

NO. 46953-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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In re the Marriage of:

HELEN CHRISTINE GILLMAN,

Appellant,

vs.

MICHAEL DEAN GILLMAN,

Respondent.

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BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

Respondent Michael Dean Gillman (hereinafter Michael or Respondent) and Appellant Helen Christine Gillman (hereinafter Helen or Appellant) were married on July 14, 2009, and separated on March 4, 2013. They have two children born of the marriage: eight-year-old Zachary and three-year-old Rose. On March 27, 2013, Helen filed a *pro se* Summons and Petition for Dissolution of Marriage, as well as a Proposed Parenting Plan. CP 1-8, 9-16. The Proposed Parenting Plan disavowed any claim of domestic abuse under RCW 26.09.191(2). CP 9.

On April 29, 2013, Helen, filed an amended *pro se* Proposed Parenting Plan, and on June 5, 2013, she filed a second amended *pro se* Proposed Parenting Plan. CP 18-25, 26-33. As with the original proposed parenting plan, Helen disavowed any claim of domestic abuse under RCW 29.09.191(2) in both the amended and the second amended proposed parenting plans. CP 19, 27. By may of 2013 both Helen and Michael retained attorneys who filed their Notices of Appearance in this case. CP 34, 43.

On August 9, 2013, Helen, now represented by an attorney, filed a Third Amended Proposed Parenting Plan. CP 91-100. As with the preceding three proposed parenting plans, this third amended plan disavowed any claim of domestic abuse under RCW 26.09.191(2). CP 91. In this third amended

proposed parenting plan, Helen requested the following visitation schedule for the couple's under school age child and for the couple's school age child:

### **3.1 SCHEDULE OF CHILDREN UNDER SCHOOL AGE**

Prior to enrollment in school, the children shall reside with the mother, except for the following days and times when the children will reside with or be with the other parent:

Every first, third and alternative fifth weekends as defined by Fridays, from Friday at 6:00 pm. Also, father shall visit with the children every Wednesday after school/work to Thursday at 8:00 am.

If Father is living outside of the 20 mile radius from children, father will also have the option of visitation with the children on Wednesdays from after school until 7:00 pm in the Pierce County area. Father shall give 48 hours notice if he intends upon exercising this visitation option.

### **3.2 SCHOOL SCHEDULE**

Upon enrollment in school, the children shall reside with the mother, except for the following days and times when the children will reside with or be with the other parent

Same as 3.1.

CP 102 (emphasis in original).

Helen's fourth and final proposed parenting plan also requested an alternating winter vacation visitation schedule between her and Michael, an alternating schedule for each child's birthday and other major holidays, that there be an equal split of time during school breaks, and that Helen have the children for her birthday and mother's day while Michael have the children

for his birthday and father's day. CP 102-104. Finally, Helen's Fourth Proposed Parenting Plan stated the following in Paragraph 3.10.

### **3.10 RESTRICTIONS**

Does not apply because there are no limiting factors in paragraphs 2.1 or 2.2.

CP 104.

The original, first amended, second amended and third amended proposed parenting plans that preceded the fourth proposed parent plan also contained the same affirmative disavowal that there should be no restrictions on visitation because there were "no limiting factors in paragraphs 2.1 and 2.1" of the respective parenting plans. CP 13, 22, 29, 94. The record on appeal does not include any request by Helen to file a fifth amended proposed parenting plan in which she would state a desire to change any of the disavowals of any limiting claims under RCW 26.09.191(2). CP 1-219.

This case eventually came on for trial before the Honorable Stephen Warning, Judge of the Cowlitz County Superior Court on August 5, 2014. RP 1. During opening statements Helen's attorney did not move to amend the Fourth Amended Proposed Parenting Plan to change Helen's disavowals in paragraphs 2.1, 2.2, and 3.10 that she was making a claim of domestic abuse under RCW 26.09.191(2). RP 4-7. Following opening statements in this case, Helen's attorney called Jamie Pannell as her first witness. CP 11-

43. She is the court-appointed guardian ad litem. CP 11-43. At no point in her testimony did she recommend that the court find a restriction under RCW 26.09.191(2). *Id.*

Following Ms Pannell's testimony, Helen then took the stand on her own behalf. RP 44-162. During this testimony she claimed one instance of a physical confrontation between her and Michael that occurred in the bathroom of the home after their young daughter had accidentally poured scalding hot liquid down her front. RP 69-70. Helen's claims were as follows:

Q. Okay. And – and so you said that you were in the bathroom, and were you drawing a – like a tub of water?

A. Yeah, I had put her in the tub and I just had cold water running. It was – she had spilled it all over her. It was just a bad burn.

Q. And so you're in the bathroom, and then did Mr. Gillman then come into the bathroom after you?

A. Yes.

Q. Okay. And you – you referenced that eventually he had his hand around your throat, but how did you get from, I assume kind of bent down near the child, to up against the wall, can you kind of explain that?

A. I was down there trying to run cold water, and he was trying to push me out of the way. And so I stood up to – and to move – was trying, you know, because he was trying to push me out of the way, and so when I stood up to kind of get out of his way, and I said, "Please don't grab her out of the tub, she needs to be in the water," I – I don't know, that just made him – made him angry, and that's when it happened.

Q. Okay. And did that cause you fear?

A. Yes.

Q. Okay. And when he put his hand around your throat, did – was he squeezing or was he just pinning you to the wall?

A. It was kind of squeezing. I mean, it was enough to make me, you know, have to try to catch my breath for a moment. But it was just kind of held there, and then he let go.

RP 69-70.

When Michael later testified in this case he refuted Helen's claims that she was attending to their daughter in the bathroom when he became upset and grabbed her by the throat. RP 236:13-20. Rather, he explained to the court that he had been the one who had rushed their daughter into the shower to douse her with cold water and that he only put hands on Helen in order to prevent her from interfering with his attempt to give medical aid to their daughter. RP 235-236. His testimony as to what happened during this even was as follows:

Q. Okay. And you heard the testimony of Ms. Gillman. What is – what do you recall happening on July 29th, 2012?

A. What – Zachary and I and Emily were all out on the back patio. I don't recall exactly what we were doing. We were making something or putting something together or doing something. I don't recall what it was. Helen came out with hot chocolate for everybody, and she brought out my cup of hot chocolate and handed it to me. And the cup was so hot, I couldn't hold it in my hands. So I set it down on the table outside, next to me, while Helen and I engaged in

a conversation. During the course of our conversation, neither one of us was watching Emily. Well, she reached up on the table with both hands and grabbed my mug of hot chocolate and went to take a sip. And obvious the cup was so hot, she ended up spilling the whole thing down the front of her. She immediately started screaming.

Q. She being Emily?

A. Emily, right. And Helen immediately started screaming, you know, "Why did you put the cup there? What were you thinking?" I grabbed Emily. I ran towards the bathroom in the house. A similar incident to this had happened to me when I was a child. So I repeated the same actions at that time that my father took with me. So I grabbed her. I ran to the bathroom. On the way there I was taking off her – her clothing. I got her in the bathtub. I turned the shower on as cold as I could, and I started hosing her down immediately. Helen was following me the entire time, screaming. Yeah, we were both a little freaked out at the time. And so I was – I had Emily held down in the bathtub and I was spraying cold water over there, and Helen kept reaching down trying to pull her out of the bathtub. And I, with one hand, have got the shower thing. With the other hand, I'm trying to push Helen away from the bathtub. And at some point, Helen got passed my arm and grabbed Emily to pick her up. At that time, I dropped the – the shower thing and I reached up and I grabbed Helen with both my hands. And yes, it was around the chest, the neck area there, and I pushed her out of the bathroom. I immediately went back to spraying off Emily and grabbed me a towel that I could soak in cold water so I could wrap her in it.

RP 235-236.

During her testimony Helen also claimed that there had been two incidents in which Michael "appeared to threaten her with a gun." RP 64.<sup>1</sup>

The following gives her testimony concerning these claims.

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<sup>1</sup>The quote "appeared to threaten her with a gun" is taken from Appellant's Brief page 5.

Q. So you mentioned that there were prior instances where Mr. Gillman pulled a gun on you. When did those happen?

A. The first time happened, I think, only a couple days after we had separated. I was still moving into my apartment, and so I was sleeping at the house still while he slept on the couch. And one night when I came home, I was using the key in the door and he opened it up and had the gun drawn right there on me and claimed he thought I was an intruder. And then the second time, it was probably a couple weeks after that. I was over there doing laundry because I didn't have a washer, dryer at my place and had been there for at least an hour or two doing laundry. I was coming in back in from the garage – that's where the washer and dryer was, back into the kitchen. And he was standing there with a gun, just drawn. And I said, "What are you doing?" And he said to me, "Oh, I thought you were an intruder" and then walked away. And that the – both instanc – times when that was happening, he had been drinking heavily.

Q. And in regards to – when you say he drew the gun, can you kind of show the Court what do you mean by that?

A. He just – I mean, he had it. I mean, both times, he just had it up, but aside like and he – it was pointed at me. (Gestures.)

RP 63-64.

In his testimony before the court Michael denied that he had ever pointed a firearm at or threatened Helen with a firearm. RP 233-234. Rather, he testified that there had been a single incident very late at night after Helen had moved out when he was sleeping on the couch and awoke to sounds of someone attempting to get in through the front door. *Id.* Thinking it was an intruder he got his handgun and went to the door with it held at his side. *Id.* Once at the door he determined that it was Helen trying to get inside. *Id.* His testimony as to this incident was as follows:

**BRIEF OF RESPONDENT - 7**

A. They were both sleeping in Zachary's room at the time, and I was sleeping on the couch.

Q. Okay. Had you been drinking alcohol?

A. I had not that evening, no.

Q. Okay. So what caused you to get your gun that evening?

A. It was late. It was – and my recollection is about two in the morning when I heard the door handle jingle. But my couch is right within two feet of the front door. So –

Q. At the time that you were th – were you coming up from a sleep or were you awake watching TV?

A. I was. I was – I was asleep at the time, and I heard the door handle jingle. So I – it's what woke me up, and then there was pressure on the door like somebody was trying to force the door open. So I went into my room. I obtained one of my firearms. I came to the door.

Q. Where was the firearm?

A. It's in the lockbox in my closet.

Q. Okay.

A. I came to the door, and I said, "Who's there?" And Helen responded, "It's me. You locked the deadbolt. I can't get in." So I unlocked the deadbolt. I opened the door. I turned around and walked back towards my room. It was that time that she saw the handgun by my side. Said, "Why do you have your gun out?" And I was like, "Because you were just trying to break down the door." And that was the extent of that entire situation. She actually ended up spending the night in the room that night. Apparently for some reason she decided not to stay the night at her apartment. So she ended up sleeping at my place that night.

Q. Okay. In the bedroom with –

A. In the bedroom. I was sleeping on the couch by myself. So –

Q. So at any point did you raise the gun to her –

A. No.

Q. – or threaten her in any way with the gun?

A. No.

Q. Okay.

RP 233.

While on the witness stand Michael denied any knowledge about any other incident between him and Helen in which he was holding a firearm and he also denied ever pointing a firearm at her or threatening her with one. RP

234. He testified:

Q. Okay. So just to be clear, at any point – married, separated, have you ever raised a firearm towards your – towards Ms. Gillman?

A. Never.

Q. Have you ever threatened her that you would raise a firearm towards her?

A. Never.

RP 234.

In her testimony Helen also claimed that there was one incident in which Michael called her a “whore” in front of their son. RP 60. Although Michael admitted making the statement, he denied making it to their son. RP 214. Rather, he testified that he made it to himself while in the house and

**BRIEF OF RESPONDENT - 9**

only realized after the fact that their son, who was outside walking by an open window, had overheard it. RP 214-215. He went on to state on the witness stand that he felt a great deal of remorse about their son having heard him make such a statement. *Id.*

During her testimony Helen also claimed that the defendant had once punched a hole in the bedroom wall or door in front of her and that he had once left the house after an argument and kicked a hole in a house box outside on his way to his vehicle to leave. RP 70-71. Michael denied any such conduct, testifying as follows:

Q. Okay. So outside of – well, now I – let me go back. So you heard Ms. Gillman’s allegation that you have punched holes in a door. Have you ever punched a hole in a door?

A. There’s no – no. There’s no holes in my doors and my walls. I did – the incident that she’s talking about where I did hit – hit our door in the middle or towards the end of an argument several years ago. But we never put a hole in the door or – or anything like that. There’s no holes in the house anywhere.

RP 283-284.

During his testimony in this case Michael explained the following concerning his prior and current employment. RP 180-200. Since 2009, Michael has periodically worked at different out-of-state locations for a company called Western Fabrication on a per job basis for up to three or four months at a time. RP 180-182. These jobs have taken him away from his family while he worked in places such as Texas, Idaho, Oregon and Eastern

Washington. *Id.* During most of these jobs he has had to be away from his children for extended periods of time. 182-184. In between these jobs Michael has also had two main sources of income. RP 180-196. One is from part-time work as a security officer at Lower Columbia College. RP 183-184. The other is from a small process service and courier business called Emerald Legal Services which he and his wife have had from the time they got married. RP 180, 183-186, 196, 285.

Michael explained that the last job he worked for Western Fabrication took him to Texas and then Idaho from January 1, 2013, up until the end of February 28, 2013, during which time he did not get to be with his wife or children. RP 199-200. Once he got back in February of 2013, Helen informed him that she had filed for divorce. RP 200-201. From that point on he decided not to take any more work that would require him to travel out of town for extended periods and thus take him away from his children. RP 244-245. Rather, he decided to continue expanding Emerald Legal Services into a full time business while taking other local part-time employment as it came available. RP 244. In fact, it had been his and his wife's goal to expand Emerald Legal Services into full time employment from the start. *Id.* During the trial in this case Helen had claimed that during the years in which he worked out of town for Western Fabrication, Michael could average about \$3,000.00 a month, whereas his income from Emerald Legal Services and his

other local part-time jobs provided less income. RP 377-378.

During closing argument in this case Appellant did not mention RCW 26.09.191(2)(a) and did not claim that it had any application in this case. RP 363-380. Rather, as the following portion of her closing reveals, she argued that the court should adopt her proposed parenting plan, which specifically disavowed any application of that statute and gave Michael regular visits with the children. *Id.*

It's very clear that my client has been the primary parent, has been, and should continue to be. **And we are asking the Court to adopt our plan. It's stable, it's reasonable, and it's logical. It does make strong efforts to maximize Mr.'s time without trying to strip time away from him,** but to give these children a solid home base, and a home base with a person that's managing their care, managing their medical, managing the dental, taking care of the schooling, taking care of the counseling. That really – the children belong in the household where all those things are coalescing, and in – and as well as, in fact, a household that is financially stable to support that.

RP 376 (emphasis added).

Appellant repeated this request to follow her proposed parenting plan at the end of her closing argument, stating as follows:

So in this case, I think the clear weight of the evidence does support Ms. Gillman, does support her requests. **And her requests when you look at them really are reasonable in regards to the parenting plan** and child support which are the remaining items that the Court largely has to address.

When we look at the best interests of the child, it should be to find it halfway to where the children are stable and have good relationships with both parents. And I think my client has made every effort to encourage that relationship with Mr. Gillman, and to draft a

plan that makes sense.

**So we are asking the Court to adopt our child support worksheet, adopt our parenting plan, and make provisions for the other items mentioned.**

RP 379-380 (emphasis added).

On October 27, 2014, and pursuant to Helen's arguments at trial and in her last proposed parenting plan, the trial court entered a Final Parenting Plan following her request that she be made primary custodial parent, and following her argument in paragraphs 2.1, 2.1 and 3.10 and in closing that the restrictions in RCW 26.09.191(1)-(2) had to application in this case. CP 183-191. On November 25, 2014, Helen filed a Notice of Appeal but again did not claim that the trial court had erred when it followed her arguments in her final proposed parenting plan and in her closing arguments at trial that the court find no application of RCW 26.09.191(1)-(2). CP 205-205. Rather, it claimed that the trial court had erred when it entered Paragraph 3.2 of the final parenting plan. *Id.* The Notice of Appeals states:

Petitioner, HELEN CHRISTINE GILLMAN, by and through her attorney, David A. Henson, seek review by the designated Appellate Court of the Parent Plan Final Order that was entered by the Honorable Stephen Warning on October 27, 2014. The Petitioner seeks review of the following matter:

Paragraph 3.2 School Schedule. The Order is not in the best interest of the children, maximized rather than minimizes contact between the parents, and is an abuse of the court's discretion.

CP 89-20 (capitalization in original).

**BRIEF OF RESPONDENT - 13**

## ARGUMENT

### I. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT RCW 26.09.191(2)(A) HAD NO APPLICATION IN THIS CASE.

In this case appellant's first argument on appeal is that the trial court erred when it entered the final parenting plan because it failed to limit residential time under RCW 26.09.191(2)(a). Appellant's first issue pertaining to assignments of error reads as follows on this point:

1. Did the court abuse its discretion in failing to limit residential time with the Respondent under RCW 26.09.191(2)(b) where the undisputed testimony was that there was a history of domestic violence?

Brief of Appellant, page 2.<sup>2</sup>

Respondent argues that this assignment of error fails for four separate reasons: (1) appellant failed to preserve this claim for appeal, (2) the invited error doctrine precludes consideration of this argument, (3) substantial evidence supports the trial court's finding that RCW 26.09.191(2)(a) has no application in this case, and (4) the facts even as argued by appellant do not constitute proof that respondent did "engage in . . . a history of acts of domestic violence as defined in RCW 26.09.191(2)(a)." The following sets out these arguments.

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<sup>2</sup>Respondent assumes that the reference to section 2(b) of RCW 26.09.191 is a typographical error and that appellant intended to refer to section 2(a).

***1. Appellant Failed to Preserve a Claim on Appeal That the Trial Court Erred When it Found That RCW 26.09.191(2)(a) Had No Application in this Case.***

Under RAP 2.5(a), a party may not raise an issue for the first time on appeal. *In re Marriage of Griswold*, 112 Wn.App. 333, 349 n. 7, 48 P.3d 1018 (2002). Subsection (a) of this rule states:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

RAP 2.5(a).

For example, in *In re Marriage of Studebaker*, 36 Wn. App. 815, 677 P.2d 789 (1984), the father in a divorce proceeding appealed the trial court's decision to grant his ex-spouse's motion to modify the degree, which had originally not segregated the father's child support and maintenance obligations. The trial court had granted the motion and segregated the funds. The father then argued for the first time on appeal that by segregating the payments the trial court had unintentionally created additional significant tax obligations. Under RAP 2.5(a) the court of appeals refused to consider this argument. The court held:

Mr. Studebaker's final contention is that, by segregating the undifferentiated maintenance, the trial court imposed upon him several tax disadvantages in violation of the decree's non-modification provision. The record does not contain any

indication that Mr. Studebaker advanced this claim in a substantive fashion at trial. Hence, it will not be considered on appeal.

*In re Marriage of Studebaker*, 36 Wn. App. at 818 (citing *In re Marriage of Dalthorp*, 23 Wn.App. 904, 598 P.2d 788 (1979)) and RAP 2.5(a).

Similarly, in the case at bar, Appellant never raised an objection before the trial court that the final parenting plan violated the provision of RCW 26.09.191(2)(a) or that this statute had any factual application in this case. Indeed, none of appellant's written pleadings make the claim. Neither did appellant's trial attorney in opening statements or in closing arguments. As a result, under RAP 2.5(a) this court should refuse to address this argument just as the appellate court in *Studebaker* refused to address an issue raised for the first time on appeal.

***2. The Invited Error Doctrine Precludes Appellant's Argument that the Trial Court Erred When it Found That RCW 26.09.191(2)(a) Had No Application in this Case.***

The invited error doctrine prohibits a party from setting up an error below and then complaining of it on appeal. *Nania v. Pac. NW. Bell Tel. Co.*, 60 Wn.App. 706, 806 P.2d 787 (1991). The doctrine applies when a party takes affirmative and voluntary action that induces the trial court to take an action that the party later challenges on appeal. *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 10 P.3d 380 (2000).

For example, in *In re Marriage of Morris*, 176 Wn. App. 893, 309

P.3d 767 (2013), the day before a father's child support obligation was set to terminate as to the oldest of his two children, the mother filed a motion for adjustment to establish previously reserved postsecondary support for both children. The Commissioner denied mother's request upon the basis that the filing of a motion for adjustment rather than a petition for modification deprived the court of jurisdiction once the oldest child reached majority. The mother then filed a motion for revision. In his response to the motion the father opposed modification as to the older of the two children, however he specifically agreed to the imposition of post-secondary support for the younger child. He did so in recognition of the fact that while a motion for adjustment was the inappropriate mechanism to obtain post-secondary support, the younger child had still not reached her majority and the mother still had time to file the motion properly. Ultimately the trial court granted the motion for revision and ordered post-secondary support for both children.

The father then appealed, arguing for the first time that the trial court had also erred when it granted the motion for revision for the younger of the two children. The Court of Appeals refused to consider this argument under the invited error doctrine. The court held:

Although [the father] challenges the award as to both children, he did not ask the commissioner to deny postsecondary support for the younger child. In fact, he made a self-described "strategic decision" not to challenge the award as to the younger daughter, because [the mother] could have simply filed a timely petition for

modification. Consequently, the commissioner granted the requested postsecondary support for the younger child. In response to [the mother's] motion for revision, [the father] requested that the commissioner's ruling, which included postsecondary support for the younger daughter, "be upheld and not revised in any way." The invited error doctrine prohibits a party from setting up an error below and then complaining of it on appeal. *Nania v. Pac. Nw. Bell Tel. Co.*, 60 Wn.App. 706, 709, 806 P.2d 787 (1991). [The father] made a strategic decision not to challenge the request as to the younger daughter, and he explicitly asked the superior court to affirm the ruling. He has not offered any explanation of why he is entitled to now challenge that award.

*In re Marriage of Morris*, 176 Wn. App. 893 at 900-901.

Similarly, in the case at bar, Appellant made numerous written and oral representations to the court that RCW 26.09.191(2)(a) had no application in this case and that no restrictions should be imposed. These arguments included five separate proposed parenting plans with each stating in paragraph 2.1 and 2.2 that RCW 26.09.191(2) had no application in this case. CP 10, 19, 27, 91, 101. Each of the five proposed parenting plans also stated in paragraph 3.10 that no restrictions to visitation and access to the children should be considered "because there are no limiting factors under paragraphs 2.1 and 2.2." CP 13, 22, 29, 94, 104. In addition, appellant's final proposed parenting plan specifically suggested that the court set a visitation schedule that appellant now argues the court should not have considered. CP 101-111.

Appellant also disavowed any application of RCW 26.09.191(2)(a) during opening statements, wherein she said:

It's very clear that my client has been the primary parent, has been, and should continue to be. **And we are asking the Court to adopt our plan. It's stable, it's reasonable, and it's logical. It does make strong efforts to maximize Mr.'s time without trying to strip time away from him,** but to give these children a solid home base, and a home base with a person that's managing their care, managing their medical, managing the dental, taking care of the schooling, taking care of the counseling. That really – the children belong in the household where all those things are coalescing, and in – and as well as, in fact, a household that is financially stable to support that.

RP 376 (emphasis added).

Appellant repeated this request to follow her proposed parenting plan at the end of her closing argument, stating as follows:

So in this case, I think the clear weight of the evidence does support Ms. Gillman, does support her requests. **And her requests when you look at them really are reasonable in regards to the parenting plan** and child support which are the remaining items that the Court largely has to address.

When we look at the best interests of the child, it should be to find it halfway to where the children are stable and have good relationships with both parents. And I think my client has made every effort to encourage that relationship with Mr. Gillman, and to draft a plan that makes sense.

**So we are asking the Court to adopt our** child support worksheet, adopt our **parenting plan**, and make provisions for the other items mentioned.

RP 379-380 (emphasis added).

Thus, in the same manner that the doctrine of invited error in *Morris* precluded the appellant from arguing against a proposition to which he had specifically agreed before the trial court, so the doctrine of invited error in the

case at bar precludes the appellant from arguing against a proposition she had repeatedly requested that the trial court take.

***3. Substantial Evidence Supports the Trial Court's Finding that RCW 26.09.191(2)(a) Has No Application in this Case.***

Appellate court's review challenges to a trial court's rulings on a parenting plan under an abuse of discretion standard. *In re Marriage of Christel*, 101 Wn.App. 13, 1 P.3d 600 (2000) (citing *In re Marriage of Wicklund*, 84 Wn.App. 763, 932 P.2d 652 (1996)). Under this rule an appellate court will not reverse a trial court's decision to establish or modify a parenting plan unless the trial court exercised its discretion in an untenable manner or in a manifestly unreasonable way. *In re Marriage of McDole*, 122 Wn.2d 604, 859 P.2d 1239 (1993).

As it is used in this rule the phrase "substantial evidence" means that quantum of evidence "sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003). In determining whether or not substantial evidence supports a trial court's decision the court on appeal makes all reasonable inferences from the facts in the favor of the prevailing party below and defers to the trial judge on issues of witness credibility and the persuasiveness of the evidence. *Boeing Co. v. Heidi*, 147 Wn.2d 78, 51 P.3d 793 (2002).

In this case appellant argues that the trial court erred when it failed to

limit respondent's access to his children "under RCW 16.09.191(2)(a) because of an undisputed history of domestic violence during and after the marriage." Brief of Appellant, page 1. This argument ignores both the evidence as presented as a whole at the trial and it ignores the application of the substantial evidence rule. The following addresses both the evidence in its entirety as well as how the substantial evidence rule applies when interpreting this evidence.

During Appellant's testimony at trial she claimed one instance of physical abuse that occurred in the bathroom of the home after the couple's young daughter had accidentally poured scalding hot liquid down her front. RP 69-70. Specifically, she claimed that Respondent had put his hand around her throat, although she did not allege any difficult breathing or any attempt at strangulation. *Id.*

When Respondent later testified in this case he refuted these claims. Rather, he explained to the court that he had rushed the couple's daughter into the shower to douse her with cold water and that he only put hands on Appellant in order to prevent her from interfering with his attempt to administer medical aid to the young girl. RP 235-236. His testimony as to what happened during this even was as follows:

Q. Okay. And you heard the testimony of Ms. Gillman. What is – what do you recall happening on July 29th, 2012?

A. What – Zachary and I and Emily were all out on the back patio. I don't recall exactly what we were doing. We were making something or putting something together or doing something. I don't recall what it was. Helen came out with hot chocolate for everybody, and she brought out my cup of hot chocolate and handed it to me. And the cup was so hot, I couldn't hold it in my hands. So I set it down on the table outside, next to me, while Helen and I engaged in a conversation. During the course of our conversation, neither one of us was watching Emily. Well, she reached up on the table with both hands and grabbed my mug of hot chocolate and went to take a sip. And obvious the cup was so hot, she ended up spilling the whole thing down the front of her. She immediately started screaming.

Q. She being Emily?

A. Emily, right. And Helen immediately started screaming, you know, "Why did you put the cup there? What were you thinking?" I grabbed Emily. I ran towards the bathroom in the house. A similar incident to this had happened to me when I was a child. So I repeated the same actions at that time that my father took with me. So I grabbed her. I ran to the bathroom. On the way there I was taking off her – her clothing. I got her in the bathtub. I turned the shower on as cold as I could, and I started hosing her down immediately. Helen was following me the entire time, screaming. Yeah, we were both a little freaked out at the time. And so I was – I had Emily held down in the bathtub and I was spraying cold water over there, and Helen kept reaching down trying to pull her out of the bathtub. And I, with one hand, have got the shower thing. With the other hand, I'm trying to push Helen away from the bathtub. And at some point, Helen got passed my arm and grabbed Emily to pick her up. At that time, I dropped the – the shower thing and I reached up and I grabbed Helen with both my hands. And yes, it was around the chest, the neck area there, and I pushed her out of the bathroom. I immediately went back to spraying off Emily and grabbed me a towel that I could soak in cold water so I could wrap her in it.

RP 235-236.

Under the substantial evidence rule the trial court was entitled to and did believe Respondent's version of events and find him the more credible

of the two witnesses. Under his version of events he acted with appropriate, restrained physical force to prevent Appellant from interfering with his administration of needed medical care for the couple's daughter. Thus, the trial court did not err in its refusal to find that this incident constituted an act of domestic violence under RCW 26.09.191(2)(a).

In this case, it is also true that during her testimony Appellant also claimed that there had been two incidents in which Respondent "appeared to threaten her with a gun." RP 64. By contrast, in his testimony before the court Respondent denied that he had ever pointed a firearm at or threatened Appellant with a firearm. RP 233-234. Rather, he testified that there had been a single incident very late at night after Appellant had moved out when he was sleeping on the couch and awoke to the sounds of someone attempting to get in through the front door. *Id.* Thinking it could be an intruder he got his handgun and went to the door with it held at his side. *Id.* Once at the door he determined that it was Appellant trying to get inside. *Id.*

In addition, while on the witness stand Respondent denied the existence of any other incident in which he was holding a firearm and he also denied ever pointing a firearm at Appellant or threatening her with one. RP 234. He testified:

Q. Okay. So just to be clear, at any point – married, separated, have you ever raised a firearm towards your – towards Ms. Gillman?

A. Never.

Q. Have you ever threatened her that you would raise a firearm towards her?

A. Never.

RP 234.

Under the substantial evidence rule this court on appeal is bound to accept the trial court's decision on credibility between the two parties on this point. Consequently, there is no error in the trial court's ruling that there were no incidents of domestic violence found in these unproven and refuted claims.

Finally, in her testimony Appellant also claimed that there was one incident in which Respondent called her a "whore" in front of their son. RP 60. Although Respondent admitted making the statement, he denied making it to their son. RP 214. Rather, he testified that he made it to himself while in the house and only realized after the fact that their son, who was outside walking by an open window, had overheard it. RP 214-215. He went on to state on the witness stand that he felt a great deal of remorse about their son having heard him make such a statement. *Id.* Under the substantial evidence rule the trial court was entitled to accept Respondent's version of the event as it evidently did.

Finally, during her testimony Appellant also claimed that the

defendant had once punched a hole in the bedroom wall or door in front of her and that he had once left the house after an argument and kicked a hole in a hose box outside on his way to his vehicle. RP 70-71. Respondent denied any such conduct, testifying as follows:

Q. Okay. So outside of – well, now I – let me go back. So you heard Ms. Gillman’s allegation that you have punched holes in a door. Have you ever punched a hole in a door?

A. There’s no – no. There’s no holes in my doors and my walls. I did – the incident that she’s talking about where I did hit – hit our door in the middle or towards the end of an argument several years ago. But we never put a hole in the door or – or anything like that. There’s no holes in the house anywhere.

RP 283-284.

Under the substantial evidence rule the trial court was entitled to, and did find Respondent’s denial of this incident as more credible. Thus, in this case the trial court did not err when it found in paragraphs 2.1, 2.1 and 3.10 that RCW 26.09.191(2)(a) had not application in this case.

***4. The Facts as Argued by Appellant Do Not Constitute Proof that Respondent Did “Engage in . . . a History of Acts of Domestic Violence as Defined in RCW 26.09.191(2)(a).”***

Under RCW 16.09.191(2)(a), a trial court must limit a parent’s residential time if it finds that the parent engaged in “a history of acts of domestic violence.” The statute states:

(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 . . .

RCW 26.09.191(2)(a).

The term “domestic violence” is specifically defined in RCW 26.50.010(1) to mean the following:

(1) “Domestic violence” means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

RCW 26.50.010(1).

Under subpart (a), Appellant’s claims that the defendant had briefly put his arm across her throat and had twice intimidated her with a firearm would qualify as “domestic violence” if believed and accepted because they would qualify as an “assault” or as the “infliction of fear of imminent physical harm.” However, even were Appellant’s claims to be accepted, they would still not require the trial court to limit Respondent’s residential time because RCW 26.09.191(2)(a) does not apply even with two isolated incidents of domestic violence being proven. Rather, by the plain language of the statute, the restrictions found in RCW 26.09.191(2)(a) do not apply unless the trial court finds “a history of acts of domestic violence.” In this

case no such “history of acts of domestic violence” was alleged and certainly none was proven. Thus, the trial court did not err in this case when it refused to limit Respondent’s residential time.

**II. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT DEFENDANT’S DECISION TO WORK FULL TIME IN TOWN SO HE COULD PARTICIPATE IN THE CARE AND CUSTODY OF HIS CHILDREN DID NOT CONSTITUTE VOLUNTARY UNDEREMPLOYMENT.**

Courts on appeal review child support awards, including a decision whether or not to impute income, under an abuse of discretion standard. *In re Marriage of Pollard*, 99 Wn.App. 48, 991 P.2d 1201 (2000). Thus, prior to overturning a child support award, the reviewing court must first find the trial court abused its discretion such that it ruled on untenable or manifestly unreasonable grounds. *In re Marriage of Curran*, 26 Wn.App. 108, 611 P.2d 1350 (1980).

In the case at bar Appellant argues that the trial court erred in setting Respondent’s support obligation when it imputed only \$1,500.00 income per month to him “because the evidence shows that the Respondent is capable of earning over \$3,000.00 per month, but chooses not to in order to see his children more often.” Brief of Appellant, page 1. Thus, Appellant argues that Respondent is “voluntarily underemployed.” Brief of Appellant, page 2. As the following explains, this argument is in error because the trial court did not abuse its discretion when it rejected Appellant’s argument that

Respondent was voluntarily underemployed.

In RCW 26.19.071(6), the Washington legislature has set out factors the court should use to determine whether or not a parent is “voluntarily unemployed” or “voluntarily underemployed.” This statute provides:

(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. . . .

RCW 26.19.071(6)

Under this statute, a trial court must impute income to a parent who is “voluntarily underemployed.” Voluntary underemployment is determined based upon a parent’s “work history, education, health, and age, or any other relevant factors.” However, as this statute goes on to clarify, a trial court may not impute income to a parent who is “gainfully employed on a full-time basis” unless it also finds that (1) “the parent is voluntarily underemployed,” and (2) “the parent is purposely underemployed to reduce the parent’s child support obligation.”

In the case at bar the trial court did not find that Respondent was voluntarily underemployed and it did not find that the defendant was purposely attempting to reduce his child support obligation. Rather, the trial court found that in the past Respondent had been able to make more money than he could with the small business he had started with his wife, but only on a periodic basis and only at the cost of extended periods of time out of state and out of contact with his children.

Indeed, Respondent's testimony reveals the following facts on this issue: (1) the only way Respondent and his wife had been able to maintain their small business was to have her run it when he was periodically out of state, (2) since the separation he was running the business himself, (3) were he to continue to periodically work out of state as the jobs arose he would not be able to maintain his business and thereby lose that income, and (4) were he to continue to periodically work out of state he would not be able to take care of his children as Appellant had set out in he last and final proposed parenting plan. Thus, the trial court recognized that the divorce had made respondent's periodic out of state employment unreasonable and unworkable. Consequently, the trial court did not abuse its discretion then it refused to impute income to the Respondent at a level consistent with the prior years when he had periodically worked out of state.

**III. PURSUANT TO RCW 26.09.140 AND RAP 18.1, THIS COURT SHOULD AWARD REASONABLE ATTORNEY'S FEES TO RESPONDENT FOR THE COSTS OF DEFENDING AGAINST THIS APPEAL.**

Under RCW 26.09.140 this court has the discretion to grant a party attorneys fees on appeal from an action under that title. This statute states:

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

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

The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

RCW 26.09.140.

This statute is mentioned in RAP 18.1, which sets out further criteria for obtaining an award of attorney's fees on appeal for an action grounded in

RCW 26. Parts (a) and (c) of RAP 18.1 state:

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

RAP 18.1(a)&(c).

Generally, when determining an award of attorney fees, the trial court must first balance the needs of the spouse requesting them against the ability of the other spouse to pay. *In re Marriage of Crosetto*, 82 Wn.App. 545, 563, 918 P.2d 954, 963 (1996). For example in *In re Marriage of Williams*, 84 Wn. App. 263, 927 P.2d 679 (1996), the husband in a divorce appealed arguing that the trial court erred (1) in its maintenance decision, (2) in its property split, particularly in characterizing the wife's gambling losses as a community obligation, (3) in its refusal to grant the husband attorneys fees based upon his claim of intransigence against his wife, and (4) that he was entitled to attorney's fees on appeal. His ex-wife also requested attorneys's fees on appeal. Ultimately the Court of Appeals rejected each of the husband's arguments on appeal and then awarded attorney's fees on appeal to the wife, holding as follows:

Both Stanley and Glenda request attorney fees on appeal. Pursuant to RCW 26.09.140, this court may award reasonable

attorney fees for maintaining or defending an action under RCW 26.09, provided the party seeking fees submits an affidavit of need as required by RAP 18.1(c). Glenda timely submitted an affidavit of need and we award her reasonable attorney fees and costs for defending this appeal. RAP 18.1(c); RCW 26.09.140.

*In re Marriage of Williams*, 84 Wn.App. at 273 (citations omitted).

In the case at bar line one of the final parenting plan shows that appellant has almost twice the gross income at \$2,701.00 to the respondent's imputed \$1,500.00 per month. This document shows a significant disparity between appellant and respondent's respective ability to pay the costs on appeal. In addition, as respondent's brief explains, in this case appellant has brought an appeal that, for the most part, this court should not even consider because of both the failure to preserve the first argument for appeal as well as appellant's violation of the invited error doctrine. As to the second argument on the imputation of income, Appellant addresses an area in which the court has wide discretion and where a court on appeal will only reverse upon a showing of a manifest abuse of that discretion. The court in *Williams* noted as following on this issue:

We begin by noting that trial court decisions in marital dissolution proceedings are rarely changed on appeal. *In re Stenshoel*, 72 Wash.App. 800, 803, 866 P.2d 635 (1993). The party who challenges a maintenance award or a property distribution must demonstrate that the trial court manifestly abused its discretion. *In re Washburn*, 101 Wash.2d 168, 179, 677 P.2d 152 (1984); *In re Terry*, 79 Wash.App. 866, 869, 905 P.2d 935 (1995).

*In re Marriage of Williams*, 84 Wn.App. 263 at 267.

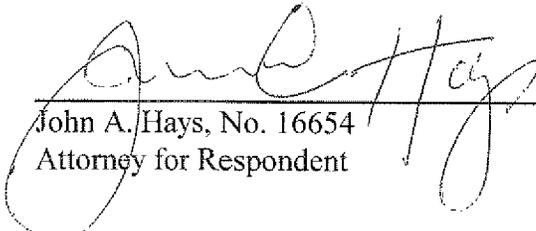
In this case there has been no abuse of discretion much less a manifest abuse of discretion. As a result, this court should grant respondent's request for attorney's fees under RCW 26.09.140 and RAP 18.1. Respondent will file an affirmation of financial need no later than 10 days prior to the date this case is set for oral argument or consideration on the merits.

**CONCLUSION**

The trial court did not err when it found that RCW 26.09.191(2)(a) did not apply in the case at bar and when it found that the defendant was not voluntarily underemployed.

DATED this 10<sup>th</sup> day of September, 2015.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Respondent

## APPENDIX

### RCW 26.09.140

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

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

The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

### RCW 26.09.191(2)(a)

(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 . . .

### RCW 26.19.071(6)

(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, aged, blind, or disabled assistance benefits, pregnant women assistance benefits, essential needs and housing support, 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.

#### **RCW 26.50.010(1)**

(1) "Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

**COURT OF APPEALS OF WASHINGTON, DIVISION II**

**In re the Marriage of:**

**Helen Christine Gillman,  
Appellant,**

**vs.**

**Michael Dean Gillman,  
Appellant.**

**NO. 46953-7-II**

**AFFIRMATION  
OF SERVICE**

The undersigned states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Respondent with this Affirmation of Service attached (with postage paid if by mail) to the indicated parties:

1. Mr. David A. Nelson  
Attorney at Law  
Nelson Law Firm  
Longview, WA 98563  
dave@lighthouselaw.com
2. Mr. Michael Dean Gillman  
3256 Nebraska Street  
Longview, WA 98632

Dated this 10<sup>th</sup> day of September, 2015, at Longview, WA.



Donna Baker

## HAYS LAW OFFICE

**September 10, 2015 - 1:11 PM**

### Transmittal Letter

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Court of Appeals Case Number: 46953-7

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Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

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