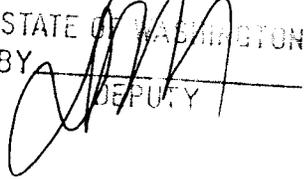


COURT OF APPEALS
DIVISION II

NO. 40119-3

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

STATE OF WASHINGTON
BY  DEPUTY

CLYDE H. REED,

Appellant/Cross-Respondent,

v.

CATHERINA Y. BROWN,

Respondent/Cross-Appellants

REPLY BRIEF

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorney for Appellant/Cross-Respondent

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INTRODUCTION

It is undisputed that neither Judge Armijo nor Judge Hickman considered RCW 26.09.187(3), which requires trial courts to consider enumerated statutory factors before designating a primary residential parent.¹ Judge Armijo's temporary orders do not mention RCW 26.09.187(3) or any of its factors, and were subject to a review hearing four months after they were entered. Judge Hickman, who presided over the review hearing, erroneously refused to determine primary residential parentage, ruling that Judge Armijo had not reserved the issue.

Judge Hickman also erred in limiting his consideration to incidents occurring after the first trial. Judge Hickman could not accurately decide highly fact-specific issues based on half of the record. This Court should reverse and remand, with instructions to determine primary residential parentage under RCW 26.09.187(3).

Judge Hickman correctly awarded child support as calculated in the temporary orders, and correctly denied Brown's fee request. This Court should affirm, and deny Brown's request for appellate fees.

¹ Reed refers to the trial court judges by name to avoid confusing the two different trials. No disrespect is intended.

REPLY REGARDING PROCEDURAL HISTORY

The parties' daughter, Tuscany, was born on February 14, 2007. CP 63. Reed has always been actively involved in Tuscany's life. CP 27-28, 63-65; 12/02/08 RP 82-86; 12/03/08 RP 12-14, 76-77. Although Brown agreed that overnight visitations would start when Tuscany turned four-months old, Brown changed her mind, dictating that overnights would not start until Tuscany turned six-months old. CP 65. Days before Tuscany turned six-months old, Brown announced that she and Tuscany were moving out of the State. *Id.*; CP 358.

Reed immediately obtained an *ex parte* order restraining Brown from removing Tuscany from the State, and petitioned for a parenting plan, residential schedule, and child support order. CP 35, 53-59. The parties agreed to a temporary visitation schedule, under which Reed had visitation Tuesday and Thursday evenings, and on Sundays, but no overnights. CP 5-8. Brown's compliance was spotty and she significantly delayed the litigation, refusing to cooperate with the GAL, ignoring deposition requests, defying court orders, and repeatedly changing attorneys. CP 65, 358.

The parties went to trial before Judge Armijo in December 2008. CP 350-56. After a three-day trial, Judge Armijo initially

stated (1) that he wanted “to give [Reed] as much time as possible”; (2) that overnights should begin when Tuscany turned two-years old (four months after the oral ruling); and (3) that the court was “think[ing]” about overnights occurring Thursday through Sunday every other week, with a mid-week overnight in between. 12/08/08 RP 31-32. The court then took a recess, telling counsel to work on implementing the schedule. *Id.* at 33.

But when Judge Armijo returned to the bench, Brown claimed that during the break she had spoken to someone at Mary Bridge Hospital who indicated that Tuscany should not have any changes to her residential schedule until she completed six-to-eight weeks of therapy (beginning on January 13, 2009) for her sensory integration difficulties. *Id.* at 36-38. Judge Armijo backed off his plan to implement overnights, ordering visitation much as it had been per the parties’ agreement, adding 6.5 hours on Saturday every other week, but taking away 2.5 hours from every Sunday visit. *Compare* CP 5-8 and 12/08/08 RP 46-48 with CP 376-77. Judge Armijo set a review hearing for April 17, 2007, indicating the he would maintain jurisdiction and sit on the case *pro tempore*. 12/08/08 RP 72-73. The court’s orders also stated that the parties would return for the review hearing. CP 374, 384.

This matter was reassigned to Judge Hickman, who continued the trial date to May 19, 2009. CP 400; 02/06/09 RP 27. In March, Judge Hickman revised the temporary visitation schedule, granting Reed one overnight per week. CP 475; 03/06/09 RP 43-46. Trial began on September 14, 2009.

Judge Hickman ruled *in limine* that “the issues, evidence, and testimony shall be after the date of the prior trial” before Judge Armijo. CP 594; 09/14/09 RP 57-58.² Judge Hickman plainly stated his intent to enter a final parenting plan and child support order, expressing his frustration that Judge Armijo failed to enter “final decisions.” 09/14/09 RP 57-58. Yet after a four-day trial, Judge Hickman refused to consider primary-residential-parent status, concluding that Judge Armijo made a final determination as to that issue. 10/09/09 RP 532.

ARGUMENTS

- A. The trial court improperly refused to determine primary-residential-parent status, incorrectly concluding that temporary orders resolved the issue.**

Judge Armijo entered temporary orders, reserving final decisions until Tuscany had completed six-to-eight weeks of

² This ruling is discussed *infra*, Argument § B.

therapy. 12/08/08 RP 46-48. Judge Armijo failed to consider (or even mention) RCW 26.09.187. 12/08/08 RP 28-90. Although Judge Hickman concluded that the visitation was temporary, he refused to consider primary residential parentage, ruling that Judge Armijo had made a permanent decision on that issue. 09/14/09 57-58; 10/09/09 RP 532. As a result, Brown remains Tuscan's primary residential parent simply because of the temporary orders. That is not the law. This Court should reverse.

When entering a parenting plan – temporary or permanent – the trial court must consider the factors enumerated in RCW 26.09.187(3). RCW 26.09.187(3); RCW 26.09.197; *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993) (“The residential placement is to be in the best interests of the child and is to be made only after certain factors have been considered by the court”); *In re Marriage of Shui and Rose*, 132 Wn. App. 568, 590, 125 P.3d 180 (2005) (same). Indeed, RCW 26.09.187(3)(a) provides that the trial court “shall consider” the statute’s enumerated factors.

When entering a temporary plan, but not when entering a permanent plan, the court must also consider “[w]hich parenting arrangements will cause the least disruption to the child’s emotional

stability while the action is pending.” RCW 26.09.197; *Kovacs*, 121 Wn.2d at 808-09. Thus, while the temporary primary-residential-parent designation is concerned with who has been primarily responsible for the child in the past, the permanent primary-residential-parent designation is concerned with who should be primarily responsible for the child in the future. 121 Wn.2d at 809 (quoting Washington State Bar Ass’n, FAMILY LAW DESKBOOK 45-25 (1989)).

1. Brown’s technical arguments are meritless. (BR 1-4).

Brown raises a bevy of technical arguments, inviting this Court not to reach the merits. BR 1-4. Brown misunderstands Reed’s appeal and the RAPs she cites.

Brown first argues that Reed has not perfected review of Judge Armijo’s temporary order and parenting plan. BA 1-2. But Reed appeals from Judge Hickman’s refusal to determine primary-residential-parent status. BA 1, AOE 1; BA 16-23.

The temporary orders are properly before this Court in any event, where they prejudicially affected Judge Hickman’s orders and were entered before this Court accepted review:

The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision

designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

RAP 2.4(b). The temporary orders prejudicially affected Judge Hickman's decision, where he would have determined primary-residential-parentage status but for his belief that Judge Armijo had not "reserved" the issue. 10/09/09 RP 532; ***Adkins v. Aluminum Co. of Am.***, 110 Wn.2d 128, 134, 750 P.2d 1257, 756 P.2d 142 (1988) (holding that an order granting a mistrial prejudicially effected the final verdict, where the second trial would not have occurred absent the court's decision granting the mistrial). These orders were entered in December 2008, long before this Court accepted review. CP 366-77, 378-85.

This Court should review these orders, and reverse, if it is persuaded by Brown's argument that Judge Armijo made a final primary-residential-parent determination. BR 5-6. Judge Armijo plainly did not consider RCW 26.09.187(3) – neither the statute, nor any of the enumerated factors, are mentioned in the oral ruling or written decisions. *Infra*, Argument § A. 2; CP 366-77, 378-85; 12/08/08 RP 28-90. Rather, the primary-residential-parent designation is nothing more than a checked box on a standard-form

order. CP 366, 380. This Court should reverse. ***In re Marriage of Croley***, 91 Wn.2d 288, 292, 588 P.2d 738 (1978).

Brown also asks this Court not to review Judge Hickman's orders because (1) Reed failed to comply with RAP 10.4(c); and (2) Reed failed to assign error to paragraphs in Judge Hickman's permanent parenting plan and judgment designating Brown the primary residential parent. BR 3-4. RAP 10.4(c) does not apply to court orders – it states that parties should quote or append relevant statutes, rules, regulations, jury instructions, finding of facts, and exhibits. And Reed's first Assignment of Error and corresponding issue statement make clear that he challenges Judge Hickman's refusal to determine primary-residential-parent status, which plainly includes an appeal from orders designating Brown the primary residential parent. BA 1, AOE 1, BA 2, Issue 2; RAP 10.3(a)(4). In any event, this Court should review this issue, where Reed clearly "briefed the matter sufficiently for [Brown] to respond." ***State v. Breitung***, 155 Wn. App. 606, 619, 230 P.3d 614 (2010) (this Court "may decline to refuse review under RAP 10.3(g) where the briefing and argument are clear and the record is adequate").

2. **Judge Hickman erroneously refused to determine primary residential parentage, where Judge Armijo's orders were temporary. (BA 16-23, BR 4-6).**

Judge's Armijo's orders were temporary. There is no indication that he considered RCW 26.09.187(3), and no indication that he made a permanent primary-residential-parentage determination. Judge Hickman erroneously refused to consider this issue. This Court should reverse.

Consistent with Judge Armijo's oral ruling, his temporary judgment and order determining parentage specifically provides that "[t]he parties shall return for review on April 17, 2009 at 9 am" CP 384. The real purpose of this judgment and order was to change Tuscany's last name to "Brown-Reed," which Brown had repeatedly refused to do, violating court orders. BA 17-18; CP 144-149, 185, 195, 200; 12/04/08 RP 89-91. Reed was unaware that Brown struck out the name change before filing the order, falsifying the court's order. CP 379, 381, 418-19.

The order has a box checked that Brown was the primary residential parent as she had been before the first trial, and continued to be while the review hearing was pending. CP 380; BA 18-19. This checked box simply preserved the status quo, as temporary orders are supposed to do. *Kovacs*, 121 Wn.2d at 808-

09. The order does not include any RCW 26.09.187 findings and is expressly subject to review. CP 384.

The temporary parenting plan also states that it will be reviewed. CP 374. Although the temporary parenting plan has a check mark next to "final parenting plan," the caption indicates that it is "Temporary," crossing out "Final Order (PP)." CP 366.

Judge Hickman agreed that Judge Armijo's orders were temporary:

Judge Armijo made some preliminary decisions and then decided to defer a final order until the spring of '09 in order for there to be an additional hearing in order to determine what, in fact, should be the final parenting plan and issued temporary orders or interim orders until that time.

09/14/09 RP 57. Brown too referred to Judge Armijo's orders as "interim" and "temporary." 09/14/09 RP 55.

Yet Judge Hickman refused to determine primary residential parentage, ruling that Judge Armijo did not "reserve" the issue. 10/09/09 RP 532.³ But the issue had to have been reserved – there is no indication that Judge Armijo determined primary-residential-parent status. 12/08/08 RP 28-90. Although Reed

³ Reed did not move to modify because there was no final decision to modify – Judge Armijo's orders were not final, and there was no indication that Judge Armijo had made a permanent primary-residential-parent determination. BA 16-17.

plainly argued that he should be Tuscany's primary residential parent, Judge Armijo's oral ruling never mentions primary residential parentage, RCW 26.09.187, or any of the enumerated factors a trial court must consider before determining primary residential parentage. *Compare* 12/04/08 RP 74, 127 *and* CP 360-62 *with* 12/08/08 RP 28-90 *and* **Kovacs**, 121 Wn.2d at 808-09.

Judge Armijo's orders are consistent with a temporary primary-residential-parentage determination, which endeavors to maintain the *status quo*. RCW 26.09.197; **Kovacs**, 121 Wn.2d at 808-09. Although Judge Armijo had intended to enter an order working up to ten overnights per month for Reed and Tuscany, he ultimately made only a minor change to the parties' agreed visitation schedule, maintaining the *status quo* until the review hearing. 12/08/08 RP 32, 39.

In short, nothing in the records indicates that Judge Armijo made a permanent primary-residential-parentage determination.

Judge Hickman erred in refusing to determine primary residential parentage.⁴

3. **Neither trial court decided primary-residential-parent status, so Brown is the permanent primary residential parent because she was the temporary primary residential parent, contrary to binding authority. (BA 16-23).**

Brown was Tuscany's primary residential parent before the litigation. Reed did not object to Brown continuing to be the primary residential parent while the litigation was pending, maintaining the status quo. *Kovacs*, 121 Wn.2d at 808-09. But Judge Hickman's refusal to decide the issue results in Brown remaining the primary residential parent – without the proper statutory considerations – simply because she temporarily filled that role.

Under RCW 26.09.187(3), the Legislature rejected a presumption that it is in the child's best interest to be placed with the temporary primary residential parent. *Kovacs*, 121 Wn.2d at 809. But Judge Hickman went beyond applying an inappropriate presumption: Brown remained the primary residential parent solely

⁴ Judge Hickman also erred in entering conclusions of law that are inconsistent with his findings of fact. BA 41-43. Specifically, where many of the findings are favorable to Reed, and question Brown's credibility, the findings are consistent with naming Reed the primary residential parent. CP 618-21. But the overriding problem with the findings is that they do not really indicate one way or another who should be the primary residential parent because Judge Hickman refused to decide that issue. *Id.*

because she was already. And Judge Hickman's refusal to decide primary-residential parentage is also inconsistent with RCW 26.09.187(3) and cases applying it, which mandate that the trial court must consider the statutory factors before determining primary residential parentage. *Kovacs*, 121 Wn.2d at 801; *Shui*, 132 Wn. App. at 590; RCW 26.09.187(3)(a). Simply put, the trial court must consider applicable law.

4. This Court cannot affirm a decision that was never made. (BR 6-14).

Brown argues (1) that Judge Hickman's findings satisfy the requirements of RCW 26.09.187(3)(i), which must be given the greatest weight of the seven enumerated factors (BR 6-7); and (2) that Judge Hickman "heard testimony" on the remaining statutory factors. BA 7-13. Although she is not entirely clear, Brown seems to be asking this Court to affirm on the ground that a trial court need not enter written findings for each RCW 26.09.187(3) factor – she argues: "Even if it was required to re-address the issue of primary custody of the parties, [*sic*] child, the trial court was not required to make an express finding as to each factor listed in RCW 26.09.187." BA 7. But the issue here is not the absence of findings, it is the absence of a decision.

It is undisputed that Judge Hickman did not decide primary-residential-parent status. 10/09/09 RP 532. It is thus irrelevant that Judge Hickman's findings coincidentally address one RCW 26.09.187 factor and that he "heard testimony" related to other factors. BA 6-13. As Brown agrees, this Court "does not reweigh the evidence." BR 14. Nor will the Court weigh the evidence for the first time to make a decision that the lower court never made.

The cases upon which Brown relies are inapposite. BA 7-8 (citing **Croley**, 91 Wn.2d at 292; **Shui**, 132 Wn. App. at 590-91). and **Shui**, 132 Wn. App. at 590-91). These cases address the appellate court's ability to review a custody determination under former RCW 26.09.190 (**Croley**) or a primary-residential-parent determination under RCW 26.09.187(3) (**Shui**), where the findings do not address each enumerated factor. **Croley**, 91 Wn.2d at 292; **Shui** 132 Wn. App. at 590-91. They stand for the general proposition that if the record makes clear that the trial court weighed the statutory factors, then the appellate court will not reverse simply because there are not findings for each statutory factor. *Id.* Here, however, Judge Hickman plainly was not weighing RCW 26.09.187(3) factors – he refused to make a primary-parent determination. 10/09/09 RP 532.

In sum, neither trial court made a decision under the applicable statute, RCW 26.09.187(3). This Court should reverse.

B. The trial court erroneously refused to consider anything that happened before December 2008. (BA 23-24, BR 14-15).

The trial before Judge Hickman was a review hearing – not a modification hearing. There is no basis for artificially limiting the evidence to the ten months between the first and second trials. This Court should reverse.

Judge Hickman ruled *in limine* that the parties could not repeat the same evidence presented to Judge Armijo:

I will grant the motion to exclude witnesses or evidence that's going to reiterate or rehash issues that were tried on or before, let's say, December 8th of '08. This is not – and I repeat – this is not a retrial of this case that was heard before Judge Armijo. . . . I've got plenty of information as to what happened at that time and before. Gosh, I've got transcripts. Look at this exhibit notebook. It takes a forklift to lift it

09/14/09 RP 57-58. This statement indicates only that Judge Hickman did not want a repeat of all the testimony from the first trial, not that he was refusing to consider anything before 2008. *Id.* Indeed, his statement that he had all of the transcripts and exhibits implied that he planned to consider the evidence. *Id.*

Reed agreed that the review hearing should be confined to evidence of incidents occurring since December 2008:

[Brown's] theoretical objection is the issues [sic] that the trial Court today before this court should be confined to facts and witnesses who can testify to incidents that have occurred since December 8, 2008, to the present. I agree with that as a theoretical basis. . . .

09/17/09 RP 53. But in Brown's closing argument, Judge Hickman stated for the first time that the only thing he would consider from the first trial was Judge Armijo's oral ruling:

The Court: Do we have a transcript of [Armijo's] final decision?

. . .

[Brown]: There's a trial transcript, Your Honor, but it wasn't admitted. It was marked but not admitted, and I would object to it being admitted for the simple fact that we're not trying to retry that. . . .

The Court: No. The ruling, only because I've read it once already.

[Brown]: Just the ruling?

The Court: Yeah, just the ruling. . . . But go back and read the transcript, no way.

09/17/09 RP 515-16.

There is simply no basis for refusing to consider anything that took place before the 2008 hearing. This was a review hearing – Judge Armijo plainly would have considered evidence from the

first trial if he had presided over the review hearing as he intended. 12/08/08 RP 72-73. Reviewing the issues before Judge Armijo necessarily required Judge Hickman to consider the evidence presented in the first trial. Instead, Judge Hickman treated the second trial like a modification, considering only new evidence.

Brown does not address this argument on the merits, arguing only that Reed waived the issue. BA 14-15. Reed agreed not to repeat the same testimony – he did not agree that Judge Hickman would only consider new evidence, ignoring the evidence before Judge Armijo. 09/14/09 RP 53.

In short, Judge Hickman erred in considering only the 10 months between the first hearing and the review hearing. This Court should reverse.

C. This Court should reverse and remand, directing the trial court to enter findings after considering all of the evidence. (BA 24-41, 15-23).

Reed's third argument challenges Judge Hickman's refusal to enter RCW 26.09.191 limitations, and his fourth, fifth, and sixth arguments challenge Judge Hickman's failure to enter findings regarding Brown's unstable lifestyle, Brown's substantial nonperformance of parenting functions, and Reed's superior relationship with Tuscany. BA 25-41. The underpinning of these

arguments is Judge Hickman's failure to consider evidence from the first trial. BA 25-28, 31-34, 36, 39, 41.

For example, Reed argues that evidence before Judge Armijo included abusive-use-of-conflict evidence, significant to .191 limitations. BA 25-26. Brown's only response is that Judge Hickman properly refused to consider evidence from the first trial. BR 15-17.⁵ As discussed above, there was no basis for limiting the evidence to a ten-month snapshot, ignoring undeniably relevant evidence from the first trial.

In short, Judge Hickman could not decide these very fact-intensive issues without considering all of the facts. This Court should reverse and remand with instructions to consider all relevant evidence.⁶

FACTS RELEVANT TO THE CROSS-APPEAL

Judge Armijo entered a temporary child support order, with attached worksheet, requiring Reed to pay Brown \$730 each

⁵ It is unclear why Brown cites RAP 10.7, governing the submission of improper briefs, for the proposition that Reed's reliance on evidence from the first trial is improper. BR 17.

⁶ Reed addresses Brown's fee request in his response to Brown's Cross-Appeal.

month. CP _____ (Cross-Appeal App. 2).⁷ Brown notes that the worksheets do not include rental income from small apartment building Reed owns. Cross-Appeal 3. But Brown omits Reed's explanation: he was losing money on the building and did not think his losses could decrease his work-related income for purposes of calculating child support. 12/04/08 RP 67. As the first trial came to a close, Brown asked Judge Armijo to consider the building on the child-support calculation when the parties reconvened. 12/08/08 RP 83-84. Judge Armijo suggested that the parties submit their income tax returns, warning that any rental income could easily have been offset by Reed's mortgage. *Id.* at 84.

Brown focuses on the appraised value of Reed's apartment building and his home, and an "anticipated . . . projection" of rental income, ignoring the reality of Reed's financial situation. Cross-Appeal 3; 09/14/09 RP 148. Reed is "deeply in debt" and is losing money on the apartment building. 09/14/09 RP 82-83. Reed's rental income is insufficient to meet his mortgage every month and

⁷ Brown attaches the temporary child support order to her brief, but it is not in the Clerk's Papers. When Brown filed her brief, she indicated that she would file a Supplemental Designation of Clerk's Papers. On February 1, 2011, this Court directed Brown to file her supplemental designation no later than February 16, 2011, imposing a \$150 sanction if she failed to do so. Brown filed a Designation of Clerk's Papers on March 1, 2011, but did not designate the temporary child support order.

he also had to pay utilities. *Id.* at 157. In short, Reed's financial situation is "dire." 09/17/09 RP 494.

ARGUMENT ON CROSS-APPEAL

A. The trial court properly calculated child support.

Brown argues that Judge Hickman "disregarded unchallenged evidence that [Reed's] current net monthly income was \$14,943." Cross-Appeal 7-8. This is not "unchallenged evidence." *Id.* Reed acknowledged that he filed a declaration that "listed" \$14,943 as his net monthly income. 09/14/09 RP 151. This figure includes \$8,140 in rental income, but does not deduct Reed's mortgage and utilities. Ex 5; 09/14/09 RP 151. Reed loses money on the apartment building. 09/14/09 RP 82-83. As Reed explained, he did not think that he could reduce his salaried income by losses on the rental. 12/04/08 RP 67.

And Reed never agreed that this figure reflected his "current net monthly income." *Compare* 09/14/09 RP 151 *with* Cross-appeal 3. Reed's monthly net income is \$5,519.88. Cross-Appeal App 2.

Brown also accuses Judge Hickman of "violating" RCW 26.19.071(3)(u), requiring parties to include rental income in a

gross monthly income calculation. Cross-Appeal 8.⁸ Again, however, Reed's mortgage and utilities entirely offset the rent – he did not have any net rental income. 09/14/09 RP 82-83, 157.

Finally, Brown argues that Judge Hickman erred in denying her “request for modification of child support” without entering findings. Cross-Appeal 7. It is unclear why Brown refers to a “modification” – she agrees that Judge Armijo's child support order was temporary. Cross-Appeal 9; 09/14/09 RP 61, 09/17/09 RP 517. In any event, Judge Hickman did not alter the temporary order Judge Armijo entered, a form order with all of the standard findings for support set at the presumptive amount. Cross-Appeal App. 2. Judge Hickman did not err in failing to repeat the same findings Judge Armijo had already entered.

In short, Reed's rental income is completely offset by the rental's expenses, just as Judge Armijo predicted. Judge Hickman correctly decided that there was no reason to change the temporary support order. This Court should affirm.

⁸ Without any citation to the record, Brown alleges that Reed's rental income was \$10,725 per month. Cross-Appeal 8. This figure comes from a document projecting Reed's anticipated rental income. 09/14/09 RP 149. The document did not reflect actual rental income. Reed's monthly rental income varied, but was about \$8,100. Ex 5; 09/14/09 RP 151.

B. This Court should affirm Judge Hickman's denial of attorney fees and deny Brown's request for fees on appeal.

Brown asks for attorney fees under an inapplicable statute. Reed does not have the ability to pay in any event. This Court should affirm the denial of fees, and deny Brown's request for fees on appeal.

Brown asks for attorney fees under RCW 26.26.625(3) (governing adjudications of parentage), which allows a trial court to award attorney fees incurred in "a proceeding under this section and RCW 26.26.500 through 26.26.620 and 26.26.630." Cross-Appeal 9. But Reed petitioned under RCW 26.26.375, allowing a parent executing an acknowledgment of paternity to petition for residential provisions or a parenting plan. CP 53-59. By its own terms, RCW 26.26.625(3) does not apply to this action. This Court need not consider this argument further.

In any event, Reed plainly does not have the ability to pay Brown's fees. Cross-Appeal 9. At the time of trial, Reed already owed his attorney \$52,000, was \$11,000 behind on his home mortgage, and was about to receive a \$4,000 utility bill for his rental property. 09/14/09 RP 157; 09/17/09 RP 494. Reed's financial situation is "dire." 09/17/09 RP 494.

It is entirely disingenuous to suggest that requiring Brown to pay her own attorney fees “deprives [her] of many opportunities” to do things for Tuscany. Cross-Appeal 10. Reed pays 75% of the support obligation and extraordinary expenses. Cross-Appeal App. 2. He financially provides for Tuscany every bit as much as Brown, if not more so. Any money that would go to Brown’s attorney fees could also be going to Tuscany’s care.

Finally, fees are not appropriate under RAP 18.9. BR 27. A trial court must consider applicable statutes and relevant evidence. Judge Hickman erroneously failed to do so.

CONCLUSION

This Court should reverse and remand with instructions to consider the applicable statute, RCW 26.09.187(3), and to consider all of the relevant evidence. This Court should affirm the child support order, affirm the denial of attorney fees, and deny Brown’s request for appellate fees.

RESPECTFULLY SUBMITTED this 2nd day of March,
2011.

MASTERS LAW GROUP, P.L.L.C.

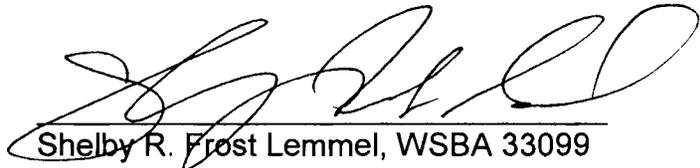
A handwritten signature in black ink, appearing to read "Kenneth W. Masters", written over a horizontal line.

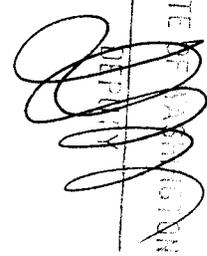
Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 2nd day of March 2011, to the following counsel of record at the following addresses:

Christopher M. Constantine
P.O. Box 7125
Tacoma, WA 98417-0125


Shelby R. Frost Lemmel, WSBA 33099

COURT OF APPEALS
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STATE OF WASHINGTON
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RCW 26.09.187

Criteria for establishing permanent parenting plan.

(1) DISPUTE RESOLUTION PROCESS. The court shall not order a dispute resolution process, except court action, when it finds that any limiting factor under RCW 26.09.191 applies, or when it finds that either parent is unable to afford the cost of the proposed dispute resolution process. If a dispute resolution process is not precluded or limited, then in designating such a process the court shall consider all relevant factors, including:

(a) Differences between the parents that would substantially inhibit their effective participation in any designated process;

(b) The parents' wishes or agreements and, if the parents have entered into agreements, whether the agreements were made knowingly and voluntarily; and

(c) Differences in the parents' financial circumstances that may affect their ability to participate fully in a given dispute resolution process.

(2) ALLOCATION OF DECISION-MAKING AUTHORITY.

(a) AGREEMENTS BETWEEN THE PARTIES. The court shall approve agreements of the parties allocating decision-making authority, or specifying rules in the areas listed in RCW 26.09.184(5)(a), when it finds that:

(i) The agreement is consistent with any limitations on a parent's decision-making authority mandated by RCW 26.09.191; and

(ii) The agreement is knowing and voluntary.

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

(i) A limitation on the other parent's decision-making authority is mandated by RCW 26.09.191;

(ii) Both parents are opposed to mutual decision making;

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

(c) MUTUAL DECISION-MAKING AUTHORITY. Except as provided in (a) and (b) of this subsection, the court shall consider the following criteria in allocating decision-making authority:

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

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

(iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(5)(a); and

(iv) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

(3) RESIDENTIAL PROVISIONS.

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the

following factors:

- (i) The relative strength, nature, and stability of the child's relationship with each parent;
- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
- (iii) Each parent's past and potential for future performance of parenting functions as defined in *RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
- (iv) The emotional needs and developmental level of the child;
- (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
- (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
- (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.

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

(c) For any child, residential provisions may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of residential time by a parent, including but not limited to requirements of reasonable notice when residential time will not occur.

[2007 c 496 § 603; 1989 c 375 § 10; 1987 c 460 § 9.]

RCW 26.09.191

Restrictions in temporary or permanent parenting plans.

(1) The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct: (a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (b) physical, sexual, or a pattern of emotional abuse of a child; or (c) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

(2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm; or (iv) the parent has been convicted as an adult of a sex offense under:

(A) RCW 9A.44.076 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(B) RCW 9A.44.079 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(C) RCW 9A.44.086 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(D) RCW 9A.44.089;

(E) RCW 9A.44.093;

(F) RCW 9A.44.096;

(G) RCW 9A.64.020 (1) or (2) if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;

(H) Chapter 9.68A RCW;

(I) Any predecessor or antecedent statute for the offenses listed in (a)(iv)(A) through (H) of this subsection;

(J) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (a)(iv)(A) through (H) of this subsection.

This subsection (2)(a) shall not apply when (c) or (d) of this subsection applies.

(b) The parent's residential time with the child shall be limited if it is found that the parent resides with a person who has engaged in any of the following conduct: (i) Physical, sexual, or a pattern of emotional abuse of a child; (ii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm; or (iii) the person has been convicted as an adult or as a juvenile has been adjudicated of a sex offense under:

(A) RCW 9A.44.076 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(B) RCW 9A.44.079 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(C) RCW 9A.44.086 if, because of the difference in age between the offender and the victim, no rebuttable

presumption exists under (e) of this subsection;

(D) RCW 9A.44.089;

(E) RCW 9A.44.093;

(F) RCW 9A.44.096;

(G) RCW 9A.64.020 (1) or (2) if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(H) Chapter 9.68A RCW;

(I) Any predecessor or antecedent statute for the offenses listed in (b)(iii)(A) through (H) of this subsection;

(J) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (b)(iii)(A) through (H) of this subsection.

This subsection (2)(b) shall not apply when (c) or (e) of this subsection applies.

(c) If a parent has been found to be a sexual predator under chapter 71.09 RCW or under an analogous statute of any other jurisdiction, the court shall restrain the parent from contact with a child that would otherwise be allowed under this chapter. If a parent resides with an adult or a juvenile who has been found to be a sexual predator under chapter 71.09 RCW or under an analogous statute of any other jurisdiction, the court shall restrain the parent from contact with the parent's child except contact that occurs outside that person's presence.

(d) There is a rebuttable presumption that a parent who has been convicted as an adult of a sex offense listed in (d)(i) through (ix) of this subsection poses a present danger to a child. Unless the parent rebuts this presumption, the court shall restrain the parent from contact with a child that would otherwise be allowed under this chapter:

(i) RCW 9A.64.020 (1) or (2), provided that the person convicted was at least five years older than the other person;

(ii) RCW 9A.44.073;

(iii) RCW 9A.44.076, provided that the person convicted was at least eight years older than the victim;

(iv) RCW 9A.44.079, provided that the person convicted was at least eight years older than the victim;

(v) RCW 9A.44.083;

(vi) RCW 9A.44.086, provided that the person convicted was at least eight years older than the victim;

(vii) RCW 9A.44.100;

(viii) Any predecessor or antecedent statute for the offenses listed in (d)(i) through (vii) of this subsection;

(ix) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (d)(i) through (vii) of this subsection.

(e) There is a rebuttable presumption that a parent who resides with a person who, as an adult, has been convicted, or as a juvenile has been adjudicated, of the sex offenses listed in (e)(i) through (ix) of this subsection places a child at risk of abuse or harm when that parent exercises residential time in the presence of the convicted or adjudicated person. Unless the parent rebuts the presumption, the court shall restrain the parent from contact with the parent's child except for contact that occurs outside of the convicted or adjudicated person's presence:

(i) RCW 9A.64.020 (1) or (2), provided that the person convicted was at least five years older than the other person;

(ii) RCW 9A.44.073;

(iii) RCW 9A.44.076, provided that the person convicted was at least eight years older than the victim;

(iv) RCW 9A.44.079, provided that the person convicted was at least eight years older than the victim;

(v) RCW 9A.44.083;

(vi) RCW 9A.44.086, provided that the person convicted was at least eight years older than the victim;

(vii) RCW 9A.44.100;

(viii) Any predecessor or antecedent statute for the offenses listed in (e)(i) through (vii) of this subsection;

(ix) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (e)(i) through (vii) of this subsection.

(f) The presumption established in (d) of this subsection may be rebutted only after a written finding that:

(i) If the child was not the victim of the sex offense committed by the parent requesting residential time, (A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, and (B) the offending parent has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child; or

(ii) If the child was the victim of the sex offense committed by the parent requesting residential time, (A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the offending parent is in the child's best interest, and (C) the offending parent has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child.

(g) The presumption established in (e) of this subsection may be rebutted only after a written finding that:

(i) If the child was not the victim of the sex offense committed by the person who is residing with the parent requesting residential time, (A) contact between the child and the parent residing with the convicted or adjudicated person is appropriate and that parent is able to protect the child in the presence of the convicted or adjudicated person, and (B) the convicted or adjudicated person has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child; or

(ii) If the child was the victim of the sex offense committed by the person who is residing with the parent requesting residential time, (A) contact between the child and the parent in the presence of the convicted or adjudicated person is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the parent residing with the convicted or adjudicated person in the presence of the convicted or adjudicated person is in the child's best interest, and (C) the convicted or adjudicated person has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes contact between the parent and child in the presence of the convicted or adjudicated person is appropriate and poses minimal risk to the child.

(h) If the court finds that the parent has met the burden of rebutting the presumption under (f) of this subsection, the court may allow a parent who has been convicted as an adult of a sex offense listed in (d)(i) through (ix) of this subsection to have residential time with the child supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(i) If the court finds that the parent has met the burden of rebutting the presumption under (g) of this subsection, the court may allow a parent residing with a person who has been adjudicated as a juvenile of a sex offense listed in (e)(i) through (ix) of this subsection to have residential time with the child in the presence of the person adjudicated as a juvenile, supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless

the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(j) If the court finds that the parent has met the burden of rebutting the presumption under (g) of this subsection, the court may allow a parent residing with a person who, as an adult, has been convicted of a sex offense listed in (e)(i) through (ix) of this subsection to have residential time with the child in the presence of the convicted person supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(k) A court shall not order unsupervised contact between the offending parent and a child of the offending parent who was sexually abused by that parent. A court may order unsupervised contact between the offending parent and a child who was not sexually abused by the parent after the presumption under (d) of this subsection has been rebutted and supervised residential time has occurred for at least two years with no further arrests or convictions of sex offenses involving children under chapter 9A.44 RCW, RCW 9A.64.020, or chapter 9.68A RCW and (i) the sex offense of the offending parent was not committed against a child of the offending parent, and (ii) the court finds that unsupervised contact between the child and the offending parent is appropriate and poses minimal risk to the child, after consideration of the testimony of a state-certified therapist, mental health counselor, or social worker with expertise in treating child sexual abuse victims who has supervised at least one period of residential time between the parent and the child, and after consideration of evidence of the offending parent's compliance with community supervision requirements, if any. If the offending parent was not ordered by a court to participate in treatment for sex offenders, then the parent shall obtain a psychosexual evaluation conducted by a certified sex offender treatment provider or a certified affiliate sex offender treatment provider indicating that the offender has the lowest likelihood of risk to reoffend before the court grants unsupervised contact between the parent and a child.

(l) A court may order unsupervised contact between the parent and a child which may occur in the presence of a juvenile adjudicated of a sex offense listed in (e)(i) through (ix) of this subsection who resides with the parent after the presumption under (e) of this subsection has been rebutted and supervised residential time has occurred for at least two years during which time the adjudicated juvenile has had no further arrests, adjudications, or convictions of sex offenses involving children under chapter 9A.44 RCW, RCW 9A.64.020, or chapter 9.68A RCW, and (i) the court finds that unsupervised contact between the child and the parent that may occur in the presence of the adjudicated juvenile is appropriate and poses minimal risk to the child, after consideration of the testimony of a state-certified therapist, mental health counselor, or social worker with expertise in treatment of child sexual abuse victims who has supervised at least one period of residential time between the parent and the child in the presence of the adjudicated juvenile, and after consideration of evidence of the adjudicated juvenile's compliance with community supervision or parole requirements, if any. If the adjudicated juvenile was not ordered by a court to participate in treatment for sex offenders, then the adjudicated juvenile shall obtain a psychosexual evaluation conducted by a certified sex offender treatment provider or a certified affiliate sex offender treatment provider indicating that the adjudicated juvenile has the lowest likelihood of risk to reoffend before the court grants unsupervised contact between the parent and a child which may occur in the presence of the adjudicated juvenile who is residing with the parent.

(m)(i) The limitations imposed by the court under (a) or (b) of this subsection shall be reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time. The limitations shall also be reasonably calculated to provide for the safety of the parent who may be at risk of physical, sexual, or emotional abuse or harm that could result if the parent has contact with the parent requesting residential time. The limitations the court may impose include, but are not limited to: Supervised contact between the child and the parent or completion of relevant counseling or treatment. If the court expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child.

(ii) The court shall not enter an order under (a) of this subsection allowing a parent to have contact with a child if the parent has been found by clear and convincing evidence in a civil action or by a preponderance of the evidence in a dependency action to have sexually abused the child, except upon recommendation by an evaluator or therapist for the child that the child is ready for contact with the parent and will not be harmed by the contact. The court shall not enter an order allowing a parent to have contact with the child in the offender's presence if the parent resides with a person who has been found by clear and convincing evidence in a civil action or by a preponderance of the evidence in a dependency action to have sexually abused a child, unless the court finds that the parent accepts that the person engaged in the harmful conduct and the parent is willing to and capable of protecting the child from harm from the

person.

(iii) If the court limits residential time under (a) or (b) of this subsection to require supervised contact between the child and the parent, the court shall not approve of a supervisor for contact between a child and a parent who has engaged in physical, sexual, or a pattern of emotional abuse of the child unless the court finds based upon the evidence that the supervisor accepts that the harmful conduct occurred and is willing to and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing to or capable of protecting the child.

(n) If the court expressly finds based on the evidence that contact between the parent and the child will not cause physical, sexual, or emotional abuse or harm to the child and that the probability that the parent's or other person's harmful or abusive conduct will recur is so remote that it would not be in the child's best interests to apply the limitations of (a), (b), and (m)(i) and (iii) of this subsection, or if the court expressly finds that the parent's conduct did not have an impact on the child, then the court need not apply the limitations of (a), (b), and (m)(i) and (iii) of this subsection. The weight given to the existence of a protection order issued under chapter 26.50 RCW as to domestic violence is within the discretion of the court. This subsection shall not apply when (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), and (m)(ii) of this subsection apply.

(3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

(a) A parent's neglect or substantial nonperformance of parenting functions;

(b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;

(c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;

(d) The absence or substantial impairment of emotional ties between the parent and the child;

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;

(f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or

(g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

(4) In cases involving allegations of limiting factors under subsection (2)(a)(ii) and (iii) of this section, both parties shall be screened to determine the appropriateness of a comprehensive assessment regarding the impact of the limiting factor on the child and the parties.

(5) In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan.

(6) In determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, proof, and procedure.

(7) For the purposes of this section, a parent's child means that parent's natural child, adopted child, or stepchild.

RCW 26.09.197

Issuance of temporary parenting plan — Criteria.

After considering the affidavit required by RCW 26.09.194(1) and other relevant evidence presented, the court shall make a temporary parenting plan that is in the best interest of the child. In making this determination, the court shall give particular consideration to:

- (1) The relative strength, nature, and stability of the child's relationship with each parent; and
- (2) Which parenting arrangements will cause the least disruption to the child's emotional stability while the action is pending.

The court shall also consider the factors used to determine residential provisions in the permanent parenting plan.

[2007 c 496 § 604; 1987 c 460 § 14.]

RCW 26.19.071

Standards for determination of income.

(1) **Consideration of all income.** All income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent. Only the income of the parents of the children whose support is at issue shall be calculated for purposes of calculating the basic support obligation. Income and resources of any other person shall not be included in calculating the basic support obligation.

(2) **Verification of income.** Tax returns for the preceding two years and current paystubs shall be provided to verify income and deductions. Other sufficient verification shall be required for income and deductions which do not appear on tax returns or paystubs.

(3) **Income sources included in gross monthly income.** Except as specifically excluded in subsection (4) of this section, monthly gross income shall include income from any source, including:

(a) Salaries;

(b) Wages;

(c) Commissions;

(d) Deferred compensation;

(e) Overtime, except as excluded for income in subsection (4)(h) of this section;

(f) Contract-related benefits;

(g) Income from second jobs, except as excluded for income in subsection (4)(h) of this section;

(h) Dividends;

(i) Interest;

(j) Trust income;

(k) Severance pay;

(l) Annuities;

(m) Capital gains;

(n) Pension retirement benefits;

(o) Workers' compensation;

(p) Unemployment benefits;

(q) Maintenance actually received;

(r) Bonuses;

(s) Social security benefits;

(t) Disability insurance benefits; and

(u) Income from self-employment, rent, royalties, contracts, proprietorship of a business, or joint ownership of a partnership or closely held corporation.

(4) Income sources excluded from gross monthly income. The following income and resources shall be disclosed but shall not be included in gross income:

- (a) Income of a new spouse or new domestic partner or income of other adults in the household;
- (b) Child support received from other relationships;
- (c) Gifts and prizes;
- (d) Temporary assistance for needy families;
- (e) Supplemental security income;
- (f) Disability lifeline benefits;
- (g) Food stamps; and

(h) Overtime or income from second jobs beyond forty hours per week averaged over a twelve-month period worked to provide for a current family's needs, to retire past relationship debts, or to retire child support debt, when the court finds the income will cease when the party has paid off his or her debts.

Receipt of income and resources from temporary assistance for needy families, supplemental security income, disability lifeline benefits, and food stamps shall not be a reason to deviate from the standard calculation.

(5) Determination of net income. The following expenses shall be disclosed and deducted from gross monthly income to calculate net monthly income:

- (a) Federal and state income taxes;
- (b) Federal insurance contributions act deductions;
- (c) Mandatory pension plan payments;
- (d) Mandatory union or professional dues;
- (e) State industrial insurance premiums;
- (f) Court-ordered maintenance to the extent actually paid;

(g) Up to five thousand dollars per year in voluntary retirement contributions actually made if the contributions show a pattern of contributions during the one-year period preceding the action establishing the child support order unless there is a determination that the contributions were made for the purpose of reducing child support; and

(h) Normal business expenses and self-employment taxes for self-employed persons. Justification shall be required for any business expense deduction about which there is disagreement.

Items deducted from gross income under this subsection shall not be a reason to deviate from the standard calculation.

(6) Imputation of income. The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation. Income shall not be imputed for an unemployable parent. Income shall not be imputed to a parent to the extent the parent is unemployed or significantly underemployed due to the parent's efforts to comply with court-ordered reunification efforts under chapter 13.34 RCW or under a voluntary placement agreement with an agency supervising the child. In the absence of records of a parent's actual earnings, the court shall impute a parent's income in the following order of priority:

- (a) Full-time earnings at the current rate of pay;

(b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;

(c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;

(d) Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is recently coming off public assistance, disability lifeline benefits, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;

(e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.

[2010 1st sp.s. c 8 § 14; 2009 c 84 § 3; 2008 c 6 § 1038; 1997 c 59 § 4; 1993 c 358 § 4; 1991 sp.s. c 28 § 5.]

RCW 26.26.375

Judicial proceedings.

(1) After the period for rescission of an acknowledgment of paternity provided in RCW 26.26.330 has passed, a parent executing an acknowledgment of paternity of the child named therein may commence a judicial proceeding for:

(a) Making residential provisions or a parenting plan with regard to the minor child on the same basis as provided in chapter 26.09 RCW; or

(b) Establishing a child support obligation under chapter 26.19 RCW and maintaining health insurance coverage under RCW 26.09.105.

(2) Pursuant to RCW 26.09.010(3), a proceeding authorized by this section shall be entitled "In re the parenting and support of..."

(3) Before the period for a challenge to the acknowledgment or denial of paternity has elapsed under RCW 26.26.335, the petitioner must specifically allege under penalty of perjury, to the best of the petitioner's knowledge, that: (a) No man other than the man who executed the acknowledgment of paternity is the father of the child; (b) there is not currently pending a proceeding to adjudicate the parentage of the child or that another man is adjudicated the child's father; and (c) the petitioner has provided notice of the proceeding to any other men who have claimed parentage of the child. Should the respondent or any other person appearing in the action deny the allegations, a permanent parenting plan or residential schedule may not be entered for the child without the matter being converted to a proceeding to challenge the acknowledgment of paternity under RCW 26.26.335 and 26.26.340. A copy of the acknowledgment of paternity must be filed with the petition or response. The court may convert the matter to a proceeding to challenge the acknowledgment on its own motion.

[2002 c 302 § 316.]

RCW 26.26.625

Order adjudicating parentage.

(1) The court shall issue an order adjudicating whether a man alleged or claiming to be the father is the parent of the child.

(2) An order adjudicating parentage must identify the child by name and age.

(3) Except as otherwise provided in subsection (4) of this section, the court may assess filing fees, reasonable attorneys' fees, fees for genetic testing, other costs, and necessary travel and other reasonable expenses incurred in a proceeding under this section and RCW 26.26.500 through 26.26.620 and 26.26.630. The court may award attorneys' fees, which may be paid directly to the attorney, who may enforce the order in the attorney's own name.

(4) The court may not assess fees, costs, or expenses against the support enforcement agency of this state or another state, except as provided by other law.

(5) On request of a party and for good cause shown, the court may order that the name of the child be changed.

(6) If the order of the court is at variance with the child's birth certificate, the court shall order the state registrar of vital statistics to issue an amended birth certificate.

[2002 c 302 § 536.]