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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

NO. 316009

IN RE:

DARRYL ROBINSON

Petitioner

vs.

SHEA ROBINSON

Respondent

RESPONDENT'S BRIEF

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I. Statement of the Case

Shea Robinson and Darryl Robinson began dating in January 2009. **(RP 116)** At that time, Ms. Robinson had one child, Aiden, (date of birth April 8, 2006). **(RP 101-102)** On December 31, 2009, Ms. Robinson gave birth to the parties child, Stella. **(RP 102)** The parties began living together in approximately April 2010, **(RP 117)**, and married on September 10, 2011 at Hauser Lake, Idaho. **(RP 102)** A Petition for Legal Separation was filed on March 20, 2012. **(RP 158)** Ms. Robinson testified at trial that the marriage was irretrievably broken and requested a dissolution of the marriage. **(RP 102)**

Mary Ronnestad was appointed as the guardian ad litem for Stella during the pendency of the action. **(RP 170)** A temporary parenting plan was ordered by the court after a contested hearing. Ms. Robinson was designated the primary parent and Mr. Robinson was ordered to complete a Domestic Violence Perpetrator's assessment. The plan included a shared schedule for Stella on a temporary basis. **(CP 33-38)**.

Trial was held before the Honorable Michael Price, Spokane County Superior Court Judge, beginning February 25, 2013. **(RP 1)** Both parties were represented by counsel and testified at trial. The guardian ad litem also testified. **(RP 2)**

At trial, the g.a.l. testified that she had reviewed a number of records involving the parties, including CPS records and police reports. **(RP 10)** The g.a.l. testified that at the time of the original temporary order hearing, domestic violence charges were pending against Mr. Robinson. **(RP 21)** The g.a.l. testified that she had reviewed a psychological evaluation of Mr. Robinson by Dr. Sean Smitham and that there were issues with the self-reporting of Mr. Robinson noted within the evaluation. **(RP 24-31)** Ms. Ronnestad had the benefit of the full report, including the results of psychological tests, by the time of trial. **(RP 29)**

The g.a.l. testified that she interviewed Mr. Robinson regarding his March 2012 arrest for domestic violence. **(RP 32-33)** Mr. Robinson reported to the g.a.l. his version of events. **(RP 32-33)** The g.a.l. testified that Ms. Robinson also made other allegations of domestic violence that pre-dated the March 2012 arrest. **(RP 34)** The g.a.l. testified that Ms.

Robinson reported being choked, pushed and pulled by Mr. Robinson and that she was afraid while living with him. **(RP 64)** Ms. Robinson reported to the g.a.l. her version of events that led to Mr. Robinson's March 2012 arrest and continued to express concern about Mr. Robinson during the g.a.l. investigation. **(RP 133-135)** The g.a.l. further testified that Mr. Robinson's previous wife had reported a history of drug and alcohol abuse, as well as emotional, mental and physical problems on the part of Mr. Robinson. **(RP 71)**

The g.a.l. testified that the temporary order designated Ms. Robinson as the primary residential parent and that both parties proposed parenting plans continued to designate Ms. Robinson as the primary parent. **(RP 21)** The g.a.l. testified as to her conclusion that the child needed stability and that neither the father's work schedule nor a shared plan offered that stability. **(RP 50)** The g.a.l. further testified that she believed that Mr. Robinson had a history of committing acts of domestic violence. **(RP 51-52)** The g.a.l. testified about her concerns regarding the temporary plan and recommended a new parenting plan. **(RP 17-18)**

Mr. Robinson testified regarding the March 2012 incident that led

to his arrest. **(RP 86-87)** He further testified that he had pled guilty to violation of the No Contact Order that was issued as a result of the March 2012 arrest and that as part of that plea the domestic violence charge was dismissed. **(RP 76-77)** Mr. Robinson also testified about his involvement in parenting, his work schedule and his proposed parenting plan. **(RP 79-81, 88-89)**

Ms. Robinson testified about verbal and physical abuse by Mr. Robinson both before and during the parties marriage. **(RP 132-135)** She further testified about her current fear of Mr. Robinson. **(RP 135)** Ms. Robinson specifically testified about the incident leading to Mr. Robinson's March 2012 arrest. **(RP 133-134)** Ms. Robinson testified about the involvement of each parent in the parenting of Stella. **(RP 118-129)** Ms. Robinson then testified about her proposed parenting plan. **(RP 140-141)**

At trial, Mr. Robinson testified about his household income and expenses. **(RP 89-93, 95-99)** Ms. Robinson also testified about her income and expenses, including attorneys fees and costs. **(RP 104-116)** Prior to the start of testimony, the parties entered stipulations as to the division of property and debt. **(RP 4-5)**

After considering all the testimony and the admitted exhibits, Judge Price issued his oral ruling on February 27, 2013. (RP 158)

II. STANDARD OF REVIEW

Trial courts should be given broad discretion in matters dealing with the welfare of children. Schuster v. Schuster, 90 Wn.2d 626 (1978). A trial court's decision should not be disturbed except for a manifest abuse of discretion. Schuster, at 632, citing Lambert v. Lambert, 66 Wn.2d 503 (1965). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." Marriage of Littlefield, 133 Wn.2d 39 (1997). A trial court's decision is considered manifestly unreasonable if, given the applicable facts and applicable legal standard, the trial court's decision is outside the range of acceptable choices. Littlefield, at 47. A trial court's grounds may be found untenable if the factual findings are not supported by the record. Littlefield, at 47. The trial court's reasons may be found untenable if they are based on an incorrect standard or facts that do not meet the requirements of the correct legal standard. Littlefield, at 47.

Findings of Fact of the trial court must be supported by substantial evidence. **In Re Marriage of Mattson, 95 Wn.App. 592 (1999), citing In Re Marriage of Booth, 114 Wn.2d 772 (1990).** "As long as the findings of fact are supported by substantial evidence, they will not be disturbed on appeal. **Marriage of Rockwell, 141 Wn.App. 235 (2007).** "Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." **Rockwell at 242, citing In Re Marriage of Griswold, 112 Wn. App. 333 (2002).** "A court should not substitute its judgment for the trial courts, weigh the evidence or adjudge witness credibility." **Rockwell, at 242.**

III. ARGUMENT

1. **The trial court did not err in imposing RCW 26.09.191 restrictions against Mr. Robinson in the final Parenting Plan.**

In responding to the arguments of Mr. Robinson, the respondent's brief does not address Mr. Robinson's discussion of **In Re Marriage of Crump**, cited by appellant as 175 Wn.App. 1045 (2013) or **In Re**

Rodden, cited by appellant as 162 Wn.App 1040 (2011), as both cases appear to be unpublished opinions. Unpublished opinions have no precedential value and should not be cited or relied upon. Mendez v. Palm Harbor Homes, Inc., 111 Wn.App. 446 (2002).

RCW 26.09.191(2)(a) provides that a parent's residential time shall be limited if the parent is found to have engaged in certain conduct. RCW 26.09.191(2)(a)(iii) provides that such conduct includes "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." RCW 26.50.010(1) defines the term domestic violence. RCW 26.50.010(1)(a) includes "physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members" in the definition of domestic violence.

SMC 10.09.010 also includes a definition of domestic violence. SMC 10.09.010(B) includes a non-exclusive list of crimes which when committed by one family or household member against another constitute

domestic violence. Included in this non-exclusive list under SMC 10.09.010(B)(18) is the violation of the provisions of a restraining order. SMC 10.09.010(B)(19) includes the violation of the provisions of a No Contact Order.

At trial in this matter, Ms. Robinson testified to a history of domestic violence that occurred during the parties relationship, including during the parties marriage. Ms. Robinson testified to being choked, pushed, thrown, shoved and punched. She further testified to Mr. Robinson telling her that she was lucky she was not dead. (RP 132-135) Ms. Robinson testified that she had a continuing fear of being stalked and physically hurt by Mr. Robinson. (RP 135) Ms. Robinson further testified about being physically assaulted by Mr. Robinson on March 23, 2012 and his subsequent arrest for domestic violence. (RP 133-134) Testimony was also provided regarding Mr. Robinson's violations of the No Contact Order, including a violation not reported to the police. (RP 135) Ms. Robinson further testified about an emergency room visit due to physical injuries she received as a result of an assault by Mr. Robinson. (RP 133)

The guardian ad litem interviewed both parties in this matter, interviewed family members and other witnesses, reviewed the psychological report of Mr. Robinson by Dr. Smitham and reviewed other reports, including CPS and police records. Based on her investigation, the guardian ad litem concluded that there was a history of acts of domestic violence committed by Mr. Robinson. **(RP 51-52)**

At trial, Mr. Robinson admitted that he pled guilty to a violation of the No Contact Order issued after his arrest on charges of domestic violence. **(RP 76-77)**

In his oral ruling, Judge Price found that there have been allegations of domestic violence. **(RP 171, 175-177)** He further found that Mr. Robinson had pled guilty to a No Contact Order violation and in doing so pled to the accuracy of police reports and further stipulated that domestic violence had occurred as part of the plea. **(RP 175-177)** Although Judge Price did not specifically enter a finding as to the allegations of domestic violence unrelated to the criminal domestic violence charge, the appellate court can consider the trial court's oral

ruling to determine the basis for the trial court's resolution of the case. **In Re Marriage of Booth, 114 Wn.2d 772 (1990)**. In this case, The trial court referenced not only the criminal conviction but also the allegations of abuse as a whole. **(RP 175-177)**

The evidence at trial clearly established that Mr. Robinson had engaged in a history of domestic violence that pre-dated the marriage of the parties and continued during the marriage. The history of domestic violence included physical assaults and threats of physical violence, as well as an arrest for domestic violence and a subsequent violation of a court-issued No Contact Order, the violation of which was in itself an act of domestic violence, as well as Mr. Robinson's subsequent guilty plea. The trial court had the benefit at trial of a g.a.l. investigation by a g.a.l. the trial court found to be "an excellent guardian ad litem . . . probably one of our most thorough and well-versed guardian ad litem (sic) we have." **(RP 170)** The g.a.l. investigation resulted in a conclusion that Mr. Robinson had engaged in a history of domestic violence. The trial court also had the ability to weigh the credibility of both parties at trial as they testified about the domestic violence issues. The issues of credibility of

witnesses, resolving the conflicting testimony of witnesses and weighing the persuasiveness of evidence is left to the trial court. **Thompson v. Hanson, 142 Wn.App 53 (2007).**

Domestic violence as defined by **RCW 26.50.010** includes not only physical harm, bodily injury or assault but also the infliction of fear of imminent physical harm, bodily injury or assault. Mr. Robinson argues that his subsequent guilty plea to a violation of the No Contact Order does not constitute domestic violence because it does not establish that an assault actually took place. However, Mr. Robinson's arrest for violation of the No Contact Order occurred as a result of his entry into the residence from which he was restrained per the order. **(RP 15)** Entry of the residence on the part of Mr. Robinson, while restrained pursuant to a court order, would reasonably instill fear on the part of Ms. Robinson of further imminent physical harm, bodily injury or assault. In fact, Ms. Robinson testified that the fear continued even up to the time of trial.

Further, the specific language of **SMC 10.09.010(A)** may not take into account the issue of whether an assault took place but that statute

exists to deal with violations of restraining orders and no contact orders that were issued based on a history of domestic violence. A violation of such an order cannot be found unless an underlying order was issued. There is no question in this case that there was in fact an underlying order based on a domestic violence allegation. Therefore, as set forth in SMC 10.09.010(B)(18) and (19), violations of such restraining orders and no contact orders are defined as additional acts of domestic violence.

Judge Price's findings on the issue of a history of domestic violence were fully supported by the evidence. Evidence which included allegations of a history of domestic violence prior to marriage, allegations of a history of domestic violence during the marriage, an arrest for an act of domestic violence at the time of the parties separation, a subsequent violation of a criminal No Contact Order, continuing fear of assault on the part of Ms. Robinson and a guilty plea by Mr. Robinson to the violation.

Having substantial evidence on which to base the findings of a history of domestic violence, Judge Price did not abuse his discretion in imposing restrictions pursuant to RCW 26.09.191.

2. The trial court's decision regarding the final Parenting Plan was based on substantial evidence.

RCW 26.09.004(4) defines a temporary parenting plan as a plan for parenting of children during the pendency of an action. RCW 26.09.004(3) defines a permanent parenting plan as a plan for the parenting of children which is incorporated into the final order. Mr. Robinson argues that the trial court reduced Mr. Robinson's court ordered residential time based on insufficient findings. However, the trial court's decision was an initial determination of a permanent plan, based on a review of the testimony of the parties, the investigation of the g.a.l. and a review of the exhibits admitted at trial. The temporary parenting plan, ordered by a court commissioner, was not binding on the court. There was no issue of a "reduction" as the temporary order decision was only meant to address parenting issues pending trial or agreed final resolution.

Further substantial evidence supported the trial court's findings that the shared plan proposed by Mr. Robinson was not in the best interests of the parties child. Considering the allegations of domestic violence, the parties did not demonstrate an ability to communicate with each other for

the benefit of the child. **(RP 176)** Further, the guardian ad litem testified that her investigation resulted in the conclusion that the plan proposed by Mr. Robinson was not in the child's best interests and did not offer the stability the child needed. **(RP 50)** Ms. Robinson testified about her involvement in parenting versus that of Mr. Robinson. **(RP 118-129)** Both parties testified about their respective work schedules, including the changing nature of Mr. Robinson's work schedule. **(RP 79-81)**

The trial court commented on Ms. Robinson's testimony regarding her greater involvement in parenting, as well as the fact that Mr. Robinson did not contest that she had been the primary caregiver of the parties child. **(RP 171)** The trial court found that the schedule proposed by Mr. Robinson was not based on what was in the child's best interests but was instead based on what he felt was in his own best interests. **(RP 173)** The trial court expressed concerns about the instability in the schedule proposed by Mr. Robinson, as well as concerns about the parties ability to work together. **(RP 173-177)** The trial court then reviewed the plan proposed by Ms. Robinson and found it to be in the best interests of the child. **(RP 178-181)** The plan proposed by Ms. Robinson was similar in many ways to the plan proposed by the g.a.l.

Substantial evidence supported the findings of the trial court regarding an appropriate parenting plan. The trial court did not abuse its discretion in adopting the plan proposed by Ms. Robinson.

3. The trial court did not err in imposing an award of attorney fees against Mr. Robinson nor did the trial court err in ordering Mr. Robinson to pay the remaining guardian ad litem fees.

At trial, Ms. Robinson testified that she had paid \$5,400.00 in attorney fees prior to trial by borrowing money from her parents and taking advances on a credit card. **(RP 114-116)** Ms. Robinson further testified that she would be incurring additional fees based on the trial and any work thereafter. **(RP 114-116)** The trial court heard the parties stipulation as to property and debts at the start of the trial. **(RP 4-5)**. Both parties testified about their incomes and expenses at trial. **(RP 89-93, 95-99, 104-116)**

The trial court had the authority to order attorney fees at any point during the pendency of the action, after considering the financial resources of the parties. **RCW 26.09.140**. An award of fees is reviewable for any abuse of discretion. **In re Marriage of Mattson, 95 Wn.App.592 (1999)**

There was substantial evidence to support the trial court's findings that Ms. Robinson had incurred reasonable attorney fees. There was substantial evidence to support the trial courts finding of an ability to pay on the part of Mr. Robinson and need on the part of Ms. Robinson. The trial court based its conclusion on the amount to be awarded on the testimony submitted at trial and the court's own experience in such matters. The court did not abuse its discretion in awarding fees and costs in the amount of \$3,500.00; an amount less than had already been incurred by the time of trial.

Similarly, the trial court's order that Mr. Robinson pay the g.a.l. fees remaining was based on substantial evidence including the financial declarations of the parties, the testimony of the parties, the child support percentages and the arguments of counsel. **(RP 184)** The issues were within the discretion of the trial court and the court did not abuse its discretion.

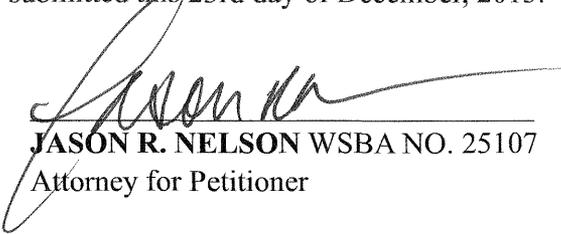
ATTORNEY FEES

Ms. Robinson requests an award of attorney fees in responding to this appeal.

IV. CONCLUSION

The findings of the trial court in this matter were based on substantial evidence and the trial court did not abuse its discretion. The court appropriately imposed limiting factors pursuant to RCW 26.09.191. The Parenting Plan adopted by the court was in the best interests of the child and supported by the substantial evidence at trial. The trial court did not abuse its discretion in awarding attorney fees to Ms. Robinson and requiring Mr. Robinson to pay the remaining fees to the guardian ad litem. Ms. Robinson respectfully requests that the appeal of Mr. Robinson be denied and that she be awarded fees and cost.

Respectfully submitted this 23rd day of December, 2013.

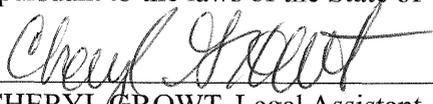


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DECLARATION OF DELIVERY

I, CHERYL GROWT, under penalty of perjury pursuant to the laws of the State of Washington, declare that on the 23rd day of December, 2013, I had delivered a copy of this document to the law office of attorney Robert Cossey, 902 North Monroe, Spokane, WA 99201, via legal messenger.

I swear that the above is true and correct, to the best of my knowledge and belief, under penalty of perjury pursuant to the laws of the State of Washington.



CHERYL GROWT, Legal Assistant