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Nº. 69426-0-I

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

MICHELLE PLATT,
Respondent,

v.

MITHELL KING,
Appellant.

BRIEF OF RESPONDENT

Appeal from the Superior Court of King County,
Cause No. 11-3-06034-2
The Honorable Deborah D. Fleck, Presiding Judge

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A. INTRODUCTION

Michelle Platt hereby responds to the Brief of Appellant, Mitchell King.

B. COUNTER-STATEMENT OF THE CASE

In the statement of the case contained in Mr. King's Opening Brief, Mr. King repeatedly cites to trial exhibits 101 and 117 as the sources of the "facts" set out in his brief. Specifically, the portion of the statement of the case set out from the last paragraph on page 12 through the second paragraph on page 16 of Mr. King's opening brief is based virtually solely on trial exhibits 101 and 117. Appellant's Brief, p. 12-16. Trial exhibit 101 was not admitted into evidence and trial exhibit 117 was not admitted as substantive evidence. RP 86, 145-147, 7-31-12.¹

Accordingly, Ms. Platt objects to the citation of these documents as sources for factual statements in Mr. King's appeal and moves to strike the portions of Mr. King's statement of the case that rely on exhibits 101 and 117 as their source in the trial record.

Mr. King filed for dissolution of marriage in April of 2009 in Grant County, Washington. CP 273. On September 17, 2010, Grant County Judge Knodell entered a final parenting plan in which Ms. Platt was designated

¹ The report of proceedings is not numbered continuously between all volumes. Reference to the record will be made by giving the page number followed by the date of the hearing being referenced.

custodian of KMK. CP 275-276.

In 2009, Ms. Platt was granted an order to relocate with KMK to the Kent, Washington area. CP 273-274. Mr. King did not move to remain closer to KMK, but remained living in Moses Lake. CP 278.

On November 21, 2011, a temporary parenting plan was entered by pro tem Commissioner Loudon, which placed KMK in Mr. King's custody. CP 282-283. On January 26, Hon. Deborah Fleck revised Commissioner Loudon's order and reinstated the 2010 final parenting plan. CP 283.

Mr. King filed a petition to modify the parenting plan to change custody of KMK to himself. CP 1-6. Seeking to relocate to Pierce County with KMK, Ms. Platt filed a cross petition for minor modification of the parenting plan. CP 283. Trial on the petitions began on July 31, 2012, presided over by Judge Fleck. CP 284.

On September 4, 2012, Judge Fleck denied Mr. King's petition to modify the parenting plan, and made a minor modification of the parenting plan to permit Ms. Platt's relocation with KMK to Pierce County. CP 298-301. The modification to the parenting plan consisted of the addition of two paragraphs, as follows:

The following paragraph is added to § 3.2:

Kaelin shall continue visiting with her father on the schedule provided in the final parenting plan entered on September 17, 2010 for the next three months. If the father has not relocated

to be within approximately one hour of Kaelin's residence in Puyallup after three months, the father's visits shall be modified in the following manner: at least one of his alternating weekend visits per month shall occur in the King/Pierce County area to avoid Kaelin being subjected to so much long distance travel and to reduce the frequency of her travelling in sometimes dangerous conditions during the winter.

The following paragraph is added to § 3.2 and § 4.2:

Kaelin shall attend Zeiger elementary school, and otherwise attend school associated with the mother's residence. If the father relocates his residence near the mother, such that it is convenient for the mother to have him provide before and/or after school care for Kaelin, he may do so, with mother having the final decision-making authority on this issue.

CP 306; 308-309.

On September 10, Mr. King filed a motion to reconsider the Order on Modification. CP 310-316.

On September 11, 2012, Ms. Platt filed a petition for an Order of Protection -- Harassment. CP 317-319.

On September 24, 2012, a hearing was held regarding Ms. Platt's motion for a protective order. RP 4-16, 9-24-12. Judge Fleck entered a one-year anti-harassment order, prohibiting Mr. King from contacting KMK "to gather information about mother." CP 342-343.

On September 25, 2012, Judge Fleck denied Mr. King's motion for reconsideration of the Modification to Parenting Plan. CP 344-346.

On October 8, 2012, Mr. King filed a Notice of Appeal, seeking

review of the Memorandum of Decision, Order on Objection to Relocation, Modification of Parenting Plan -- Final, and Order Re Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule, all entered on September 4, 2012; and review of the Order Denying Reconsideration, and Order Granting Anti-harassment Order, both entered on September 24, 2012. CP 347-393.

A hearing was held on October 26, 2012, regarding various other motions. RP 17-82, 10-26-12. On October 26, 2012, Judge Fleck filed an Order Granting Relocation, permitting Ms. Platt to relocate to Pierce County with KMK. CP 1137-1142.²

On November 5, 2012, Mr. King filed a motion for an order finding Ms. Platt in contempt for failing to provide KMK to Mr. King for his scheduled visit on the weekend of November 2, 2012. CP 671-692. Mr. King sought sanctions under RCW 26.09.060(2)(b)(iii). CP 672.

On November 6, 2012, Ms. Platt filed a pro-se declaration regarding Mr. King's motion for an order of contempt. CP 693-714. In her declaration Ms. Platt stated that she did not permit KMK to spend the weekends of October 19-21, 2012 and November 2-4, 2012, because Ms. Platt was in great

² A respondent's designation of clerk's papers has been filed designating the trial court's October 26, 2012 and January 29, 2013 orders. For the sake of expediency, the CP numbers used for these documents in this brief are the estimated numbers and may not match the final CP numbers given these documents by the King County Clerk's Office.

fear of sending KMK to visit Mr. King since when Mr. King had KMK over the weekend of October 5-7, 2012, Mr. King threw a party with his college aged housemate and Mr. King consumed hard liquor in front of KMK and got very drunk. CP 694. Mr. King took KMK to his bedroom and yelled at KMK about the trial court's ruling, that he was going to sue Dr. Kinney, that KMK was no longer his daughter, and when KMK told him to stop talking about those issues because it was hurting her stomach he said "good." CP 694. KMK also told Ms. Platt not to tell anyone what Mr. King had done because KMK was afraid Mr. King would hurt KMK if he found out KMK told anyone what he had said. CP 694. Ms. Platt was aware that Mr. King had a history of alcohol abuse, anger issues, and abusive behavior towards KMK and her younger brother. CP 694-695. Ms. Platt stated that she withheld KMK on those weekends to protect KMK from harm. CP 693, 695.

On November 7, 2012, Mr. King filed a reply declaration in which he claimed everything Ms. Platt stated in her declaration was a lie. CP 717-719.

On November 9, 2012, a hearing was held on Mr. King's motion to find Ms. Platt in contempt for withholding KMK on the weekend of October 19, 2012, and for taking KMK to a skin and eye clinic for treatments of Plantar's warts. RP 83-108. The trial court entered an order regarding Mr. King's motion for sanctions. CP 720-722. The trial court denied Mr. King's

In the event the CP numbers in this brief do not match the CP numbers ultimately

motion to find Ms. Platt in contempt for taking KMK to a doctor to care for KMK's Plantar's warts. CP 720. The trial court reserved ruling on Mr. King's motion to find Ms. Platt in contempt for withholding KMK on the weekend of October 19, 2012. CP 721. The trial court appointed Dr. Milo as guardian ad litem for KMK for purposes of interviewing KMK regarding what happened during KMK's visit with Mr. King on October 4 and 5, 2012. CP 721; RP 102-103, 105, 11-9-12. The trial court also held that KMK's statements about her physical and mental distress and Mr. King drinking were admissible under *Betts v. Betts*, 3 Wn.App. 53, 59 473 P.2d 403, *review denied* 78 Wn.2d 994 (1970). RP 106-107, 11-9-12.

The trial court ordered a hearing on the motion for sanctions to be held on December 10, 2012, and ordered that Mr. King would advance Dr. Milo's fee. CP 721. The trial court also ordered that Mr. King was to have make-up visits with KMK on the weekends of November 9, 2012, November 16, 2012, and over the Thanksgiving holiday. CP 721-722. The trial court ordered that Mr. King was not permitted to consume alcohol for 12 hours prior to a visit or during a visit. CP 722.

On November 9, 2012, Ms. Platt filed a declaration repeating her summary of what KMK told her happened over the weekend of October 5-7, 2012, and including the handwritten statements KMK and Ms. Platt gave to

assigned to these documents, a corrected brief will be filed.

the Puyallup Police Department about Mr. King's behavior that weekend. CP 723-729.

On November 27, 2012, Ms. Platt filed a motion for sanctions and related declaration seeking sanctions against Mr. King for violation of Judge Fleck's September 24, 2012, and November 9, 2012 orders prohibiting Mr. King from questioning KMK about the October 5, 2012 weekend. CP 747-761. Ms. Platt alleged that Mr. King had been questioning KMK in attempts to gather information about Ms. Platt and about Ms. Platt and KMK filing police statement. CP 749-752. Ms. Platt included a copy of an email KMK had sent regarding Mr. King's interrogation of KMK. CP 753.

On November 27, 2012, Mr. King filed another motion for sanctions against Ms. Platt for Ms. Platt withholding KMK over the Thanksgiving holiday. CP 779-783. This motion was accompanied by a declaration from Mr. King stating that Ms. Platt withheld KMK over the Thanksgiving holiday and that Ms. Platt was lying about the reasons why she had done so. CP 790-793.

On November 29, 2012, Mr. King filed a motion and affidavit to change the judge for the contempt proceedings. CP 811-815. Mr. King sought a new judge "under chapters 4.12, 7.21, and 26.09 RCWs" and RAP 7.2(e) because personal service was required on the alleged contemnor "as in the manner provided for personal service of a summons and petition in a new

case. CP 811-812. Alternatively, Mr. King argued that if the court found that RCW4.12.050 did not apply, then Mr. King was moving for a change of judge because he could not receive a fair trial before Judge Fleck. CP 812.

On December 4, 2012, the trial court ordered that there would be no reallocation of the GAL fee between Mr. King and Ms. Platt because Mr. King had failed to provide the court with the requisite financial declarations even through the time had been extended for him to file them. CP 831-832.

On December 5, 2012, Mr. King filed a motion and declaration for an order finding Ms. Platt in contempt for Ms. Platt withholding KMK on the weekend of November 30, 2012, for relocating her residence without permission from Mr. King or the court, and for not notifying Mr. King of her change of address. CP 833-860.

On December 6, 2012, Mr. King filed a reply declaration for contempt and other allegations of Ms. Platt. CP 862-875.

On December 10, 2012, the trial court held a hearing to address the various motions to find the parties in contempt as well as Mr. King's motion for the trial judge to recuse herself. RP 109-182, 12-10-12. The trial judge denied the motion that she recuse herself on the basis of actual or perceived bias. RP 117-118, 12-10-12. The trial court also held that Mr. King did not have the right under Chapter 4.24 RCW to a "free affidavit" with regards to each of the contempt motions since the trial court had retained jurisdiction of

the case and because contempt actions did not constitute new proceedings. RP 119-122, 163-164, 12-10-12.

At the December 10 hearing, Mr. King objected to the court considering the statements KMK made regarding Mr. King's actions on the basis that those statements were hearsay. RP 130-131, 12-10-12. Ms. Platt informed the court that KMK's statements were not being offered for the truth of the matter asserted but were offered for purposes of establishing Ms. Platt's state of mind when she withheld KMK from visiting Mr. King. RP 131, 12-10-12. The trial court overruled Mr. King's objection on the basis that KMK's statements were offered to show Ms. Platt's state of mind and Ms. Platt's state of mind was relevant to whether or not she withheld KMK in bad faith. RP 131, 12-10-12. The court also held that KMK's statements were admissible under *Betts* because the statements went to KMK's state of mind, regardless of the truth of the statements. RP 137-139, 12-10-12. The trial court indicated that it had received but had not read or looked at the report prepared by Dr. Milo regarding KMK's statements about Mr. King's actions. RP 139-140, 12-10-12.

On December 10, 2012, the court entered an order regarding the contempt motions. CP 916-922. The trial court found that Ms. Platt did not comply with the parenting plan by withholding KMK on August 31, 2012, September 17, 2012, and November 19, 2012, but, based on KMK's

statements and other evidence, the court also found that Ms. Platt did not violate the plan with bad faith. CP 916-918. The trial court also did not find Ms. Platt in contempt for withholding KMK on the weekends of October 19, 2012 and November 2, 2012 because the court found no bad faith on Ms. Platt's part, but the court ordered Mr. King to receive make-up visitation time. CP 918-919.

In the December 10, 2012 order the trial court also denied Mr. King's motion for the judge to recuse herself under RCW 4.12 and Mr. King's theory that contempt/enforcement actions are new proceedings. CP 921. The court overruled Mr. King's ER 803 objections to KMK's statements and retained jurisdiction over the case. CP 921.

On December 13, 2012, Mr. King moved for reconsideration of the trial court's ruling denying reallocation of the GAL fee. CP 925-958.

On December 20, 2012, Ms. Platt filed a response to Mr. King's motion for reconsideration of the court's ruling on the GAL fee reallocation. CP 966-980.

On December 20, 2012, the trial court denied Mr. King's Motion to reconsider the reallocation of the GAL fees because Mr. King had failed to timely provide the court with the requisite financial documentation to permit the court to make a ruling despite the court granting Mr. King an extension of time in which to do so. CP 988-990.

On January 11, 2013, Ms. Platt refiled her motion for contempt previously filed on November 27, 2012. CP 995-1021. Also on January 11, 2013, Ms. Platt filed a reply declaration regarding Mr. King's November 30, 2012 allegations of contempt. CP 1022-1051.

On January 18, 2013, Mr. King filed a declaration in response to Ms. Platt's January 11, 2013 declaration. CP 1056-1073.

On January 22, 2013, Ms. Platt filed a reply to Mr. King's declaration in response. CP 1071-1073.

On January 26, 2013, a hearing was held regarding motions for contempt filed by the parties. RP 183-239, 1-25-13. Mr. King also argued that the trial court incorrectly admitted KMK's statements at the December 10, 2012 hearing and, therefore, erred in finding that Ms. Platt did not act in bad faith in withholding KMK. RP 193-203, 1-25-13. Mr. King's arguments were that (1) KMK's state of mind was irrelevant to the proceedings so her statements were not admissible under ER 803(a) (RP 193-196, 1-25-13), and (2) that the statements were used as proof of truth of the matters asserted and were not admissible as hearsay. RP 197-203, 1-25-13.

Mr. King also argued (1) that the trial court had improperly shifted the burden of proof on the contempt issues to Mr. King by appointing a GAL (RP 207, 1-25-13); (2) that the trial court lacked authority to appoint a GAL to evaluate KMK's statements (RP 207-208, 1-25-13); (3) the trial court

lacked authority to retain jurisdiction of the case (RP 208-209, 1-25-13); and (5) the October 26, 2012 hearing was actually a settlement conference and the trial court lacked authority to enter and order at the hearing. RP 209-212, 1-25-13. The trial court indicated that it would issue a written decision on Mr. King's motions. RP 237, 1-25-13.

On January 29, 2013, the trial court entered its written memorandum of decision and order regarding the January 25, 2013 hearing. CP 1143-1155.

C. IDENTIFICATION OF ISSUES

1. Did the trial court err in modifying the parenting plan to require Mr. King to spend one of his two monthly visits in the Puyallup area in order to reduce the amount of time KMK would have to spend traveling?
2. Did the trial court abuse its discretion by not adopting the GAL's recommendations for modification of the parenting plan?
3. Did the trial court abuse its discretion in excluding the CPS/DLR report?
4. Did the trial court abuse its discretion in allowing Dr. Kinney to testify at trial and in admitting Dr. Kinney's opinion relied on by Dr. Milo in forming her opinion?
5. Did the trial court abuse its discretion by not considering the evidence Mr. King alleges was proof of Ms. Platt's "lack of parenting"?
6. Did the trial court abuse its discretion by granting relief beyond what Ms. Platt requested in her November 4, 2011 proposed parenting plan?

7. Did the trial court abuse its discretion by not holding Ms. Platt in contempt?
8. Did the trial court “wrongfully shift the burden and the expense” of Ms. Platt’ establishing that she acted in good faith in withholding KMK?
9. Did the trial court err in ordering Mr. Platt to pay for the cost of Dr. Milo interviewing KMK?
10. Did the trial court abuse its discretion in admitting evidence of the statements of KMK in post trial hearings?
11. Did the trial court abuse its discretion in finding that Ms. Platt did not act with bad faith in withholding KMK?
12. Did the trial court abuse its discretion in retaining jurisdiction of the case?
13. Did the trial court err in renewing the anti-harassment order against Mr. King?
14. Did the trial court err in permitting Ms. Platt to relocate her residence?
15. Is Ms. Platt entitled to attorneys’ fees if she prevails on appeal?

D. ARGUMENT

1. The trial court did not abuse its discretion in modifying the parenting plan.

A trial court's decision to modify a parenting plan is reviewed for abuse of discretion. *In re Marriage of Zigler*, 154 Wn.App. 803, 808, 226 P.3d 202, review denied 169 Wn.2d 1015, 236 P.3d 895 (2010). A court abuses its discretion if it relies on unsupported facts, if it applies the wrong

legal standard, or if its decision is manifestly unreasonable. *Zigler*, 154 Wn.App. at 808–09. A trial court's findings of fact regarding modification are reviewed for substantial evidence, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *In re Marriage of Chua*, 149 Wn.App. 147, 154, 202 P.3d 367, review denied 166 Wn.2d 1027, 217 P.3d 336 (2009), certiorari denied 559 U.S. 977, 130 S.Ct. 1696, 176 L.Ed.2d 190 (2010); *In re Marriage of Akon*, 160 Wn.App. 48, 57, 248 P.3d 94 (2011).

There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. *Fisher Props., Inc. v. Arden–Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990). If the standard is satisfied, the Court of Appeals will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879–80, 73 P.3d 369 (2003). The Court of Appeals reviews only those findings of fact to which error has been assigned. Findings to which error has not been assigned are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

Appellate courts review whether the findings of fact support the conclusions of law. *In re Marriage of Rockwell*, 141 Wn.App. 235, 242, 170 P.3d 572 (2007), review denied 163 Wn.2d 1055, 187 P.3d 752 (2008).

Appellate courts review questions of law de novo. *Chua*, 149 Wn.App. at 154. Appellate courts defer to the fact finder on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *In re Parentage of J.H.*, 112 Wn.App. 486, 493 n. 1, 49 P.3d 154 (2002), *review denied* 148 Wn.2d 1024, 66 P.3d 637 (2003).

Because changes in residence are highly disruptive to children, appellate courts employ a strong presumption against modification of a parenting plan. *In re Custody of Halls*, 126 Wn.App. 599, 607, 109 P.3d 15 (2005). The moving party bears the burden to show that a modification is appropriate under RCW 26.09.260. Under that statute,

[T]he court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

In applying this standard, the trial court “shall maintain the residential schedule established by the decree or parenting plan” unless one of four factors is met. RCW 26.09.260(2).

At the outset, it should be noted that Mr. King has not assigned error to **any** of the trial court’s findings. Accordingly, those findings must be treated as verities on appeal. *Robel*, 148 Wn.2d at 42, 59 P.3d 611.

- a. *The trial court did not abuse its discretion by considering the location of Mr. King's residence in modifying the parenting plan.*

The trial court denied Mr. King's motion to modify the parenting plan but granted Ms. Platt's motion to modify the parenting plan. CP 272-297, 299. The trial court modified the parenting plan under RCW 26.09.260(1) and (2). CP 299.

At the time the competing petitions to modify the parenting plan were filed, KMK was having to travel from Ms. Platt's residence in Puyallup to Mr. King's residence in Moses Lake and back every other weekend. CP 289-291. Noting that such an extensive amount of travel was hazardous in the winter and that such a large amount of out-of-school time spent in a vehicle was not in KMK's best interests (CP 289-291), the trial court found that permitting KMK to remain in Pierce County with Ms. Platt and requiring Mr. King to either move closer to Puyallup or to travel to Puyallup for one of his weekend visits per month would be in KMK's best interests "to avoid [KMK] being subjected to so much long distance travel and help avoid the need for her to travel in sometimes dangerous conditions in the winter." CP 294-295, 299. Mr. King has not challenged these factual findings on appeal.

Mr. King challenges the trial court's concern for the well being of KMK and the negative impact of requiring KMK to drive from Puyallup to Moses Lake and back twice per month as an abuse of the trial court's

discretion for considering Mr. King's residential location and characterizes the trial court's modification of the plan as a restriction on his choice of residence. CP 31-33. Further, citing *Littlefield v. Littlefield*, 133 Wn.2d 39, 55, 940 P.2d 1362 (1997), Mr. King argues that a trial judge has no authority to limit or restrict a parent's choice of residence under the Parenting Act. Appellant's Brief, p. 32-33.

- i. Mr. King mischaracterizes the nature of the trial court's ruling modifying the parenting plan.

The modification of the parenting plan was not a restriction on Mr. King's choice of residence. The plain language of the modified parenting plan states that Mr. King may continue living in Moses Lake but, should he do so, he must travel to Puyallup for one of the two monthly weekend visits with KMK. CP 295, 299. The modified parenting plan did not require Mr. King to move or prohibit KMK from travelling to Moses Lake for one of the two monthly weekend visits with Mr. King.

- ii. *Littlefield* is inapplicable to this case and has been superceded by statute.

First, even assuming *Littlefield* is still good authority and that Mr. King has interpreted it correctly, as stated above, the modification to the parenting plan does not require Mr. King to move. Mr. King may continue to reside in Moses Lake as he has done.

Second, *Littlefield* has been superceded by statute. In *In re Marriage of Christel and Blanchard*, 101 Wn.App. 13, 24, 1 P.3d 600 (2000), a parent relied on *Littlefield* to argue that revision of an order “impermissibly” restricted her right to move. The *Christel and Blanchard* court noted in a footnote that “[t]he legislature superseded the decision[] of . . . *Littlefield*” in Chapter 21, Laws of 2000. *Id.* at 24 fn 3, 1 P.3d 600.

In *In re Marriage of Grigsby*, 112 Wn.App. 2, 7, 57 P.3d 1166 (2002), this Court made current Washington law on relocation crystal clear, beginning with the very *Littlefield* language quoted by Mr. King:

In *Littlefield*, the court held that a court may not prohibit a parent from relocating a child unless relocation would harm the child. The court further held that the harm to the child must be “more than the normal distress suffered by a child because of travel, infrequent contact of a parent, or other hardships which predictably result from a dissolution of marriage.” [Footnote omitted.]

...

The Relocation Act of 2000 reflects a disagreement with the rationale of these cases and gives courts the authority to allow or disallow relocation based on the best interests of the child. Under RCW 26.09.520, there is a rebuttable presumption that the intended relocation of the child will be permitted.

Emphasis added.

- iii. Time spent travelling in vehicles between parental residences has been approved as a basis to limit residential visitation time.

In *In re Marriage of Fahey*, 164 Wn.App. 42, 66-68, 262 P.3d 128 (2011), *review denied* 173 Wn.2d 1019, 272 P.3d 850 (2012), the court of appeals affirmed the trial court's decision to limit the father's residential time with pre-teen and teen daughters to the geographical area where they lived with their mother because of concerns about the girls "spending their lives in cars, being transferred to one place and another place as opposed to participating in normal activities that they may have with their friends in Omak, despite the fact that it is their father's weekend."

This case is virtually identical to *Fahey* with the exception that Mr. King's visitation time has not been affected but, rather, he has been required to spend some of the visitation time with KMK in Puyallup rather than in Moses Lake to avoid excessive travel time for KMK.

The trial court did not abuse its discretion in considering the location of Mr. King's residence and the travel time necessary for KMK to visit Mr. King in Moses Lake.

- b. The trial court did not abuse its discretion in not "modifying the parenting plan to adopt the GAL recommendations based upon the substantial change in circumstances Ms. Platt and her instability" and the trial court did consider evidence of Ms. Platt's conduct.*

In its memorandum of decision the trial court discussed the GAL's recommendation that KMK and Ms. Platt relocate to Moses Lake provided

that there is no indication that Mr. King or Mr. King's family interfere with Ms. Platt's ability to find a job in Moses Lake or to secure housing. CP 293.

Mr. King argues that "the Court erred in not modifying the parenting plan to adopt the GAL recommendations based upon the substantial change in circumstances of the mother and her instability." Appellant's Brief, p. 33-34.

The trial court clearly considered the GAL's recommendations. However, the trial court also found that "a significant portion of the chaos in [Ms. Platt's] life has been the result of serious financial difficulties" and that "Courts do not make residential provisions for children based on the relative financial resources or lack of financial resources between the parents." CP

294. In so ruling, the trial court found

that [KMK]'s present environment, living in Puyallup with her mother, near extended family on both sides, engaging in activities, attending a good school, and having her medical needs met, etc. is not a 'present environment' that is 'detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child,' given the strong presumption in favor of custodial continuity and against modification in Washington law.

CP 294.

The trial court considered the GAL's recommendation and even included the GAL's assessment of KMK and her parents in the memorandum of decision. CP 292-293. The trial court also considered the father's past behavior including his refusal to pay his share of the costs of what he agrees

is excellent day care for KMK (CP 279-280), his and his family's repeated questionable reporting of Ms. Platt to CPS motivated in part to gain custody of KMK and indicating a lack of concern about the impact of this behavior on KMK and Ms. Platt's former foster daughter (CP 280), and Mr. King's refusal to respond to Ms. Platt's attempts to include Mr. King in the decision making process regarding where KMK would attend school. CP 287-288. The trial court also discussed at length Ms. Platt's history of poor decision making, bi-polar disorder, financial difficulties, frequent residential changes, and romantic relationships occurring after her separation from Mr. King. CP 273-295.

The trial court's memorandum of decision clearly demonstrates that the trial court did, in fact, consider the GAL's recommendations as well as the facts that Mr. King characterizes as Ms. Platt's "instability." The trial court resolved the case contrary to Mr. King's wishes, but Mr. King has not presented any argument as to why the trial court's ruling was an abuse of discretion. *i.e.* why the trial court's ruling relied on unsupported facts, applied the wrong legal standard, or was manifestly unreasonable.

The trial court did not abuse its discretion in modifying the parenting plan.

- c. *The trial court did not abuse its discretion in excluding the CPS/DLR report.*

At page 35 of his Opening Brief, Mr. King includes a one paragraph long argument that the trial court erred in failing to admit the CPS/DLR report.

- i. This court should strike this portion of Mr. King's brief since Mr. King has failed to comply with RAP 10.3.

As an initial matter, Mr. King provides no citation to the report of proceedings or to the Clerk's Papers in support of his argument regarding the CPS/DLR report. Mr. King does not provide this court with any indication as to where in the lengthy report of proceedings the trial court discussed the CPS/DLR report and Mr. King fails to provide this court with any of the trial court's reasons for excluding the report.

Under RAP 10.3(a)(6), legal argument in brief must include reference to relevant parts of the record. Appellate courts "are not required to search the record for applicable portions thereof in support of the plaintiffs' arguments." *Mills v. Park*, 67 Wn.2d 717, 721, 409 P.2d 646 (1966). Courts are not obligated "to comb the record" where counsel has failed to challenge specific findings and support arguments with citations to the record. *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). "It is not the function of trial or appellate courts to do counsel's thinking and briefing." *Orwick v. City of Seattle*, 103 Wn.2d 249, 256, 692 P.2d 793 (1984).

Accordingly, this court should disregard the argument made by Mr. King regarding the CPS/DLR report.

- ii. The trial court did not abuse its discretion in excluding the CPS/DLR report.

In an abundance of caution, should this court find that Mr. King has presented sufficient references to the record to permit this court to address this issue, Ms. Platt presents the following argument.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Vreen*, 143 Wn.2d 923, 932, 26 P.3d 236 (2001).

The CPS/DLR report was contained in trial exhibit 101, a copy of the general set of CPS records reviewed by Dr. Milo. Appellant's Brief, p. 13-14; RP 48, 7-31-12. At trial, Dr. Milo testified that she had reviewed portions of exhibit 101 but had not reviewed all the documents contained in it. RP 49, 7-31-12.

After establishing that Dr. Milo had relied on exhibit 101 in making some of her conclusions and recommendations, Mr. King moved to have exhibit 101 admitted. RP 82-83, 7-31-12. Ms. Platt objected to the admissibility of exhibit 101 under ERs 401, 402, 403, 801, 803, and 805, arguing that exhibit 101 was irrelevant because Dr. Milo had already included the materials she believed were relevant in her report and to introduce the entire CPS report would also be admitting double hearsay and

irrelevant information since the report concluded that there had been no abuse. RP 82-83, 7-31-12.

Mr. King responded that the entirety of exhibit 101 had been submitted under ER 904 and that Ms. Platt's prior counsel had not objected to the report, rendering it admissible. RP 84, 7-31-12.

The trial court held that exhibit 101 was not admissible under ER 904(a)(6) due to the amount of hearsay contained in it. RP 85, 7-31-12. However, the trial court held that the report was admissible as a document that Dr. Milo relied on in forming her opinions but that exhibit 101 was not admissible as substantive evidence. RP 85, 7-31-12.

Upon further direct examination, Dr. Milo stated that the documents she had reviewed in preparing her opinion were "considerably less" than the entirety of exhibit 101. RP 86, 7-31-12. In fact, Dr. Milo testified that she reviewed only 15-20 pages of the 50-60 pages comprising exhibit 101. RP 86, 7-31-12. Upon hearing this testimony the trial court revised its ruling, admitting only the portions of exhibit 101 that were actually reviewed by Dr. Milo in forming her opinion, and excluding the remainder of exhibit 101.³

³ Under current Washington law, out-of-court statements on which experts base their opinions are not offered at trial as substantive proof, i.e., the truth of the matter asserted. See *Grp. Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wash.2d 391, 399-400, 722 P.2d 787 (1986) (citing *State v. Wineberg*, 74 Wash.2d 372, 382, 444 P.2d 787 (1968)). Rather, they are offered "only for the limited purpose of explaining the expert's opinion." 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE RULE 703 author's cmt. at 387, Rule 705 author's cmt. 7, at 400 (2011-2012 ed.).

RP 86, 7-31-12. After the trial court denied the admission of exhibit 101 as it was presented by Mr. King, Mr. King indicated that he intended to try and have the exhibit entered in its entirety under another theory and through another witness, but never did so. RP 86-87, 158, 7-31-12.

Mr. King argues that the trial court abused its discretion in “failing to admit the CPS/DLR report that had been properly admitted under ER 904 [sic] and had not been timely objected to.” Appellant’s Brief, p. 35. Mr. King’s argument fails.

Under ER 904(a)(6), in a civil case certain documents will be deemed *admissible*, not **admitted** when the offering party’s intent to offer the document is properly communicated to opposing counsel and the document being offered relates to a material fact, has sufficient circumstantial guaranties of trustworthiness, and admission of the document would serve the interests of justice.

ER 904(d) makes clear that ER 904 “does not restrict argument or proof relating to the weight to be accorded the evidence submitted, nor does it restrict the trier of fact’s authority to determine the weight of the evidence after hearing all of the evidence and the arguments of opposing parties.”

“The purpose of ER 904 is to expedite the admission of documentary evidence. ER 904 does not require the court to admit documents offered under this rule; rather it may exercise its traditional discretion to address a

party's evidentiary objection and admit or exclude the evidence.” *Fox v. Mahoney*, 106 Wn.App. 226, 229, 22 P.3d 839 (2001) (internal citations omitted).

In this case Ms. Platt objected to the admission of exhibit 101 under numerous evidentiary rules and the trial court ultimately held that the exhibit did not satisfy the requirement of ER 904(a)(6) that the document have sufficient guaranties of trustworthiness. RP 84-85, 7-31-12. The trial court did hold that the portions of exhibit 101 that Dr. Milo had reviewed in forming her opinion would be admissible, but Mr. King never attempted to have any portions of exhibit 101 admitted at trial.

Other than a conclusory statement that it was error, Mr. King offers no argument as to why it was an abuse of discretion for the trial court to refuse to deny admission of exhibit 101. Appellant’s Brief, p 35. It should be noted that Mr. King does not discuss in his opening brief the fact that the trial court excluded exhibit 101 on the basis that it was not sufficiently inherently trustworthy to satisfy ER 904(a)(6) due to the amount of hearsay contained in it. Appellant’s Brief, p. 35-36.

Exhibit 101 was not rendered automatically admitted because Ms. Platt’s prior counsel did not object to it. The trial court still had discretion to exclude the evidence. The trial court properly exercised that discretion and

found that exhibit 101 was not sufficiently inherently trustworthy to be admitted under ER 904.

d. The trial court did not abuse its discretion in admitting Dr. Kinney's testimony and opinion at trial.

Dr. Jill Kinney was KMK's therapist. RP 28, 7-31-12; 1106-1107, 8-9-12. Dr. Kinney began seeing KMK at the request of Dr. Zanny Milo, KMK's GAL, on March 1, 2012. RP 1106-1107, 8-9-12.

On June 20, 2012, Ms. Platt filed her list of potential witnesses. CP 205-208. Ms. Platt included Jill Kinney as a potential witness and identified Jill Kinney as KMK's therapist. CP 206.

On July 16, 2012, the joint statement of evidence was filed. CP 209-216. Ms. Platt again identified Jill Kinney as a potential witness but now indicated that she intended to call Dr. Kinney as an expert witness. CP 210.

On July 31, 2012, Mr. King filed a motion in limine objecting to Dr. Kinney testifying. RP 114, 139-142, 7-31-12. The trial court set over hearing argument on the motion until August 1, 2012. RP 142, 7-31-12.

On July 31, 2012, Dr. Milo testified that she spoke with Dr. Kinney and considered e-mails from Dr. Kinney regarding KMK's well being after Dr. Milo had completed her report, but that she did not revise her report based on Dr. Kinney's e-mails. RP 28, 113-115, 7-31-12. Mr. King objected to Dr. Milo repeating Dr. Kinney's opinion testimony on hearsay grounds.

RP 113-114, 7-31-12. The trial court sustained the objection as to Dr. Milo “reciting for substantive purposes” what Dr. Kinney reported to Dr. Milo via e-mail about what KMK thought and the court struck any testimony from Dr. Milo regarding what Dr. Kinney said. RP 114-115, 7-31-12.

Mr. King objected to Dr. Kinney testifying on two bases: (1) Dr. Kinney was not the GAL appointed to the case and was not hired as a forensic counselor (RP 297, 8-1-12); and (2) Dr. Kinney was not disclosed as a potential witness until after the discovery period had ended. RP 300, 8-1-12.

Further argument on the motion regarding Dr. Kinney was heard on August 2, 2010. RP 316-332, 512-518, 8-2-12. The trial court did not exclude Dr. Kinney’s testimon, but instead ordered that Mr. King be permitted to conduct a deposition of Dr. Kinney prior to Dr. Kinney testifying. RP 515, 518, 8-2-12. Dr. Kinney was deposed by Mr. King. RP 777, 8-8-12.

On August 6, 2012, Mr. King filed a motion asking the trial court to reconsider its decision to allow the testimony of Dr. Kinney. CP 245-260.

On August 7, 2012, Ms. Platt filed a supplemental list of potential witnesses which included Dr. Kinney and a summary of Dr. Kinney’s expected testimony. CP 261-262.

On August 8, 2012, Ms. Platt filed a response to Mr. King's motion to the trial court to reconsider its decision to permit Dr. Kinney to testify. CP 263-271. In this response Ms. Platt made clear that she was intending to call Dr. Kinney as a fact witness, not an expert witness. CP 265-266.

Argument on Mr. King's motion to reconsider as well as Ms. Platt's response was heard on August 8, 2012. RP 731-778, 8-8-12. The trial court ultimately permitted Dr. Kinney to testify as a fact witness, not as an expert witness, and offered Mr. King the option of an additional continuance to obtain an expert witness or conduct further discovery. RP 777-778, 8-8-12.

Dr. Kinney testified on August 9, 2012. RP 1097-1159, 8-9-12.

In its memorandum of decision, the trial court indicated that it did not consider Dr. Kinney's trial testimony at all but the court did consider the information from Dr. Kinney that was included in exhibit 124, Dr. Milo's report. CP 291-292; RP 94, 7-31-12.

- i. The trial court did not permit Dr. Kinney to be called as an expert witness.

Mr. King incorrectly states in his Statement of the Case that the trial court permitted Dr. Kinney to testify as an expert witness. Appellant's Brief, p. 20. The trial court permitted Dr. Kinney to testify as a fact witness, not as an expert witness. RP 777-778, 8-8-12. Mr. King misrepresented the facts of the case in his brief.

- ii. Mr. King fails to cite any authority to support his argument that the trial court abused its discretion in allowing Dr. Kinney to testify.

Mr. King fails to cite any authority in support of his argument that the trial court abused its discretion in permitting Dr. Kinney to testify. Appellant's Brief, p. 35.

Appellate courts do not address arguments that are not supported by cited authorities. RAP 10.3(a)(6); *In re Marriage of Fiorito*, 112 Wn.App. 657, 669, 50 P.3d 298 (2002).

This court should disregard Mr. King's arguments that the trial court erred in admitting Dr. Kinney's testimony and in admitting Dr. Kinney's statements contained in Dr. Milo's report.

- iii. Even if the trial court erred in admitting Dr. Kinney's trial testimony, Mr. King is not entitled to relief on appeal because he cannot demonstrate any prejudice from the admission of the testimony.

Even assuming for the sake of argument that the trial court did abuse its discretion in admitting Dr. Kinney's testimony, Mr. King is not entitled to relief because he cannot demonstrate how he was prejudiced by the admission of the testimony since the trial court ultimately disregarded it.

Error without prejudice is not grounds for reversal. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome

of the trial. *James S. Black & Co. v. P & R Co.*, 12 Wn.App. 533, 537, 530 P.2d 722 (1975).

Appellate courts presume that a trial judge considers evidence only for its proper purpose. *See State v. Bell*, 59 Wn.2d 338, 360, 368 P.2d 177, *cert. denied*, 371 U.S. 818 (1962). Moreover, the danger of prejudice is reduced in a bench trial because a trial judge is in a better position than jurors to identify and focus on the probative quality of evidence and disregard its prejudicial aspects. *State v. Jenkins*, 53 Wn.App. 228, 236–37, 766 P.2d 499, *review denied*, 112 Wn.2d 1016 (1989); *see also State v. Majors*, 82 Wn.App. 843, 848–49, 919 P.2d 1258 (1996) (in bench trial, court is presumed to give evidence its proper weight), *review denied*, 130 Wn.2d 1024 (1997).

[E]ven if some of the evidence presented by [a party is] inadmissible...in a bench trial, the court is presumed to disregard improper evidence when making its findings. *See State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970) (noting that in a bench trial there is “a presumption on appeal that the trial judge, knowing the applicable rules of evidence, will not consider matters which are inadmissible when making his findings.”)

Katare v. Katare, 175 Wn.2d 23, 40 n. 8, 283, P.3d 546 (2012), *certiorari denied* 133 S.Ct. 889, 184 L.Ed.2d 661 (2013).

Even if the trial court did abuse its discretion in admitting Dr. Kinney’s trial testimony, the trial court ultimately disregarded Dr. Kinney’s trial testimony (CP 291-292) removing any possible prejudice from the

admission of the testimony. Because Mr. King cannot demonstrate that he was prejudiced by the admission of Dr. Kinney's testimony he is not entitled to relief on appeal on that basis.

- e. *The trial court did not abuse its discretion by "not addressing any of the evidence presented regarding the mother's lack of parenting."*

Again without citation to authority or even any specific portions of the record, on pages 36-37 of his opening brief Mr. King argues that the trial court abused its discretion "by not addressing any of the evidence presented regarding the mother's lack of parenting under RCW 26.09.191." Appellant's Brief, p. 36. Mr. King's argument fails for several reasons.

- i. Mr. King affirmatively indicated that he was not seeking relief under RCW 26.09.191 and that RCW 26.09.191 did not apply to the proceedings in the trial court.

In paragraphs 3.7.4a and 3.7.4b of Mr. King's Objection to Relocation/Petition for Modification of Custody Decree/Parenting Plan/Residential Schedule, Mr. King indicated that none of the provisions of RCW 26.09.191 applied to any of the parties. CP 117.

The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *Nania v. Pac. Nw. Bell Tel. Co., Inc.*, 60 Wn.App. 706, 709, 806 P.2d 787 (1991). Mr. King should not be permitted to affirmatively inform the trial court that RCW 26.09.191 did not

apply to either party and then complain on appeal that the trial court did not address RCW 26.09.191.

- ii. Mr. King bases his arguments on facts not admitted in the record.

Mr. King does not set out specifically what facts the trial court should have considered in applying RCW 26.09.191. Appellant's Brief, p. 36-37. However, it is highly likely that the facts Mr. King believes should have been considered by the trial court in rendering a ruling under RCW 26.09.191 are the facts contained in exhibit 101 and 117 as set forth at pages 12 to 16 of Mr. King's Opening Brief. As discussed above, exhibit 101 was not admitted at trial and exhibit 117 was not admitted as substantive evidence. RP 86, 145-147, 7-31-12.

As discussed above, under RAP 10.3(a)(6), legal argument in a brief must include reference to relevant parts of the record. Appellate courts "are not required to search the record for applicable portions thereof in support of the plaintiffs' arguments." *Mills*, 67 Wn.2d at 721, 409 P.2d 646. Courts are not obligated "to comb the record" where counsel has failed to challenge specific findings and support arguments with citations to the record. *Lint*, 135 Wn.2d at 532, 957 P.2d 755. "It is not the function of trial or appellate courts to do counsel's thinking and briefing." *Orwick*, 103 Wn.2d at 256, 692 P.2d 793.

Further, appellate courts do not address arguments that are not supported by cited authorities. RAP 10.3(a)(6); *Fiorito*, 112 Wn.App. at 669, 50 P.3d 298.

Mr. King has failed both to cite any relevant portions of the trial record and any authority to support this argument. This court should dismiss this argument and not consider it.

f. The trial court did not abuse its discretion by granting relief beyond what Ms. Platt requested in her November 4, 2011 petition to modify the parenting plan.

Parenting plan decisions are an area for the exercise of the trial court's discretion, and appellate courts will not reverse unless the decision is manifestly unreasonable or based on untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997). A primary concern in establishing parenting plans is that parenting arrangements should serve the best interests of the child. RCW 26.09.002. A trial court wields broad discretion when fashioning a permanent parenting plan. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993).

Mr. King is correct that the trial court found that Ms. Platt's pro-se petition for modification of the parenting plan did not specifically indicate how she wanted the parenting plan to be modified. CP 282. However, contrary to Mr. King's claim that Ms. Platt did not file a proposed parenting

plan, on November 4, 2011, Ms. Platt *did* file a Proposed Temporary Parenting Plan. CP 143-153. In the proposed parenting plan, Ms. Platt asked that Mr. King be required to complete an alcohol assessment and mental health evaluation and parenting classes. CP 145. Ms. Platt also proposed that, until Mr. King completed the assessments and treatment, she retain primary custody of KMK and that Mr. King's visitation be limited to every other Saturday from 10 am to 6 pm and every other Sunday from 10 am to 6 pm in the Kent area. CP 145. Ms. Platt proposed that 60 days after Mr. King completed the assessments and any recommended treatment his visitation would be increased to every other Friday from 6 pm to Sunday at 6 pm. CP 145.

The trial court granted Ms. Platt's petition for modification but modified the parenting plan far less than Ms. Platt had requested. CP 295. Ultimately, the trial court retained the existing parenting plan with the exception that, should Mr. King not move to the King/Pierce County area within three months, one of Mr. King's two monthly weekend visits take place in the King/Pierce County area in order to avoid KMK having to spend so much time traveling. CP 295.

Mr. King's argument on page 38 of his opening brief that "this [sic] Court held a trial and entered relief beyond what was requested in the petition or was known to the father at the time of trial" is specious and not supported

by the record. Mr. King fails to present any argument as to how the trial court abused its broad discretion in modifying the parenting plan to reduce KMK's travel time.

2. The trial court did not abuse its discretion in not finding Ms. Platt in contempt.

Mr. King argues that the trial court abused its discretion in not finding Ms. Platt in contempt for her withholding of KMK because (1) the trial court “wrongfully shifted the burden and the expense of the defense to contempt by reason of justifiable excuse to [Mr. King]” by appointing Dr. Milo to interview KMK about the statements she made regarding what occurred at Mr. King's residence and by requiring Mr. King to pay for Dr. Milo (Appellant's Brief, p. 40-41, 50-51) and (2) Ms. Platt had no basis to withhold KMK from Mr. King, therefore “it should have been seen as *per se* bad faith but the court erred in not finding contempt by allowing double and triple hearsay of the child under a state of mind exception.” Appellant's Brief, p. 43-44, 47-50. Mr. King's arguments fail.

- a. *The trial court did not “wrongfully shift the burden and the expense” of Ms. Platt establishing by a preponderance of the evidence that she withheld KMK in good faith.*

Punishment for contempt of court is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). A trial court abuses its discretion by exercising it on untenable grounds or for untenable reasons.

In re Marriage of James, 79 Wn.App. 436, 440, 903 P.2d 470 (1995).

We review the trial court's factual findings for substantial evidence and then determine whether the findings support the conclusions of law. A parent seeking a contempt order to compel another parent to comply with a parenting plan must establish the contemnor's bad faith by a preponderance of the evidence. *In re James*, 79 Wn.App. at 442, 903 P.2d 470. If the court finds that a parent has, in bad faith, failed to comply with the parenting plan, "the court shall find the parent in contempt of court." RCW 26.09.160(2)(b) (emphasis added). Then, "[u]pon a finding of contempt, the court shall order" the contemnor (1) to provide additional visitation time to make-up for the missed time, (2) pay the other parent's attorney fees and costs, and (3) pay the other parent a penalty of at least one hundred dollars. RCW 26.09.160(2)(b)(i)-(iii) (emphasis added). At its discretion, "[t]he court may also order the parent to be imprisoned." See RCW 26.09.160(2)(b) (emphasis added). Other than sending a parent to jail, punishment for contempt in this context is mandatory, not discretionary. See *In re Marriage of Wolk*, 65 Wn.App. 356, 359, 828 P.2d 634 (1992); *Rideout v. Rideout*, 110 Wn.App. 370, 376, 40 P.3d 1192 (2002), *aff'd*, 150 Wn.2d 337, 77 P.3d 1174 (2003).

A parent who refuses to perform the duties imposed by a parenting plan is per se acting in bad faith. RCW 26.09.160(1). Parents are deemed to have the ability to comply with orders establishing residential provisions and the burden is on a noncomplying parent to establish by a preponderance of the evidence that he or she lacked the ability to comply with the residential provisions of a court-ordered parenting plan or had a reasonable excuse for noncompliance. See RCW 26.09.160(4); *In re Marriage of Rideout*, 150 Wn.2d 337, 352-53, 77 P.3d 1174 (2003).

In re Marriage of Meyers, 123 Wn.App. 889, 892-893, 99 P.3d 398 (2004).

[T]he moving party has the burden of proving contempt by a preponderance of the evidence. This showing must include

evidence from which the trial court can find that the offending party has acted in bad faith or engaged in intentional misconduct or that prior sanctions have not secured compliance with the plan. Once the moving party has established a prima facie case, the responding parent must rebut that showing with evidence of legitimate reasons for failing to comply with the parenting plan. RCW 26.09.160(4). The trial court will then weigh the evidence in the traditional manner and determine whether the moving party has met his or her burden. If so, the statute directs that a contempt order issue.

In re the Marriage of James, 79 Wn.App. 436, 442-443, 903 P.2d 470 (1995).

Where there is substantial evidence to support the trial court's finding, the court of appeals does not substitute its judgment for that of the trial court “even though [it] might have resolved a factual dispute differently.” *Korst v. McMahon*, 136 Wn.App. 202, 206, 148 P.3d 1081 (2006).

The trial court found that Ms. Platt had violated the terms of the parenting plan by withholding KMK, but that Ms. Platt did not do so in bad faith. CP 916-918. The trial court found that Ms. Platt had acted in good faith based on the statements KMK had made. CP 917.

Mr. King’s argument that the trial court shifted the burden of establishing this defense onto him rather than leaving it with Ms. Platt by appointing Dr. Milo to interview KMK about her statements is predicated on the presumption that the trial court based its ruling on the report prepared by Dr. Milo. However, as the trial court made clear, the trial court received but

never looked at Dr. Milo's report regarding KMK's statements. RP 139-140, 12-10-12. As will be discussed further below, the trial court properly determined that KMK's statements were admissible and the court based its ruling on those statements rather than on Dr. Milo's report. The appointment of Dr. Milo is, therefore, irrelevant since it did not impact the trial court's decision or lessen or shift Ms. Platt's burden of establishing that she acted in good faith in withholding KMK.

Like the admission of Dr. Kinney's testimony discussed above in section 1(d)(iii), the appointment of Dr. Milo to interview KMK about her statements had no impact on the outcome of the trial and therefore cannot be the basis of any relief on appeal. This court should disregard Mr. King's argument that the appointment of Dr. Milo shifted the burden from Ms. Platt to Mr. King to demonstrate that Ms. Platt acted in good faith.

b. The trial court did not err in ordering Mr. King to pay for Dr. Milo's interview of KMK.

RCW 26.12.175 provides, in pertinent part,

(1)(a) The court may appoint a guardian ad litem to represent the interests of a minor or dependent child **when the court believes the appointment of a guardian ad litem is necessary to protect the best interests of the child in any proceeding under this chapter....**

(b) **The guardian ad litem's role is to investigate and report factual information regarding the issues ordered to be reported or investigated to the court....**

(d) The court shall enter an order for costs, fees, and disbursements to cover the costs of the guardian ad litem. **The court may order either or both parents to pay for the costs of the guardian ad litem, according to their ability to pay.**

Emphasis added.

Contrary to Mr. King's assertion that RCW title 26 does not apply to a post trial contempt motion (Appellant's Brief, p. 50), the plain language of RCW 26.12.175(1)(a) indicates that the court may appoint a guardian ad litem "in any proceeding under this chapter."

Under RCW 26.12.010,

Each superior court shall exercise the jurisdiction conferred by this chapter and while sitting in the exercise of such jurisdiction shall be known and referred to as the "family court." A family court proceeding under this chapter is: (1) **Any proceeding under this title or any proceeding in which the family court is requested to adjudicate or enforce the rights of the parties or their children regarding the determination or modification of parenting plans, child custody, visitation...**

Emphasis added.

Because the proceeding at which the trial court appointed Dr. Milo was a proceeding at which the trial court was being asked to "adjudicate or enforce the rights of the parties regarding parenting plans or visitation," the proceedings was a "family court proceeding" under RCW 26.12.010. Because the proceeding was a "family court proceeding" under RCW

26.12.010, the proceeding was a proceeding under RCW chapter 26.12 for purposes of RCW 26.12.175(1)(a). Therefore, the trial court acted well within its authority in ordering Mr. King to pay Dr. Milo's costs.

- c. *The trial court did not abuse its discretion in admitting KMK's statements and in finding that Ms. King acted without bad faith.*

At trial and on appeal, Mr. King objected to the trial court considering KMK's statements about Mr. King's behavior on the weekend of October 5-7, 2012 on the basis that KMK's statements were hearsay. RP 130-131, 12-10-12; 193-203, 1-25-13; Appellant's Brief, p. 43-44, 47-50.

The trial court overruled Mr. King's objections on the basis that KMK's statements were offered to show Ms. Platt's state of mind and Ms. Platt's state of mind was relevant to whether or not she withheld KMK in bad faith. RP 131, 12-10-12. The court also held that KMK's statements were admissible under *Betts v. Betts*, 3 Wn.App. 53, 59 473 P.2d 403, *review denied* 78 Wn.2d 994 (1970) because the statements went to KMK's state of mind, regardless of the truth of the statements. RP 137-139, 12-10-12.

- i. KMK's statements were not offered for the truth of the matter asserted, therefore they were not inadmissible hearsay.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *Vreen*, 143 Wn.2d at 932, 26 P.3d 236.

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is generally inadmissible, unless there is an applicable exception. ER 802. “Out-of-court statements not introduced to prove the truth of the matters asserted are not hearsay.” *In re Personal Restraint Petition of Theders*, 137 P.3d 7, 8 (2006).

The issue before the court at the December 10, 2012 hearing was whether or not Ms. Platt was in contempt of court for violating the parenting plan in bad faith. Ms. Platt’s argued that she withheld KMK because she was afraid for KMK’s safety in Mr. King’s care after KMK reported that Mr. King had consumed hard liquor in front of KMK, had yelled at KMK, and was aware that Mr. King had a history of alcohol abuse, anger issues, and abusive behavior towards KMK and her younger brother. CP 694-695. On November 9, 2012, and again on December 10, 2012, the trial court held that KMK’s statements were admissible not as proof that the events described by KMK actually happened but as evidence of Ms. Platt’s “state of mind” at the time she withheld KMK:

There has to be a finding not just of did she send the child or not send the child. There has to be a finding that she did not send the child, and it was in bad faith that she didn’t send the child. Here the mother is asserting that the child experienced physical discomfort, emotional discomfort, and stress and

when she was...with her father, that he was drinking, your client denies it. The mother is asserting it. I'm allowing it under *Betts versus Betts* and other cases.

RP 106-107, 11-9-12.

On December 12, 2012, Ms. Platt indicated that she was offering KMK's statements "for purposes of state of mind with regards to why Ms. Platt has" withheld KMK. RP 131, 12-10-12. The trial court overruled Mr. King's objection on that basis. RP 131, 12-10-12.

Where statements are offered to explain why a party took an action and are not offered for the truth of the matter asserted in the statements, the statements are not hearsay. *See State v. Iverson*, 126 Wn.App. 329, 337, 108 P.3d 799 (2005) (When a statement is not offered for the truth of the matter asserted but to show why an officer conducted an investigation, it is not hearsay and is admissible); *State v. Williams*, 85 Wn.App. 271, 280, 932 P.2d 665 (1997) (guard's statement to officer that he smelled alcohol on defendant's breath was admissible to show why officer then asked defendant to perform breathalyzer test and was not inadmissible hearsay).

Saying that KMK's statements were admissible as to Ms. Platt's "state of mind" is the same as saying that the statements were admissible to determine whether or not Ms. Platt acted with bad faith in withholding KMK. The court recognized this when it stated "Ms. Platt's state of mind goes to good faith or bad faith." RP 131, 12-10-12. The court reaffirmed that

KMK's statements were not admitted to prove the truth of the matters asserted in those statements in its January 29th, 2013, memorandum of decision: "I found that the mother had credible concerns based on what the child was telling her about her mental and physical state, and on what caused those conditions, regardless of the truth of the child's statements regarding those causes." CP 1150.

Ms. Platt withheld KMK because KMK had reported to her that Mr. King had been drinking in front of KMK, had gotten drunk, had yelled at KMK, and had made her uncomfortable. KMK's statements were not offered to prove whether or not the acts KMK alleged in her statements actually took place, but were, instead, offered to show why Ms. Platt withheld KMK. Like the hearsay statements to the law enforcement officers in *Iverson* and *Williams*, KMK's statements to Ms. Platt were offered to show why she withheld KMK, not to prove that what KMK said was true.

Because KMK's statements were not offered to prove the truth of what KMK asserted in her statements, the statements were not hearsay and were not inadmissible.

- ii. The trial court did not abuse its discretion in finding that Ms. Platt acted without bad faith in withholding KMK from visiting Mr. King.

Under RCW 26.09.160(4), it is a defense to a claim that a parent is in contempt of a parenting plan if the parent can establish by a preponderance of

the evidence that she had a reasonable excuse for failing to comply with the parenting plan.

Here the trial court found both that Ms. Platt was not acting in bad faith and that Ms. Platt had a reasonable excuse for withholding KMK from visiting Mr. King after KMK reported what Mr. King had done. CP 917; RP 144 12-10-12. This was clearly set forth in the court's its January 29th, 2013, memorandum of decision: "At the December 10th hearing, I did not find the mother in contempt because I did not find her failure to send the child was in bad faith. I found that the mother had credible concerns based on what the child was telling her about her mental and physical state, and on what caused those conditions, regardless of the truth of the child's statements regarding those causes." CP 1150. Other than asserting that KMK's allegations were false and again incorrectly arguing that KMK's statements were inadmissible hearsay, Mr. King has not articulated any argument as to why the trial court abused its discretion in not finding Ms. Platt in contempt.

3. The trial court properly retained jurisdiction over the proceedings after the trial.

Mr. King appears to argue that once the Superior Court entered its ruling on the modification proceeding, it lost all jurisdiction over the case. Appellant's Brief, p. 44-47. In support of this argument, Mr. King cites LCR 5, LCR 6, KCLR 16(b)(5), LFLR 5, and LFLR17. Appellant's Brief, p. 44-

47. It is presumed that Mr. King is referring to the King County Local Civil Rules (KCLCR) and the King County Local Family Law Rules (KCLFLR). The authorities cited by Mr. King are either nonexistent or do not apply to the post-trial proceedings held in the Superior Court in this matter.

KCLCR 5 governs service and filing of pleadings and other papers and is silent about a trial court's authority post-trial.

KCLCR 6 does not exist.

KCLCR 16(b) is concerned with alternative dispute resolution proceedings which must be completed "no later than 28 days *before* trial." KCLCR 16(b)(1). Emphasis added. KCLCR 16(b)(5) therefore is not applicable to any post-trial proceedings.

Mr. King asserts without explanation that KCLFLR 5 mandates that Mr. King's contempt petition against Ms. Platt must be heard exclusively by a family law commissioner. Appellant's Brief, p. 46. Mr. King is incorrect.

RCW 26.12.010 grants the superior court the jurisdiction to hear family court proceedings under RCW chapter 26.12. RCW 26.12.010. RCW 26.12.050 grants superior courts and county legislative authorities the power to appoint attorneys to act as family court commissioners or to create family court commissioner positions for purposes of assisting the superior court in dealing with family law matters. Thus, jurisdiction to hear family court matters under RCW chapter 26.12 rests primarily with the superior court

which may then choose to delegate that authority to a family law commissioner. Nothing in KCLFLR 5 or RCW chapter 26.12 prohibits superior court judges from retaining jurisdiction over a family law matter.

Nothing in KCLFLR 17 prohibits the superior court from retaining jurisdiction over a family law case to hear post-trial contempt proceedings.

Contrary to Mr. King's assertions, ample authority exists indicating that the superior court may retain jurisdiction over a family law proceeding once an order is entered.

In a dissolution proceeding, the trial court has authority to enforce its decree and orders using its contempt powers. *In re Marriage of Mathews*, 70 Wn.App. 116, 126, 853 P.2d 462, *review denied* 122 Wn.2d 1021, 863 P.2d 1353 (1993). Nothing in the modification statute, RCW 26.09.170, precludes the court that heard a dissolution proceeding from retaining jurisdiction for a limited period of time to review and determine the efficacy of its ruling. *In re Marriage of Ochsner*, 47 Wn.App. 520, 527, 736 P.2d 292, *review denied*, 108 Wn.2d 1027 (1987). Further, "[i]t has been held...that the jurisdiction of the court entering a decree of dissolution is continuing as to maintenance." *Ochsner*, 47 Wn.App. at 527, 736 P.2d 292.

The trial court did not err in retaining jurisdiction over this case to determine the post-trial motions, especially when those motions were

contempt motions dealing with the enforcement of the terms of a modification of a parenting plan entered by the trial court.

4. The trial court did not err in renewing the anti-harassment order against Mr. King.

Citing RCW 10.14.080(3), Mr. King argues that “The Court erred when it entered a renewal of the anti-harassment order without articulating the three instances of harassing behavior as required by the statute.” Appellant’s Brief, p. 50.

RCW 10.14.080(3) reads as follows: “At the hearing, if the court finds by a preponderance of the evidence that unlawful harassment exists, a civil antiharassment protection order shall issue prohibiting such unlawful harassment.”

Appellate courts do not address arguments that are not supported by cited authorities. RAP 10.3(a)(6); *Fiorito*, 112 Wn.App. at 669, 50 P.3d 298. RCW 10.14.080(3) contains no requirement that the trial court articulate three instances of harassing behavior. Mr. King has yet again failed to cite authority to support his argument. This court should disregard Mr. King’s argument about the error in renewing the antiharassment order, or, alternatively, should this court consider MR. King’s argument, find that Mr. King is incorrect and that there is not requirement that the trial court articulate three instances of harassment on the record.

5. The trial court did not err in permitting Ms. Platt to move to an undisclosed location.

Without citation to any authority or even any portion of the trial record, Mr. King argues that the trial court erred in permitting Ms. Platt to move to an undisclosed address with KMK. Appellant's Brief, p. 51. Again, Mr. King's arguments are not supported by any cited authorities and this court should disregard this argument. RAP 10.3(a)(6), *Fiorito*, 112 Wn.App. at 669, 50 P.3d 298.

6. Ms. Platt requests attorney's fees pursuant to RAP 18.

RAP 18.1(a) permits the Court of Appeals to award a party attorney fees or expenses if applicable law grants a party the right to recover such fees and expenses. "In Washington, a prevailing party may recover attorney fees authorized by statute." *Landberg v. Carlson*, 108 Wn.App. 749, 758, 33 P.3d 406 (2001), *review denied* 146 Wn.2d 1008, 51 P.3d 86 (2002) (citing RAP 18.1).

Under RCW 26.09.140,

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

(Emphasis added.)

Ms. Platt requests this court to award her reasonable attorney's fees and costs for money she has spent responding to Mr. King's appeal.

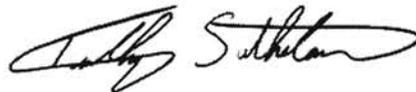
E. CONCLUSION

Mr. King has failed to assign error to any of the trial court's findings. Mr. King has misrepresented the trial record and failed to provide this court with a complete accounting of the events at trial. Mr. King's arguments are contrary to the facts of the case, unsupported by law or reference to the record, and incorrect. Many of Mr. King's arguments are unsupported by any citation to the record and to published legal authority.

For the reasons stated above, this court should deny Mr. King's appeal and affirm the trial court's rulings.

DATED this ___th day of August, 2013.

Respectfully submitted,



Timothy Sutherland, WSBA No. 42510
Attorney for Respondent

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that, on the below date, I caused delivery of a true copy of: (1) BRIEF OF RESPONDENT (50 page brief) to the parties listed below via:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, Washington, this 15nd day of August, 2013.

//s// Kristin Husebye

Kristin Husebye, Legal Assistant