

No. 70259-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

TRINA A. WHERRY,

Respondent,

v.

DAVID B. RATNER,

Appellant.

2013 OCT 21 PM 2:45
STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE LAURA INVEEN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF FACTS..... 2

 A. After a 2004 parenting plan gave the father limited residential time, his child support obligation deviated upward because the mother bore almost all the child’s day-to-day expenses..... 2

 B. The father sought to increase his residential time and reduce his child support obligation in 2010. 3

 C. The parties agreed to submit child support issues to binding arbitration under RCW ch. 7.04A..... 4

 D. After the arbitrator issued his child support ruling, the parties authorized him to reconsider based on the child’s change in primary residence. 5

 E. The father sought trial *de novo* under RCW ch. 7.06 despite the parties’ written agreement that the arbitrator’s child support ruling was binding under RCW ch. 7.04A. 9

 F. The trial court dismissed the trial *de novo*, because the parties agreed to RCW ch. 7.04A binding arbitration, and found no error to warrant vacating the arbitration ruling.12

III. ARGUMENT14

 A. The trial court properly enforced the parties’ agreement submitting to RCW ch. 7.04A binding arbitration by dismissing the RCW ch. 7.06 trial *de novo*.....14

1.	The trial court had authority to consider the mother’s renewed motion to dismiss the trial <i>de novo</i>	14
2.	Substantial evidence supports the trial court’s finding that the parties agreed to RCW ch. 7.04A binding arbitration, which does not provide for <i>de novo</i> review.....	15
3.	A separate petition to modify child support was unnecessary because a modification of the parenting plan was already pending.	21
B.	Neither statute nor court rule prohibits agreements to submit child support issues to RCW ch. 7.04A binding arbitration.	21
1.	Parties may agree to, but King County does not compel, mandatory arbitration of child support modifications.	21
2.	The Parenting Act does not entitle the father to <i>de novo</i> review of a child support arbitration decision.....	25
C.	No error on the face of the arbitration ruling warranted vacation or modification.....	29
D.	The trial court properly deferred to the arbitrator authority to award attorney fees incurred addressing the husband’s challenge to the arbitration rulings in the superior court.....	33
E.	This court should award attorney fees to the mother on appeal.....	34
IV.	CONCLUSION	35

TABLE OF AUTHORITIES

STATE CASES

<i>Ashley v. Superior Court In & For Pierce Cnty.</i> , 83 Wn.2d 630, 521 P.2d 711 (1974).....	24
<i>Barnett v. Hicks</i> , 119 Wn.2d 151, 829 P.2d 1087 (1992).....	16-17
<i>Cummings v. Budget Tank Removal & Emtl. Servs., LLC</i> , 163 Wn. App. 379, 24, 260 P.3d 220 (2011)	29
<i>Davidson v. Hensen</i> , 135 Wn.2d 112, 954 P.2d 1327 (1998)	29-30, 33
<i>Expert Drywall, Inc. v. Ellis-Don Const., Inc.</i> , 86 Wn. App. 884, 939 P.2d 1258 (1997), <i>rev. denied</i> , 134 Wn.2d 1011, 954 P.2d 276 (1998)	29
<i>Fox v. Fox</i> , 87 Wn. App. 782, 942 P.2d 1084 (1997) (App. Br. 28)	31
<i>Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Grp., Inc.</i> , 148 Wn. App. 400, 200 P.3d 254 (2009)	18
<i>Herrmann v. Cissna</i> , 82 Wn.2d 1, 507 P.2d 144 (1973).....	14
<i>Kennewick Educ. Ass'n v. Kennewick Sch. Dist. No. 17</i> , 35 Wn. App. 280, 666 P.2d 928 (1983).....	29
<i>Malted Mousse, Inc. v. Steinmetz</i> , 150 Wn.2d 518, 79 P.3d 1154 (2003).....	16
<i>Marriage of Burrill</i> , 113 Wn. App. 863, 56 P.3d 993 (2002), <i>rev. denied</i> , 149 Wn.2d 1007 (2003).....	18

<i>Marriage of Coy</i> , 160 Wn. App. 797, 248 P.3d 1101 (2011)	25
<i>Marriage of Healy</i> , 35 Wn. App. 402, 667 P.2d 114, <i>rev. denied</i> , 100 Wn.2d 1023 (1983)	34
<i>Marriage of Morrison</i> , 26 Wn. App. 571, 613 P.2d 557 (1980) (App. Br. 25)	20
<i>Meadows v. Grant's Auto Brokers, Inc.</i> , 71 Wn.2d 874, 431 P.2d 216 (1967)	20
<i>Parentage Smith-Bartlett</i> , 95 Wn. App. 633, 976 P.2d 173 (1999)	25
<i>Sales Creators, Inc. v. Little Loan Shoppe, LLC</i> , 150 Wn. App. 527, 208 P.3d 1133 (2009).....	16
<i>Snyder v. State</i> , 19 Wn. App. 631, 577 P.2d 160 (1978).....	24
<i>Zimny v. Louvic</i> , 59 Wn. App. 737, 801 P.2d 259 (1990), <i>rev. denied</i> , 116 Wn.2d 1013, 807 P.2d 884 (1991)	14

STATUTES

Code of Judicial Conduct 2.9.....	15
RCW ch. 7.04A.....	<i>passim</i>
RCW 7.04.010	17
RCW 7.04A.020	10
RCW 7.04A.060	17
RCW 7.04A.150.....	32
RCW 7.04A.230	1
RCW 7.04A.240	1

RCW 7.04A.250	33
RCW ch. 7.06	<i>passim</i>
RCW 7.06.020	22-23
RCW 26.09.070	26-27
RCW 26.09.175	25
RCW 26.09.184.....	25
RCW 26.19.020.....	27-28
RCW 26.19.035	28
RCW 26.19.071.....	31

RULES AND REGULATIONS

CR 12	11
KCLMAR 2.1.....	23
KCLFLR 14.....	23-24
MAR 1.2.....	23
MCLMAR 1.1	22
SCLMAR 1.1	22
RAP 18.1	34
RAP 18.9.....	34

OTHER AUTHORITIES

House Bill Report EHB 2155 (1989).....	28
Laws of 1987, ch. 460, §6.....	27
Laws of 1989, ch. 375, §4	28

[http://www.kingcounty.gov/courts/Superior
Court/civil/arbitration.aspx](http://www.kingcounty.gov/courts/SuperiorCourt/civil/arbitration.aspx) 23

I. INTRODUCTION

The parties agreed to submit their child support obligations to binding arbitration under RCW ch. 7.04A, which does not provide for *de novo* review by the superior court. Their consent was evidenced by the arbitration agreement they each signed, by their attorneys' subsequent emails and oral communications, and by the parties' arguments at arbitration. Only after the father received what he believed was an unfavorable arbitration decision did he claim that the parties' agreement to arbitrate was unenforceable, arguing that all arbitrated child support decisions are subject to trial *de novo*.

The trial court properly dismissed the father's demand for a trial *de novo* when neither statute nor local rule require *de novo* review of child support decisions when the parties have agreed to RCW ch. 7.04A binding arbitration. The trial court also properly denied the father's motion to vacate after finding that the arbitrator made no error that would warrant vacating or modifying the arbitration decision under RCW 7.04A.230 and RCW 7.04A.240. This court should affirm and award the mother her attorney fees for having to respond to this meritless appeal.

II. RESTATEMENT OF FACTS

A. After a 2004 parenting plan gave the father limited residential time, his child support obligation deviated upward because the mother bore almost all the child's day-to-day expenses.

Respondent Trina Wherry and appellant David Ratner are the parents of a daughter, now age 15 (DOB 7/1998). (See CP 1) A parenting plan entered in 2000 gave the parents shared residential time. (CP 268) In 2004, the trial court modified the parenting plan to reduce the father's residential time, because he "ha[d] decided to leave his current residence in the State of Washington and sail his boat." (CP 18)

Based on this new residential schedule, the trial court deviated upward from the standard calculation of \$245.37 and ordered the father to pay \$500 in monthly child support, as "the mother [is now] assuming the majority of the [daughter's] day to day residential schedule and day to day living expenses." (CP 17-18) The mother was ordered to pay 100% of the daughter's extraordinary expenses, including daycare, education, therapy, and transportation costs. (CP 20-21)

B. The father sought to increase his residential time and reduce his child support obligation in 2010.

By October 25, 2010, the father was living in Vancouver, British Columbia. (CP 30) He filed a petition to modify the parenting plan, and asked the court to modify the child support order “if the court grants the petition to modify the parenting plan.” (CP 30-38)

On December 13, 2010, a family law court commissioner found adequate cause for the father’s petition, established a temporary residential schedule giving the father additional residential time, and ordered him to pay temporary monthly support at the standard calculation of \$933, based on the parents’ current incomes. (CP 43, 45, 47, 54-55)

On January 18, 2011, the court appointed a guardian ad litem to make recommendations for the parenting plan. (CP 71) The order required the parties to initially share the guardian ad litem’s fees equally, with final allocation of the fees to be reviewed at trial. (CP 72)

C. The parties agreed to submit child support issues to binding arbitration under RCW ch. 7.04A.

By September 2011, the parties had agreed to a modified parenting plan giving the father alternating weekends with the daughter. (CP 77, 79-87) Their Notice of Settlement of All Claims Regarding Parenting Plan Modification filed on September 22, 2011 stated that “the parties have agreed to arbitrate all remaining issues with Howard Bartlett.” (CP 77) On September 28 and October 3, 2011, the parties signed an agreement submitting the remaining issues, including child support, the division of responsibility for the guardian ad litem fees, and attorney fees, to “binding arbitration” with Howard Bartlett. (CP 110-16, 228) The parties agreed that “the arbitrator shall have the authority to award fees and costs to either party.” (CP 113) Their agreement provided that, with the exception of parenting (which was no longer an issue), any rulings by Arbitrator Bartlett would be “subject to the specific rights of appeal enumerated in RCW 7.04A.” (CP 111)

The arbitrator issued his decision on the remaining financial issues on December 2, 2011, and January 3, 2012. (CP 377, 388) The December ruling set forth the basis of the arbitrator’s decision. (CP 377-86) The January ruling included a child support order and

worksheets for entry with the court upon confirmation. (CP 388-99)

D. After the arbitrator issued his child support ruling, the parties authorized him to reconsider based on the child's change in primary residence.

Soon after the arbitrator issued his child support decision, but before either party sought to confirm it, the parties reached a new agreement on parenting that resulted in the daughter moving to Vancouver, B.C. to reside primarily with the father. (CP 88-96) The parties agreed to terminate the father's child support obligation pending entry of a new child support order reflecting the change in residence. (CP 98-100) Given the daughter's change in primary residence, the arbitrator "stay[ed] the application of [his] arbitration decisions," and inquired whether the parties needed his assistance to resolve a new child support order based on the child's change in primary residence. (CP 298)

The father asked for the arbitrator's "guidance" to "get this matter resolved," and inquired whether it was more appropriate to "reopen" the arbitration or to have the parties file "dual motions for reconsideration" to address the change in primary residence. (CP 432-33) On February 22, 2012, the arbitrator responded to the father's inquiry, stating that it was not necessary to reopen the

arbitration “for all purposes” because “the fact that [the daughter] is now living with [the father] does not change my decision with regard to the financial issues and basic child support, it merely changes who pays child support to whom.” (CP 455) The father apparently agreed, as his counsel stated that he had already been “trying to redo the Order of Child Support and worksheets to conform to the new parenting plan.” (CP 432)

On February 24, 2012, the father questioned whether the parties needed “a new arbitration agreement as the agreement really only covered arbitrating under the facts of the old plan.” (CP 438) The mother offered to sign a new agreement, but noted that “a review of our correspondence will show that we agreed to return to arbitration with Mr. Bartlett if we could not resolve support by agreement based upon the change in primary caregiver for [the daughter].” (CP 441) The arbitrator suggested a telephone conference, “so that I can be clear as to what the issues are and a schedule for resolving any remaining issues can be put in place.” (CP 455)

On March 5, 2012, the parties’ attorneys and the arbitrator conferred and “agreed the arbitrator could continue deciding all outstanding child support issues, even though the primary caregiver

had changed [and] remained bound by the original agreement to arbitrate.” (CP 162; *see also* CP 230) The father later denied this agreement (*see* CP 125), but consistent with their written and oral agreements, the parties proceeded with arbitration on September 10, 2012, including live testimony, on all outstanding child support issues. (*See* CP 162, 230-31, 348)

Contrary to the father’s repeated claims that the arbitrator “refus[ed] to consider current financial information” in this hearing (App. Br. 7, 9, 11, 23, 26, 27), both parties presented evidence of their current financial situations. For example, the arbitrator considered the fact that the mother had obtained a paid part-time position at the University of Washington Medical Center in August 2012 (7 months after the child’s change in primary residence) (CP 349), testimony from the father that his monthly net income was down from \$5,077 at the time of the initial arbitration to \$4,700 (CP 350), and a tax assessment, produced by the father, dated May 27, 2012. (CP 350)

On September 19, 2012, the arbitrator reconsidered his earlier arbitration rulings in light of the daughter’s change in primary residence as well as the various issues raised by both parties in their motions for reconsideration. (CP 348-60) In his

ruling, the arbitrator acknowledged that “although the child is now living primarily with [the father], the new residential schedule does not change the essence of the Motion for Reconsideration. Whether the child is residing primarily with [the mother] or [the father] does not change the child support worksheets. It merely changes who is paying child support to whom.” (CP 348)

Generating much debate on reconsideration was the parties’ incomes. The father, age 62, and the mother, age 58, were both retired from their usual professions, and each had investment income. (CP 349-50) The father argued that the mother should be imputed income based on her highest income from four years earlier. (CP 349) Rather than impute income to either party, the arbitrator used the parties’ actual incomes, finding that the father had net monthly income of \$5,075 and the mother had net monthly income of \$3,969. (CP 350, 356)

Using the parties’ actual incomes, the arbitrator established the mother’s child support obligation at \$693, based on the “standard calculation.” (See CP 353, 358) The arbitrator also ruled that each pay half the outstanding obligation to the guardian ad litem, consistent with the division in the order appointing the guardian ad litem. (CP 353) Finally, the arbitrator denied the

father's request for attorney fees, which was based on his claim that the mother had not provided healthcare insurance information in a timely manner. (CP 354-55) The arbitrator concluded that the mother's process in providing the information was "reasonable and does not constitute intransigence." (CP 355) The arbitrator's September 19, 2012 ruling included a child support worksheet, but no child support order for entry with the court. (CP 348-60)

On October 26, 2012, the arbitrator denied the father's second motion for reconsideration, made one correction to his September arbitration ruling, and awarded the mother \$1,500 in attorney fees for "having to respond to the motion." (CP 419-21) This ruling also did not include a child support order for entry with the court.

E. The father sought trial *de novo* under RCW ch. 7.06 despite the parties' written agreement that the arbitrator's child support ruling was binding under RCW ch. 7.04A.

On November 13, 2012, the father requested a "trial *de novo*," under RCW ch. 7.06, which governs mandatory arbitrations, despite the parties' written agreement that review would be under RCW ch. 7.04A, governing voluntary binding arbitrations. (CP 101, 111) A trial *de novo* was scheduled for March 4, 2013, before King

County Superior Court Judge Ramsdell. (CP 253) Meanwhile, even though the matter was set for a trial *de novo* before Judge Ramsdell, the Clerk also set the matter on the “trial by affidavit” calendar before a family law court commissioner. (CP 256)

The mother asked Judge Ramsdell to strike the trial *de novo* under CR 12(b)(6), because of the parties’ agreement to be bound by the review procedures under RCW ch. 7.04A, which does not provide for a trial *de novo*. (CP 104-09)¹ In response, the father claimed that the arbitrator was not authorized to resolve child support issues after the daughter changed primary residence, and that RCW ch. 7.06, not RCW ch. 7.04A, governed. (CP 125) But the father did not dispute that the RCW ch. 7.04A governed the arbitrator’s original rulings and the parties’ subsequent motions for reconsideration. (CP 125: “There is absolutely no doubt that all of the issues before the arbitrator prior to the January 13th 2012 change in the primary residential parent are covered under the agreement of the parties including both motions for reconsideration and RCW 7.04A.020.”)

¹ At the time she filed her motion to dismiss, the mother was unaware that the Clerk had also scheduled the matter on the trial by affidavit calendar. (CP 247-48)

On December 21, 2012, the trial court denied the motion to dismiss “pursuant to CR 12(b)(6).” (CP 172) The trial *de novo* was then transferred from Judge Ramsdell to Judge Laura Inveen, effective January 14, 2013. (Supp. CP 456)

On January 23, 2013, taking a position inconsistent with his earlier position that RCW ch. 7.06 governed, the father filed a motion to “vacate, modify, and correct” the arbitration ruling under RCW ch 7.04A. (CP 174) While his motion to vacate was pending, the father filed a motion to either continue the RCW ch. 7.06 trial *de novo* or stay the proceedings while his RCW ch. 7.04A motion to vacate was pending. (CP 225) Meanwhile, the trial by affidavit on the family law motions calendar was continued after the commissioner found “there are multiple procedural issues that must be resolved before case should be heard, if at all, on [the trial by affidavit] calendar. Good cause to continue to resolve trial court issues with IC judge.” (CP 312)

In his motion to vacate, the father argued that certain provisions of the arbitration ruling were governed by the parties’ agreement for review under RCW ch. 7.04A, but that other provisions of the ruling were subject to review under RCW ch. 7.06. (See CP 174-85) By the time the parties appeared before Judge

Inveen (the “trial court”) on March 4, 2013, the father changed his position again, claiming that parties could *never* agree to binding arbitration because the King County local rules provide that the “parties may stipulate to arbitrate the issues in the petition pursuant to the state and local Mandatory Arbitration Rules.” (RP 8-9)

F. The trial court dismissed the trial *de novo*, because the parties agreed to RCW ch. 7.04A binding arbitration, and found no error to warrant vacating the arbitration ruling.

The trial court issued its ruling on March 15, 2013, finding that the parties had agreed to submit child support issues, including support issues related to the child’s change in primary residence, to binding arbitration under RCW ch. 7.04A. (CP 333-34) The trial court found that the parties’ consent was evidenced by their written agreement, emails, oral communications, presentations at arbitration, and failure to object to the arbitrator’s authority prior to issuance of his ruling:

The parties agreed to the arbitrator’s authority to rule on post January, 2012 issues in accordance with the Rules and Procedures for Binding Arbitration signed by the parties on 9/29/11 & 10/3/11. This agreement is demonstrated 1) by the oral & email communication between the parties; 2) the parties actively submitted current issues of child support to the arbitrator before the hearing; 3) line of questioning in the arbitration

hearing by respondent referenced post 1/12 issues such as pet'r's current position at the medical center; 4) respondent's briefing called for decisions regarding current income & child support expenses; 5) no objection to the arbitrator's authority was made at the September hearing.

(CP 333-34) Accordingly, the trial court dismissed the trial *de novo*, finding that "it does not have statutory or court rule authority to hear a trial *de novo* pursuant to RCW 7.06 because this is not a type of case that court rules provide for mandatory jurisdiction and parties did not agree to arbitrate under RCW 7.06. LFLR 14(d)(6) does not apply." (CP 333)

Judge Inveen acknowledged that she had consulted with Judge Ramsdell to clarify his earlier decision denying the mother's motion to dismiss "pursuant to CR 12(b)(6)." (RP 15; CP 172) Judge Ramsdell apparently had no "independent memory" of the decision, other than he "simply den[ied] a CR 12(b)(6) finding," and "wasn't suggesting that it wouldn't be dismissed on other grounds." (RP 15)

The trial court also denied the father's motion to vacate under RCW ch. 7.04A, finding that "the arbitrator made no error that rises to the level of vacating or modifying the arbitrator's decision." (CP 334) The trial court awarded the mother her

attorney fees and directed her to submit a fee and cost declaration to the arbitrator “for determination of an award of fees and costs for having to respond to both Respondent’s trial *de novo* action and the motion to vacate the arbitration decision.” (CP 334)

The trial court denied the father’s motion for reconsideration. (CP 335-36) The father appeals. (CP 337)

III. ARGUMENT

A. The trial court properly enforced the parties’ agreement submitting to RCW ch. 7.04A binding arbitration by dismissing the RCW ch. 7.06 trial *de novo*.

1. The trial court had authority to consider the mother’s renewed motion to dismiss the trial *de novo*.

This court must reject the father’s disingenuous argument that Judge Inveen was prohibited from dismissing the trial *de novo* after Judge Ramsdell had denied the mother’s motion to dismiss. (App. Br. 30-32) An order denying a motion to dismiss, like an order denying summary judgment, is not a final judgment and has no *res judicata* effect. *See Zimny v. Lovric*, 59 Wn. App. 737, 739, 801 P.2d 259, 260 (1990), *rev. denied*, 116 Wn.2d 1013, 807 P.2d 884 (1991); *Herrmann v. Cissna*, 82 Wn.2d 1, 3, 507 P.2d 144 (1973). Judge Inveen was free to examine whether dismissal was

warranted when the mother renewed her motion to dismiss after the father sought to vacate the arbitration ruling under RCW ch. 7.04A.

The father's claim that Judge Inveen violated the Code of Judicial Conduct by seeking clarification from Judge Ramsdell as to the basis of his earlier ruling is not only unfounded, but offensive. Code of Judicial Conduct 2.9(A)(3) permits a judge to consult with another judge "provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter." Judge Inveen was not seeking, nor did she receive, "factual information that is not part of the record" by asking Judge Ramsdell to clarify his ruling. Furthermore, it is clear that Judge Inveen did not "abrogate the responsibility" to make her own independent decision, because she ultimately disagreed with Judge Ramsdell and dismissed the trial *de novo*.

2. Substantial evidence supports the trial court's finding that the parties agreed to RCW ch. 7.04A binding arbitration, which does not provide for *de novo* review.

The trial court properly dismissed the trial *de novo* after concluding that RCW ch. 7.06, which governs mandatory

arbitrations, did not apply, finding that the parties had instead agreed to binding arbitration under RCW ch. 7.04A, which does not provide for review by trial *de novo*. *Sales Creators, Inc. v. Little Loan Shoppe, LLC*, 150 Wn. App. 527, 531, ¶ 9, 208 P.3d 1133 (2009) (under RCW ch. 7.04A, “the parties may seek court confirmation of the award, but unlike mandatory arbitration, there is no provision for court review of the award.”). When parties agree to arbitration under RCW ch. 7.04A, as the parties did here, “a superior court may only confirm, vacate, modify, or correct an arbitrator’s award.” *Barnett v. Hicks*, 119 Wn.2d 151, 156, 829 P.2d 1087 (1992). “The very purpose of arbitration is to avoid the courts insofar as the resolution of the dispute is concerned.” *Barnett*, 119 Wn.2d at 160.

The appellant does not seriously deny that he signed an agreement submitting outstanding child support issues to binding arbitration, “subject to the specific rights of appeal enumerated in RCW 7.04A.” (CP 111; *see also* CP 125) RCW ch. 7.04A “makes agreements to arbitrate existing or future disputes ‘valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement.’” *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 526, 79 P.3d 1154, 1158 (2003)

(*quoting former RCW 7.04.010*²); *see also Barnett*, 119 Wn.2d at 154 (“An arbitration agreement is valid, enforceable, and irrevocable unless grounds exist for the revocation of such an agreement.”).

Appellant claims that the parties only agreed to binding arbitration under the review procedures of RCW ch. 7.04A for child support issues that pre-dated the child’s change in primary residence. (App. Br. 25) But the trial court rejected this claim as not credible in light of other evidence. RCW 7.04A.060(2) (“The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate”). The trial court found, and substantial evidence supports, that “the parties agreed to the arbitrator’s authority to rule on post January, 2012 issues in accordance with the Rules and Procedures for Binding Arbitration signed by the parties on 9/29/11 & 10/3/11.” (CP 334)

“An appellate court will uphold a finding of fact if substantial evidence exists in the record to support it. Evidence is substantial if

² *Former RCW 7.04.010* is not substantively distinguishable from current RCW 7.04A.060(1), which provides that “an agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.”

it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it. This is because credibility determinations are left to the trier of fact and are not subject to review.” *Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003). “If the dispute can fairly be said to invoke a claim covered by the agreement, any inquiry by the courts must end. Washington State has a strong public policy favoring arbitration of disputes.” *Heights at Issaquah Ridge, Owners Ass’n v. Burton Landscape Grp., Inc.*, 148 Wn. App. 400, 403-04, ¶ 5, 200 P.3d 254 (2009). “Any doubts should be resolved in favor of coverage, and further, all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication.” *Heights at Issaquah Ridge, Owners Ass’n*, 148 Wn. App. at 405, ¶ 8.

Here, the trial court clearly found the evidence of the parties’ agreement to arbitrate child support issues arising from the change in the child’s primary residence under the same terms of the earlier agreement more credible than the father’s claims otherwise. The trial court considered evidence that the parties agreed in a

teleconference to “further arbitration of all issues, including determining the future child support obligations of the mother” and that “the arbitrator could continue deciding all outstanding child support issues and, even though the primary caregiver had changed, we remained bound by the original agreement to arbitrate.” (CP 162, 230)

This agreement was supported by other evidence, including the father’s arguments during arbitration seeking a remedy for the mother’s purported failure to pay child support after the child move (even though no order required her to do so), his argument seeking payment from the mother for extraordinary expenses associated with the child going to school in Canada, and his inquiry into the mother’s current income post-dating the change in primary residence. (CP 230-31, 438, 452) Further, after the child changed primary residence, the father advised the arbitrator that he was working on redoing the worksheets (based on the arbitrator’s prior ruling) to conform to the new parenting plan, but purportedly could not complete them without further information from the mother on health insurance. (See CP 432) He asked the arbitrator for “guidance on how you wish to proceed to get this matter resolved.” (CP 433) At no point until *after* the arbitrator issued his ruling did

the father claim that the arbitrator had no authority to rule on the child support issues arising from the child's change in primary residence.

None of this was "hearsay" evidence, as now claimed by appellant. (App. Br. 25) The appellant largely complains that the trial court's decision was based in part on a sworn declaration from the mother's counsel. (App. Br. 25) But this is proper evidence, as the mother's counsel had personal knowledge of the agreement reached in the teleconference, and participated in the September 2012 arbitration hearing. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 880, 431 P.2d 216 (1967) (attorney's affidavit based on personal knowledge entitled to same consideration as any other affidavit). This case is nothing like *Marriage of Morrison*, 26 Wn. App. 571, 613 P.2d 557 (1980) (App. Br. 25), where the court rejected an attorney's affidavit purporting to recite a conversation between his client and the opposing party of which the attorney had no personal knowledge. 26 Wn. App. at 575, fn. 2.

Based on the evidence presented, the trial court properly concluded that the parties agreed to submit the child support issues arising after the child's change in primary residence to binding arbitration under their previously signed agreement.

3. A separate petition to modify child support was unnecessary because a modification of the parenting plan was already pending.

The father sought to modify child support consistent with any modified parenting plan in his petition to modify the parenting plan. (CP 31, 38) The father cites no authority (because there is none), for his claim that a separate petition for modification of child support was required before the parties could proceed to arbitration after entering an agreed modified parenting plan. (App. Br. 23) In fact, the parties agreed to terminate the father's child support obligation, pending entry of a new order of child support, after the child changed primary residence. (CP 99) There was no need for either party to file a separate petition for modification of child support when the parties were already pursuing arbitration of the child support order under the father's petition for modification of the parenting plan.

B. Neither statute nor court rule prohibits agreements to submit child support issues to RCW ch. 7.04A binding arbitration.

1. Parties may agree to, but King County does not compel, mandatory arbitration of child support modifications.

There is nothing in the statutes, rules, or case law that requires that disputes regarding child support be subject to

mandatory arbitration under RCW ch. 7.06, as argued by the father. (App. Br. 12) The trial court properly concluded that child support modification “is not a type of case that court rules provide for mandatory jurisdiction and the parties did not agreed to arbitrate under RCW 7.06.” (CP 333)

RCW 7.06.020 does not mandate that child support modifications be subject to mandatory arbitration. Instead, the statute allows counties to choose whether to require mandatory arbitration for child support modification “if approved by a majority of the superior court judges of a county”:

If approved by majority vote of the superior court judges of a county which has authorized arbitration, all civil actions which are at issue in the superior court in which the sole relief sought is the establishment, termination or modification of maintenance or child support payments are subject to mandatory arbitration. The arbitrability of any such action shall not be affected by the amount or number of payments involved

RCW 7.06.020(2). King County, where the parties litigated this matter, has never adopted mandatory rules of arbitration for child support modifications, contrary to the father’s claims. (App. Br. 17) Unlike other counties such as Mason and Snohomish, *see* MCLMAR 1.1, SCLMAR 1.1., King County does not require that child support modification proceed to mandatory arbitration under RCW ch.

7.06. Instead, King County requires mandatory arbitration only for civil cases “where the sole relief sought is a money judgment,” and the claim is less than \$50,000. KCLMAR 2.1; MAR 1.2; RCW 7.06.020.³

King County Local Family Law Rules provide only that the parties *may* stipulate in writing to arbitration under the mandatory arbitration rules:

The parties may stipulate to arbitrate the issues in the petition [for modification of child support] to the state and local Mandatory Arbitration Rules.

KCLFLR 14(d)(6). If they do so, “requests for a trial *de novo* shall be heard on the Trial by Affidavit Calendar.” KCLFLR 14(d)(6)(B). But here, the parties did not stipulate to arbitration under RCW ch. 7.06 and the mandatory arbitration rules. Instead, the parties stipulated to binding arbitration under RCW ch. 7.04A:

Both parties agree that the arbitration ruling is binding, subject to the specific rights of appeal enumerated in RCW ch. 7.04A.

(CP 111) There is nothing in either the relevant local rules or statute suggesting that a party can be compelled to accept mandatory

³See also <http://www.kingcounty.gov/courts/SuperiorCourt/civil/-arbitration.aspx>.

arbitration of child support issues, subject to *de novo* review, absent agreement by the parties.

Even if the local rule contemplated that review of an arbitration ruling be subject to *de novo* review, the trial court did not abuse its discretion in denying *de novo* review based on the parties' agreement and expectations in this case. The court has inherent power to waive its rules. *Ashley v. Superior Court In & For Pierce Cnty.*, 83 Wn.2d 630, 636, 521 P.2d 711, 715 (1974). "Where the issue is the interpretation of a local rule by the trial court, that court is the best exponent of its own rules, and their use will not be disturbed by an appellate court unless the construction placed thereon is clearly wrong or an injustice has been done." *Snyder v. State*, 19 Wn. App. 631, 637, 577 P.2d 160, 163 (1978) (*citations omitted*). "Moreover, a superior court may, for good reason, relax and suspend its own special rules of procedure, [] observation of local rules is largely discretionary in the trial court." *Snyder*, 19 Wn. App. at 637.

Because the parties were not required to submit their child support modification to mandatory arbitration under RCW ch. 7.06 or KCLFLR 14(d)(6), the trial court properly upheld the parties' agreement to binding arbitration under RCW ch. 7.04A.

2. The Parenting Act does not entitle the father to *de novo* review of a child support arbitration decision.

Nothing in our laws mandates *de novo* review of child support decisions reached in voluntary arbitration under RCW ch. 7.04A. RCW 26.09.175(6) provides that the courts review petitions for modification of child support if the parties have not stipulated to arbitration. (“Unless all parties stipulate to arbitration [], a petition for modification of an order of child support shall be heard by the court.”). Thus, the father’s attempt to liken arbitration of child support issues to arbitration of parenting issues is misplaced.

Division Three has held parenting issue arbitrations are always subject to *de novo* review by the court because *former* RCW 26.09.184(3)(e) (*now* RCW 26.09.184(4)(e)) dictated that parents “shall have the right of review from the dispute resolution process to the superior court” in *Parentage Smith-Bartlett*, 95 Wn. App. 633, 639, 976 P.2d 173 (1999). *See also Marriage of Coy*, 160 Wn. App. 797, 805, ¶ 14, 248 P.3d 1101 (2011)(parties cannot enter into an agreement that provided the mother with the unilateral right to modify the parenting plan without court review).

No similar “right of review” is required for child support decisions when the parties agree to submit the decision to binding

arbitration, however. While the mother does not deny that a court may independently review a child support order prior to its entry to confirm it meets the statutory requirements, this does not rise to the level of *de novo* review of an arbitration decision that the parties already agreed would be binding. That the trial court denied the father's demand for *de novo* review of the arbitrator's ruling on child support did not deprive the trial court of its ability to confirm that an arbitrated child support order meets the statutory requirements prior to its entry as an order of the court.

Under RCW 26.09.070(3), courts are bound to enforce the parties' agreements on property, maintenance, and child support – *excluding only parenting* - unless the agreement was unfair at the time of execution:

If either or both of the parties to a separation contract shall at the time of the execution thereof, or at a subsequent time, petition the court for dissolution of their marriage [], the contract, except for those terms providing for a parenting plan for their children, shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties on their own motion or on request of the court, that the separation contract was unfair at the time of its execution.

RCW 26.09.070(3).⁴ The only “review” required of any child support provision within a separation contract is that it complies with RCW 26.19.020 – the child support schedule. RCW 26.09.070(3) (“child support may be included in the separation contract and shall be reviewed in the subsequent proceeding for compliance with RCW 26.19.020.”). And in this case, there is no dispute that the child support obligation at issue here is based on the child support schedule.

RCW 26.09.070(3) does not require *de novo* review of parties’ agreements on child support - including an agreement to submit it to binding arbitration. Instead, as evidenced by the legislative history of the statute, it confirms that any child support order must be based on the child support schedule under RCW 26.19.020. For instance, when the provision regarding child support was added to RCW 26.09.070 in 1989, the amendment was effected in part to “restore[] language in the current law that may imply that a court need not use the child support schedule in

⁴ Prior to its amendment in 1987, RCW 26.09.070 did not bind courts to parties’ agreements on either support or custody of children. *Former* RCW 26.09.070(3) (“the contract, except for those terms providing for the custody, support, and visitation of children, shall be binding upon the court...”.) Thereafter, the prohibition only extended to parenting plans. Laws 1987, ch. 460, § 6.

determining the amount of support to be ordered.” House Bill Report EHB 2155 (1989); Laws 1989, ch. 375, § 4. Similarly, RCW 26.19.035(4) requires that, prior to entering a child support order, the court review the worksheets to ensure compliance with the statute:

The court shall review the worksheets and the order setting support for the adequacy of the reasons set forth for any deviation or denial of any request for deviation and for the adequacy of the amount of support ordered.

RCW 26.19.035(4).

De novo review of the arbitration ruling is not required, because the trial court will already review any child support order arising from the arbitration ruling prior to its entry to ensure that it complies with statutory requirements. Just like an agreed child support order, the court will review an arbitrated child support order when it signs the order and worksheets prior to its entry with the court. If the proposed child support order does not include worksheets, as required under RCW 26.19.035, or if the transfer payment was not based on the child support schedule, as required under RCW 26.19.020, then trial court would not be required to confirm it as an order of the court, as this would be a “purely legal” error that could warrant vacation of the arbitration award under

RCW ch. 7.04A. *Cummings v. Budget Tank Removal & Evtl. Servs., LLC*, 163 Wn. App. 379, 382, 388-89, ¶¶ 1, 24, 260 P.3d 220 (2011); see e.g. *Kennewick Educ. Ass'n v. Kennewick Sch. Dist. No. 17*, 35 Wn. App. 280, 282, 666 P.2d 928 (1983) (arbitrator's decision granting punitive damages in jurisdiction that prohibits such awards is an "error on the face" of the arbitration decision).

C. No error on the face of the arbitration ruling warranted vacation or modification.

"In the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified." *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327, 1330 (1998). An "error of law on the face" must be recognizable from the language of the decision. *Cummings, LLC*, 163 Wn. App. at 388-89, ¶ 24. An alleged error that would require the reviewing court to consider the evidence presented to and weighed by the arbitrator is not an error on the face of the award. *Cummings, LLC*, 163 Wn. App. at 390, ¶ 29. "The party challenging the award has the burden to show that grounds for modification or vacation exist." *Expert Drywall, Inc. v. Ellis-Don Const., Inc.*, 86 Wn. App. 884, 888, 939 P.2d 1258, 1260 (1997), *rev. denied*, 134 Wn.2d 1011, 954 P.2d 276 (1998).

As he did below, the father challenges the merits of the arbitration decision. But judicial review of an arbitration award does not include a review of the merits of the case. *Davidson*, 135 Wn.2d at 118. For instance, the father challenges the arbitrator's decision requiring both parties to pay half of the guardian ad litem fees, complaining that because the mother offered to pay the guardian ad litem fees *before* the petition for modification was filed she was bound to do so. (App. Br. 27-28) Based on the evidence presented, arbitrator concluded that if the mother made this offer, it was not accepted, because four months later the parties entered an order that required both parties to share in the cost of the guardian ad litem. (CP 353-54, 381) The arbitrator stated, "if [the father] believed there was an agreement that [the mother] pay all of the fees, that agreement should have appeared in the order appointing the guardian ad litem." (CP 381) This was not an "error on the face" of the award.

The appellant also complains of the arbitrator's decision to base child support on the parties' actual incomes, alleging that the mother was "voluntarily unemployed." (App. Br. 28) But whether a parent is "voluntarily underemployed or voluntarily unemployed" is a factual decision based on evidence presented of the "parent's work

history, education, health, and age, or any other relevant factors.”
RCW 26.19.071(6).

Remarkably, appellant complains that the mother retired at age 57, when he, age 62, has been “retired for more than 25 years!” (App. Br. 29, *emphasis in original*) The arbitrator declined to impute income to either party, and found both able to live an “affordable lifestyle” on their investment income. The arbitrator noted that whether he imputed income to both parties or not, “the additional income to either party would have little effect on the child support obligation.” (CP 349)⁵

Fox v. Fox, 87 Wn. App. 782, 942 P.2d 1084 (1997) (App. Br. 28) does not support the father’s claim that the arbitrator abused its discretion in not imputing income to the wife based on her employment income from four years earlier. In *Fox*, the court held it was proper to impute income to the father because his decision to retire was not in good faith, as the sale of his medical practice was not an arm’s length transaction and appeared to be a ruse to transfer his income to his new wife. Here, on the other hand, the

⁵ The arbitrator stated that were he to impute income to the mother it would not be based on her income from four years earlier, as urged by the father, but by imputing her part-time wages to full-time, as required by RCW 26.19.071 (6)(a) (full-time earnings at current rate of pay is given priority over full-time earnings at the historical rate of pay).

arbitrator concluded that the mother's decision to leave her employment four years earlier was not in bad faith, she had ample investment income to live off of, and she was also working part-time by the time of arbitration. (CP 349) This was not an "error on the face" of the award.

Finally, the father complains that the arbitrator declined to "reopen" the arbitration to take new evidence. (App. Br. 23) The record simply does not support his claim that the arbitrator refused to consider the parties' current financial situations. Neither parent was prohibited from presenting "further evidence," and as is clear from the record, both presented new evidence that was not previously considered in the earlier arbitration. (See CP 349-50)

In any event, RCW 7.04A.150 gives an arbitrator discretion to "conduct the arbitration in such manner as the arbitrator considers appropriate," and the authority to "to determine the admissibility, relevance, materiality, and weight of any evidence." An arbitrator's decision declining to reopen an arbitration to consider new evidence is not a basis to vacate the decision. This court should "decline to overturn the arbitrator's award based on a refusal to re-open the hearing for additional evidence in light of Washington's strong policy favoring finality of arbitration awards

and the broad authority conferred upon the arbitrator by the parties' agreement." *Davidson*, 135 Wn.2d at 123. Because there was no apparent error on the face of the arbitrator's decision, the trial court properly denied the motion to vacate.

D. The trial court properly deferred to the arbitrator authority to award attorney fees incurred addressing the husband's challenge to the arbitration rulings in the superior court.

After deciding that an award of attorney fees to the mother was warranted for having to respond to both the father's trial *de novo* action and his motion to vacate under RCW ch. 7.04A, the trial court properly deferred the issue of the amount of attorney fees to the arbitrator. The father does not challenge the award of attorney fees itself. Instead, he claims that the trial court "improperly delegated" its authority under RCW 7.04A.250(2), which provides that "a court may allow reasonable costs of the motion and subsequent judicial proceedings," by deferring to the arbitrator to determine the amount. But consistent with the statute, it was the trial court that determined whether attorney fees were warranted for the father's actions in the superior court. The only "delegation" was to determine the amount of attorney fees, consistent with the parties' arbitration agreement granting the

arbitrator authority to award fees and costs for issues arising out of the arbitration. (CP 113)

In the event this court nevertheless determines that the trial court should have determined the amount of the fees to be awarded, it should be remanded for the trial court to make that determination.

E. This court should award attorney fees to the mother on appeal.

This court should award attorney fees to the mother for having to respond to the father's appeal. RAP 18.9(a) (authorizing terms and compensatory damages for a frivolous appeal); RAP 18.1; *Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114, *rev. denied*, 100 Wn.2d 1023 (1983) (an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney fees). The parties agreed to binding arbitration under RCW ch. 7.04A. There was neither basis nor reason for the father to pursue both a trial *de novo* under RCW ch. 7.06 and a motion to vacate under RCW ch. 7.04A. As the trial court acknowledged, the father's procedural tactics unnecessarily increased the mother's attorney fees below, warranting an award of attorney fees. (*See* CP 334) The father's appeal is a continuation of those tactics that

warrant an award of attorney fees in this court. The mother should not be forced to bear the cost of the father's frivolous appeal, and this court should award her attorney fees, with the amount to be determined by either the commissioner of this court or by the arbitrator.

IV. CONCLUSION

This court should affirm the trial court's decision and award attorney fees to the respondent on appeal.

Dated this 18th day of October, 2013.

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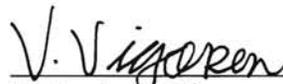
DECLARATION OF SERVICE

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

That on October 18, 2013, 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 18th day of October,
2013.



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