed. (App. Br. 9: "The parties agreed that decision making shall be joint, except that the father would have sole medical decision making with certain restrictions.") Even if the trial court's order in some way limits the mother's ability to parent her son, a parent's fundamental right to parent without state interference is not triggered in a dispute between the "conflicting wishes" of two parents, as here. **Magnusson v. Johannesson**, 108 Wn. App. 109, 112, 29 P.3d 1256 (2001); **King v. King**, 162 Wn.2d 378, 385, ¶ 12, 174 P.3d 659 (2007) (entry of a parenting plan to ensure "continued parental involvement in the children's lives does not equate to an action where the State is seeking to terminate any and all parental rights and parental involvement with the children, severing the parent-child relationship permanently").

The mother cites no authority to support her claim that an order requiring her to pay child support infringes on any fundamental right "in her wages" that requires a hearing with live testimony, and there is none. See **P.O.P.S. v. Gardner**, 998 F.2d 764, 769-70 (9th Cir. 1993) (requiring a parent to pay child support

does not affect any fundamental interests because the State has a rational basis to ensure that children are provided with appropriate levels of support); see also, e.g., RCW 26.09.170(10) (petition for modification of child support heard on affidavit unless party shows that “testimony other than affidavit is required”). The mother’s challenge is particularly baseless when she makes no claim on appeal that an order requiring her to pay child support was not warranted under the law or facts of this case.

Our courts regularly decide cases on documentary evidence, even when there are disputed issues of fact, and especially in family law cases, even without agreement. For example, child support matters are regularly decided on affidavits alone, as are contempt hearings and adequate cause determinations for parenting plan modifications. See RCW 26.09.170(10); **Marriage of Rideout**, 150 Wn.2d 337, 341, 351, 77 P.3d 1174 (2003); **Parentage of Jannot**, 149 Wn.2d 123, 126-27, 65 P.3d 664 (2003). Because the parties agreed to the form of the trial, and the trial court’s orders do not implicate any fundamental rights that would require a trial with live testimony, the trial court did not err in considering the matters before it on documentary evidence.

**2. The Trial Court Ratified The Parties' Agreement By Adopting It, And Resolved Only The Agreed Outstanding Issues.**

The mother's only stated basis for her complaint that she was deprived of her right to a trial with live testimony is her unsupported (and repeated) claim that the trial court "resolve[d] the agreed upon issues differently than proposed by the parties." (App. Br. 17; see also App. Br. 1, 2-3, 14, 15, 18, 23) But the trial court's orders are wholly consistent with the parties' agreement.

Substantial evidence supports the trial court's determination what the parties agreed to and what issues remained outstanding to be resolved on documentary evidence. ***Marriage of Rideout***, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003); see also ***Marriage of Langham/Kolde***, 153 Wn.2d 553, 559, 106 P.3d 212 (2005) (when underlying facts are disputed and credibility determinations must be made in a proceeding relying entirely on documentary evidence, substantial evidence is the appropriate standard of review). The mother accurately recites that the parties "agreed that certain issues would be resolved by motion, chief among these included (1) designation of the primary parent (if anyone), and (2) certain financial issues, including whether the Court should impute income

to the father as requested by the mother.” (App. Br. 9) Consistent with that agreement, the trial court designated the father as primary parent (CP 576), ordered the mother to pay child support (CP 583-85), declined to impute income to the father (see CP 584), and awarded each party a tax exemption in alternating years. (CP 587) The mother also accurately states that the parties “agreed that decision making shall be joint, except that the father shall have sole medical decision making with certain restrictions.” (App. Br. 9) The trial court also indisputably adopted this agreement in its parenting plan. (CP 579)

The only other agreement that the mother claims existed between the parties is that the parenting plan would be a “50/50 residential schedule.” (App. Br. 9) But the parties agreed to a *specific* residential schedule that gave the father 15 out of 28 overnights. (See CP 249-59) The parenting plan entered by the court (after a two-phase “transition” schedule) was identical to the schedule proposed by the father within the string of emails that encompassed the parties’ agreement (See CP 259; CP 254: “Terri has accepted all of his other terms,” except that she did not agree that either be designated the primary parent). That the mother did

not expect the trial court to decide the residential schedule is evident by her agreement:

Here is what Terri will agree: Judge Lum decides the issue of who will be primary via motion.

(CP 250) Had she intended for the trial court to decide a residential schedule different than the one in the parties' agreement, she would have stated as much.

Even if there were a question whether there was a "genuine dispute over either the existence of the agreement or its material terms," the trial court was not required to resolve this dispute in a trial with live testimony. See *Marriage of Ferree*, 71 Wn. App. 35, 43, 856 P.2d 706 (1993) (governing principles of summary judgment apply to motion to enforce settlements); *In re Patterson*, 93 Wn. App. 579, 584, 969 P.2d 1106 (1999). The trial court found that the parties' agreement included a residential schedule that gave the father 15 of 28 overnights, with each parent having two weekends per month, and rejected the mother's claim that the parties agreed to a "true 50/50 schedule." (CP 573-74) Even if there was an ambiguity in the parties' settlement because there was reference to a "50/50 schedule," when in fact the agreement gave the father one additional overnight per month, the more

specific provision of the days and times during which the child would reside with each parent must prevail. See ***Wright v. Safeco Ins. Co. of America***, 124 Wn. App. 263, 277, ¶ 33, 109 P.3d 1 (2004) (in contracts, “specific provisions control over general provisions”). Accordingly, the trial court properly adopted the specific residential schedule that was encompassed in the parties’ agreement over the vaguer “50/50 schedule with each parent having two weekends per month.” ***Custody of A.C.***, 124 Wn. App. 846, 856, 103 P.3d 226 (2004) (settlement on the terms of the residential schedule for the parties’ children is valid and enforceable if “(a) it is in writing or on the record, (b) the intentions of the parties are clear, and (c) the principles of a contract are met.”), *review granted, cause remanded by* 155 Wn.2d 1011 (2005).

Finally, the mother fails to explain why, even if the parties had not agreed to a specific residential schedule, it would have been error for the trial court to decide the schedule on documentary evidence. According to the mother, the residential schedule was open for resolution by the trial court. The trial court did not abuse its discretion in deciding the matter on documentary evidence

because it is undisputed that the parties agreed that remaining outstanding issues would be decided in that manner.

**B. The Trial Court Did Not Abuse Its Discretion In Ordering A Transfer Payment, Declining To Impute Income To The Father, And Awarding Each Parent The Tax Exemption In Alternating Years.**

There is no presumption that an equal or nearly equal residential schedule entitles the obligor parent to pay no child support. *State ex rel. M.M.G. v. Graham*, 159 Wn.2d 623, 635-36, ¶¶ 21-22, 152 P.3d 1005 (2007). A trial court's award of child support, including its imputation of income to a voluntarily unemployed or underemployed parent, is reviewed for abuse of discretion. *Marriage of Shui/Rose*, 132 Wn. App. 568, 588, ¶ 35, 125 P.3d 180 (2005), *rev. denied*, 158 Wn.2d 1017 (2006). Trial court decisions regarding child support will seldom be changed on appeal; a parent who challenges such decisions must show that the trial court manifestly abused its discretion. *Marriage of Booth*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990); *see DewBerry v. George*, 115 Wn. App. 351, 367, 62 P.3d 525, *rev. denied*, 150 Wn.2d 1006 (2003) (affirming trial court's decision imputing income to husband). Here, the trial court's decision to not impute income to the father

was within its discretion, and was supported by substantial evidence.

RCW 26.19.071(6) requires the trial court to impute income to a parent who is voluntarily unemployed or underemployed, in order to prevent that parent from avoiding his or her child support obligation. ***Marriage of Didier***, 134 Wn. App. 490, 496, ¶ 9, 140 P.3d 607 (2006), *rev. denied*, 160 Wn.2d 1012 (2007). To determine whether a parent is voluntarily underemployed, the court looks at “that parent’s work history, education, health, and age, or any other relevant factors.” RCW 26.19.071(6).

The undisputed work history evidence was that the father, a dentist who owns his own practice, historically has seen patients four days a week. (CP 491-92) The father explained that his 25-year dental practice in La Conner, a “tiny tourist town,” has “never been able to fill [his] schedule consistently for more than 4 days a week.” (CP 491) The father testified that it made little economic or business sense to have his practice open for a full 5 days when his patient schedule did not justify the cost of overhead and maintaining a staff for an additional day each week. (CP 491) Had he done so, his income would likely be less, since his expenses

would significantly increase without an accompanying increase in income.

Further, even though his office is “open” four days a week, the father often spends part of Friday (the day he normally does not see patients) doing paper work, conference calls, office repairs, and other maintenance. (CP 491) The father testified: “between actual dental work, and running the business, I work full time.” (CP 491) Given this evidence, the trial court did not abuse its discretion in declining to impute income to the father.

If there was any error, it was that the trial court failed to use the mother’s actual income in making its child support order. The trial court found that the mother’s gross annual income was \$115,000, (CP 591), when there was evidence that her gross annual income was nearly \$150,000, including nearly \$35,000 in previously undisclosed bonuses. (CP 498)

The trial court also did not abuse its discretion in awarding the tax exemptions to both parents. RCW 26.19.100 gives the trial court authority to “divide the exemptions between the parties, alternate the exemptions between the parties, or both.” A trial court’s award of the tax exemption is entirely discretionary.

***Marriage of Peacock***, 54 Wn. App. 12, 16, 771 P.2d 767 (1989).

Other than the mother's claim that she would allegedly benefit more from the tax exemption than the father, she fails to provide any support for her claim that the trial court abused its discretion in awarding the tax exemption in alternating years to each party. Even if the mother's claim of an alleged benefit were true, the mother cannot show that the trial court's decision to award the tax exemptions to both parties is "manifestly unreasonable, based on untenable grounds, or granted for untenable reasons," which would warrant reversal. ***Schumacher v. Watson***, 100 Wn. App. 208, 211, 997 P.2d 399 (2000).

**C. This Court Should Deny The Mother's Request For Attorney Fees.**

There is no basis for this court to award attorney fees to the mother under RCW 26.26.140. As the trial court found, the mother earns more annually than the father. If any attorney fees are to be awarded it should to the father, who has been forced to respond to this meritless appeal. RAP 18.9.

#### IV. CONCLUSION

The trial court acted consistent with the parties' agreement in deciding disputed matters on documentary evidence. The mother does not claim that the trial court's parenting plan was not in the child's best interests, and her challenges to the trial court's discretionary decisions on child support are meritless. This court should affirm the trial court's orders and deny the mother's request for attorney fees on appeal.

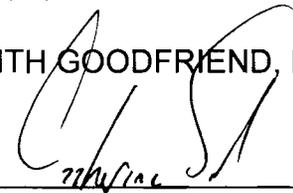
DATED this 4<sup>th</sup> day of August, 2011.

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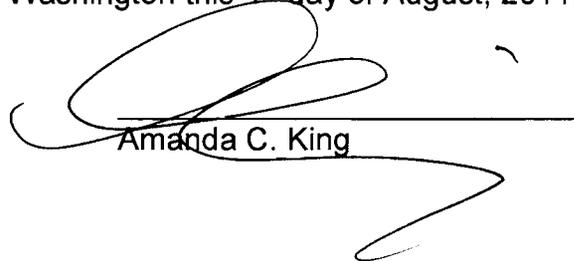
**DECLARATION OF SERVICE**

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

That on August 4, 2011, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 4<sup>th</sup> day of August, 2011.

  
Amanda C. King