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COURT OF APPEALS
DIVISION ONE
SEATTLE, WASHINGTON

NO. 71496-1-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

IN RE THE MARRIAGE OF:

JENNIFER L. BRUNSON

RESPONDENT

and

NEIL F. BRUNSON,

APPELLANT.

AMENDED RESPONSE BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

The court should be aware that Appellant's, hereinafter "Husband", Introduction does not accurately represent the facts in this case and does not accurately represent the evidence presented at trial in this matter. This case arises from a dissolution proceeding where after a trial on the merits the trial court entered final orders. The parties have two minor children, who at the time of trial were ages two and five. Based on the evidence presented, the trial court entered a final Parenting Plan, Order of Child Support with Worksheet, Decree with Exhibits H and W, and Findings of Fact. The trial court properly made findings under RCW 26.09.191 that the Husband had committed acts of domestic violence against the Respondent, hereinafter "Wife" and one of the minor children. The trial court entered restrictions and requirements in the Parenting Plan consistent with those findings and the law. The trial court entered a child support obligation using the Wife's actual income and imputing income to the Husband consistent with the law. The court divided the property and debts of the parties in a fair and equitable manner.

After the entry of the final orders, the Husband sought reconsideration of the final orders. Said request for reconsideration was denied. At the same time the Husband sought the reconsideration, he filed this appeal. The Husband's Notice of Appeal challenges the Decree of

Dissolution, Findings of Fact, Order of Child Support and Parenting Plan which were entered December 23, 2013. Wife does have a Domestic Violence Protection Order against the Husband under a separate cause number. Husband has an appeal pending in that matter too. (No. 720911).

The Husband's challenge to the final orders fails to demonstrate any abuse of discretion of the trial court. The Husband fails to provide any legal or factual basis to overturn the decision of the trial court. As to the parenting plan, the trial court's decision was based on the evidence presented and is in the best interests of the children. The trial court's computation of child support was pursuant to the evidence and the statutory guidelines. As to the division of property and debts, the trial court's decision was fair and equitable based on the entirety of the facts of the case. The Husband's request for relief should be denied.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

In response to Appellant's Assignments of Error, Respondent responds as follows:

1. Did the trial court err by not ordering an evaluation of the parents or by drawing presumptions from the temporary parenting plan?

NO: The trial court was not required to order separate evaluations of either parent. Further, the court did not draw any presumptions from the temporary parenting plan and entered the final

parenting plan based on the evidence presented at trial.

2. Did the trial court err by requiring the Husband to participate in domestic violence perpetrator treatment as a condition for having time with the children?

NO: The trial court properly considered all the evidence, made findings under RCW 26.09.191 and entered restrictions to protect the children.

3. Did the trial court err by allowing the CPS investigator to provide testimony regarding her investigation of the child abuse committed by the Husband?

NO: There is no law or court rule which prohibited the CPS investigator from testifying regarding her investigation into the child abuse committed by the Husband. RCW 13.50.100 allows DSHS to release information from CPS investigations to the court.

4. Husband's assignment of errors numbered 4 addresses alleged errors committed by the commissioner in the hearing on February 25, 2013. The Husband did not seek revision or appeal of said orders and they are not part of the appeal at this time. CP at 140.

5. Husband's assignment of errors numbered 5 address alleged errors in the orders entered on February 25, 2013. The Husband did not seek revision or appeal of said orders. CP at 140.

6. Husband's assignment of errors numbered 6 address alleged errors

in the orders entered on February 25, 2013. The Husband did not seek revision or appeal of said orders. CP at 140.

7. The Husband's assignment of error numbered seven is an alleged error committed by the commissioner on June 28, 2013. The Husband did not seek revision or appeal of said ruling. CP at 140.

8. Did the trial court's order amount to double jeopardy when the court entered restrictions and requirements in the final parenting plan?

NO: This allegation is without any basis in law. The trial court made findings under RCW 26.09.191 and entered restrictions in the final parenting to protect the children.

9. Did the trial court err in its determination of child support?

NO: The trial court properly applied RCW 26.19.071 in determining the parties' incomes and in calculating child support.

10. (i – vii) Did the trial court err in its characterization and evaluation of property and subsequent division of said property in this case?

NO: The trial court correctly and accurately characterized the property and debts in this matter. The court likewise correctly assigned values to said property. The trial court's division of property was fair and equitable pursuant to RCW 26.09.080 and other applicable law.

11. Did the trial court err by not issuing a separate ruling regarding the loan taken by the Wife against the 401k?

NO: The court considered all the evidence regarding the assets and debts in the case and made a fair and equitable property division.

12. Did the trial court err by ordering the Husband to sign a quit claim deed at the time of presentation when the court had awarded the marital home to the Wife?

NO: There is no law or court rule which prohibited the court from ordering the Husband to execute a quit claim deed at the time of presentation when the court had awarded the home to the Wife and had ordered her to immediately refinance the mortgage.

13. Did the trial court err by “offering legal advice” regarding CR 59 and then denying the CR 59 motion?

NO: First, the court did not offer legal advice by informing the Husband he had the right to seek relief under CR 59 but could not argue with the court about its decision during the oral ruling. RP at 670-671. Further, the court did not err by denying the CR 59 motion as there was no basis in fact or law to grant said motion.

14. Did the trial court err by not recusing himself after disclosing to the parties his employment in the prosecutor’s office when the Husband was arrested in 2008 when both parties were fully advised of the facts and both parties stated they did not want the court to recuse itself?

NO: The court properly disclosed a potential appearance of bias in the

matter. Both parties stated they believed there was no such bias and both parties stated they did not believe the court needed to recuse itself from the matter. RP at 80.

Husband's Brief includes a section titled "Issues Pertaining to Assignment of Errors" which is not a separate section pursuant to RAP 10.3 (a). Wife responds to that section as follows:

A. Did the trial court err by not ordering an evaluation of the parents or by drawing presumptions from the temporary parenting plan?

NO: The trial court was not required to order separate evaluations of either parent in the matter. The court did not draw any presumptions from the temporary parenting plan and entered the final parenting plan based on the evidence presented at trial.

B. Did the trial court err by making findings under RCW 26.09.191 and entering restrictions and requirements against the Husband to ensure the safety of the children?

NO: The evidence more than warranted the court making findings under RCW 26.09.191 and entering restrictions against the Husband. Further, due to said findings the trial court properly ordered sole decision making to the Wife. There was no violation of due process or Constitutional rights.

C. Did the trial court err by requiring the Husband to participate in

domestic violence perpetrator treatment as a condition for having time with the children?

NO: The trial court properly considered all the evidence and made findings under RCW 26.09.191 and entered restrictions to protect the children. The trial court did not “terminate” the Husband’s parental rights.

D. Did the trial court err by allowing the CPS investigator to provide testimony regarding her investigation of the child abuse committed by the Husband?

NO: There is no law or court rule which prohibited the CPS investigator from testifying regarding her investigation into the child abuse committed by the Husband. RCW 13.50.100 allows DSHS to release information from CPS investigations to the court.

E. Husband’s issue letter “E” pertains to the order entered on February 25, 2013. Said order is not on appeal.

F. Did the trial court err by not appointing a Guardian ad Litem in the matter?

NO: First, said alleged error is based on an order issued by the commissioner in February of 2013 and is not on appeal. However, even if said alleged error is made about the trial court, appointment of a Guardian ad Litem in a dissolution matter is at the discretion of the court and there was no need for a Guardian ad Litem in this matter.

G. Did the trial court's order amount to double jeopardy when the court entered restrictions and requirements in the final parenting plan?

NO: This allegation is without any basis in law. The trial court made findings under RCW 26.09.191 and entered restrictions in the final parenting to protect the children.

H. Did the trial court err in its determination of child support?

NO: The trial court properly applied RCW 26.19.071 in determining the parties' incomes and in calculating child support.

I. Did the trial court err in its allocation of visitation or transportation costs to the Husband?

NO: The court properly allocated the cost of supervised visitations to the Husband. Further, the Husband did not request any allocation of transportation expenses and, in fact, testified that he did not have a permanent address or know where he would be living in the future.

J. Did the trial court err in its division of the property and debts in this case?

NO: The trial court correctly and accurately characterized the property and debts in this matter. The court likewise correctly assigned values to said property. The trial court's division of property was fair and equitable pursuant to RCW 26.09.080 and other applicable law.

K. Did the trial court err in its characterization and evaluation of

property?

NO: The trial court correctly and accurately characterized the property and debts. The court likewise correctly assigned values to said property.

L. Did the trial court err in its division of the property and debts in this case?

NO: The court considered all the property and debts before it, both separate and community, and awarded each party that which it considered to be fair and equitable under the financial circumstances.

M. Did the trial court err in its valuation of the property and debts in this matter?

NO: The trial court correctly and accurately characterized the property and correctly assigned values to said property.

N. Did the trial court err in its valuation of the marital home?

NO: The trial court applied the evidence presented and properly placed a value on the home. There is no basis in law for the court to request additional evidence.

O. Did the trial court err by ordering the Husband to sign a quit claim deed at the time of presentation when the court had awarded the marital home to the Wife?

NO: There is no law or court rule which prohibited the court from ordering the Husband to execute a quit claim deed at the time of

presentation when the court had awarded the home to the Wife.

P. Did the trial court err by “offering legal advice” regarding CR 59?

NO: The court did not offer legal advice by informing the Husband he had the right to seek relief under CR 59 but could not argue with the court about its decision during the oral ruling.

R. Did the trial court err by not recusing himself after disclosing to the parties his employment in the prosecutor’s office when the Husband was arrested in 2008 when both parties were fully advised of the facts and both parties stated they did not want the court to recuse itself?

NO: The court properly disclosed a potential appearance of bias in the matter. Both parties stated they believed there was no such bias and both parties stated they did not believe the court needed to recuse itself from the matter. RP at 80.

III. REPLY TO RESTATEMENT OF THE CASE

Jennifer Brunson, Respondent, hereinafter “Wife” and Neil Brunson, Appellant, hereinafter “Husband” were married on July 29, 2005. RP at 66. The parties have two minor children, Alison Catherine Brunson, age 7, and Lillian Therese Brunson, age 4. Id. The parties separated on September 30, 2012 when the Wife fled the home after a domestic violence incident and, subsequently, obtained a domestic violence protection order. RP at 67.

The parties were married in Seattle on July 29, 2005. In December of 2005, the Husband graduated with a Bachelor of Arts in Business Administration. RP at 169. The Husband started working at Moss Adams in Yakima, Washington in January of 2006. Id.

In April of 2006, Husband began working for Allied Floors Inc., a commercial flooring company which is owned by Respondent's parents. Id. In March of 2009, Husband joined the Cement Masons and Plasterers Union Local 528 as a journeyman cement mason. RP at 169-170. Husband maintained employment as a journeyman cement mason from April 2009 to September of 2010 working for several different employers. In June of 2011, Husband started his own company, Excellent Underlayment LLC, with funds earned during the marriage. RP at 170. In September of 2010, the Husband suffered a back injury and was self-employed working light duty on and off in the flooring business. RP at 170.

In October of 2011, Husband began working for HTI Polymer. RP at 170. He worked for HTI Polymer until February 2012 when he was dismissed. Id. Husband began claiming unemployment benefits in February 2012. RP at 170. On June 14, 2012, the business license for Excellent Underlayment was allowed to lapse and the Husband closed the business bank account and transferred the funds to a joint personal account at Sound Credit Union. RP at 190-192.

In May of 2012, Husband obtained marijuana plants and started a cooperative garden in a sealed and locked room in the parties' garage. RP at 152-155. The Wife was strongly opposed but her objections were ignored. Id. The Wife was forced to assist with set-up and maintenance of the "grow room". RP at 154. The participants in the cooperative garden were the Husband, Wife and the Husband's mother. RP at 154 – 155.

The Wife graduated from Washington State University with a Bachelor of Science in Nursing in December of 2006. She earned her Registered Nurse license in February of 2007. The Wife has worked at Northwest Hospital since 2007. Her weekend schedule allowed her to be the primary caretaker for the children.

Monday through Thursday the Wife was responsible for all the care of the children and the home. RP at 144. Even when working Friday through Sunday, the Wife was responsible for the care of the children and the home by providing meals, grocery shopping, planning extracurricular activities like gymnastics and following through with transporting the children. RP at 143-145. Many nights that the Wife worked, she would come home at 8:00 p.m. to find that the children were not fed and she would make them dinner and put them to bed. RP at 145.

The history of severe domestic violence committed against the Wife by the Husband is well documented in the trial court's record. The Wife

offered detailed testimony of the horrific physical and mental abuse she suffered at the hands of the Husband. RP at 67-70, 71-82, 135-140, 145-146. Documentation completed by the Husband himself showed admission of “choking”, “kicking” and “hitting” the Wife. RP at 288-289; Ex. 2, 74-74.

In October of 2008, the Wife called the police after Husband attempted to strangle her. RP at 74-75. That night, the Husband was arrested for assault. RP at 75. The Husband voluntarily enrolled in domestic violence perpetrators treatment through Northwest Family Life in October of 2008. RP at 76; Ex. 74-75. Due to the Husband’s enrollment and the Wife’s desire to try and save the marriage, the Wife appeared at the Husband’s arraignment and requested the charges be dropped. RP at 76, 78. Sadly, after the charges were dropped the Husband refused to continue attending the treatment program. RP at 81.

After the incident in 2008, the domestic violence continued. The Wife testified about the Husband pushing her down stairs while she was pregnant, slamming her head and neck into a wall and kicking her and dragging her by her hair. RP at 71-75, 135-143. On different occasions, the Wife suffered a black eye and temporary hearing loss due to the physical abuse by the Husband. RP at 81. On more than one occasion the Husband threatened to kill the Wife. RP at 73.

On September 30, 2012, the Husband assaulted the parties' youngest child, leaving welts and bruises on her. RP at 67-68. During the abuse, the Husband telephoned the Wife at work and left a message of the child screaming while being beaten. RP at 67-68. When the Wife returned to the residence, the Husband threatened her life. The Wife waited for the Husband to go in the bedroom then snuck out the front door with the two children taking only her purse and car keys. RP at 69-70.

CPS investigated the matter and made a finding that the Husband had abused the minor child. RP at 106. Husband was later convicted after a jury trial for the assault on the child. RP at 156-158.

After the Wife fled the home, she obtained a Temporary Protection Order. RP at 140. On or about October 1, 2012, Husband left the marital home. Prior to leaving the home, the Husband took \$62,000.00 from the parties' bank accounts, the Husband's account and cash that was in the parties' safe in the home. RP at 91. On or about October 3, 2012, the Wife and children returned to the home. RP at 152.

The Wife obtained a final order of protection but the Husband claimed he was not served and the final order was vacated. RP at 140-142. A temporary order was put back into place until a full hearing could be had on the matter. RP at 141. On December 20, 2012, a one-year, protection order was entered against the Husband. RP at 141-142; Ex. 3.

Sometime prior to the entry of the December 2012 order for protection, the Husband did obtain a domestic violence evaluation which found him to be an “intimate terrorist”. RP at 290-291; Ex. 2. Treatment was recommended even though it was noted that it was doubtful it would work. RP at 297, 331-333; Ex. 2. The Husband participated in treatment but, after a few months, he was terminated from treatment for non-compliance. RP at 305-309; Ex. 4. Prior to trial, the Husband had not enrolled in a new treatment program.

On October 26, 2012, the Wife filed this Petition for Dissolution. At the time of separation, the parties owned a home which was not worth the amount of the mortgage due. RP at 177-179; Ex. 15, 16. The parties had personal and furniture items. RP at 194-199; Ex. 47, 48. The Husband had tools and business equipment. Each party had an IRA account and the Wife had a 401k with her employer. RP at 181, 186-187, 193; Ex. 44. The parties owned a Camry which the Husband took after separation. RP at 180-185; Ex. 45, 46. The parties also owned a truck which the Wife retained possession of after separation. RP at 184-185. After returning to the home, the Wife dismantled the “grow room”. The Wife transferred a majority of the Husband’s tools and personal items to a warehouse owned by her parents so that the Husband could obtain them. RP at 195-196.

After the filing of the Dissolution, the Husband filed no less than three

motions and each time sought ex parte orders attempting to restrain the Wife. RP at 159-160, 199-200. At least two of those ex parte actions were presented without any notice to counsel for the Wife. Id. Upon receiving the ex parte orders, counsel for the Wife presented motions and had said orders vacated. RP at 159-160.

Finally, a hearing was held on the Husband's motions and the Wife's motion for child support and on February 25, 2013, temporary orders were entered. RP at 160-164; Ex 34-37. Wife was named as the primary residential parent and restrictions were entered regarding Husband's time with the children. Id. The Husband was ordered to reenroll in domestic violence treatment and obtain a psychological evaluation prior to having professionally supervised time with the children. RP at 163-165; Ex 37. The Husband was ordered to pay child support in the amount of \$503.15 per month. Ex. 34,35. The Husband's requests for relief were denied by the court including his request to appoint a Guardian ad Litem. Ex. 34-37.

Due to the Husband's intransigence and abusive litigation practice, on February 25, 2013, the court ordered that the Husband was to pay the sum of \$3000.00 to the Wife as attorney fees. RP at 160; Ex. 36. Further, the court ordered that the Husband could not file additional motions until said sum was paid. Id. At no time has the Husband pay said fees. RP at 163. The Husband did not seek revision of said orders nor has he sought

appellate review for said orders.

The Husband filed a motion with the court which was heard on June 28, 2013. CP at 76, 92, 93. Said motion was to suppress the Wife's subpoena for records and to modify the child support order. CP at 76. Both of the Husband's requests were denied. CP at 93.

The matter began trial on July 9, 2013, in front of Hon. George F. Appel. RP at 1. The trial continued on the following days, July 10, July 11 and July 22, 2013. RP at 87, 278, 486. Numerous exhibits were admitted by the court and the court heard testimony from witnesses from both parties, including the parties themselves.

The court set the date for oral ruling on July 31, 2013. RP at 635, 636. The Husband appeared by telephone and the Wife and counsel were present for the ruling. RP at 636. During the oral ruling, the trial court took a recess which included the standard morning recess and obtained additional notes from his office. RP at 655-657. Contrary to the false allegations by the Husband in his Statement of the Case, at no time did counsel for the Wife and the trial court have any conversation off the record or without the Husband present either by phone or in person.

After issuing his ruling, the trial court entertained clarification questions from both parties. RP at 655. A date was then set for presentation of orders for August 22, 2013. RP at 696-697. A week or so

prior to the presentation date, the Husband retained counsel. Counsel for Husband made motion to have the entry of final orders continued to allow the Husband to obtain the transcript for the ruling. Said transcript was not readily available due to the court reporter having to provide a trial transcript in a criminal case. Said request for continuance was granted.

The transcript was obtained in November of 2013 and the parties appeared again on November 27, 2013, to enter final orders. Argument was made over several terms in the orders. The court ruled on said language disputes. The final orders were signed and entered by the court on December 23, 2013. CP at 118-121.

On January 2, 2014, the Husband through counsel filed his Motion for Reconsideration. CP at 125. Said Motion was heard on January 23, 2014, a date which was coordinated by the trial court and counsel for both parties. The trial court denied the motion with the exception of considering the issue regarding the valuation of the marital home. CP at 144. The trial court heard oral argument on that issue and took the matter under advisement. RP at 1-23-2014 at 45. The trial court issued a ruling on that remaining issue on January 30, 2014. CP at 144. There were no grounds under CR 59 for the court to reconsider any part of its decision, and there were no grounds for the court to grant a new trial in the matter. *Id.* Husband then proceeded with this appeal. CP at 140.

IV. ARGUMENT IN RESPONSE

A. Standard of Review

The final orders in this matter entered by the trial court are supported by the evidence presented at trial. Appellate courts apply the substantial evidence standard of review to findings of fact made by the trial judge. *See* WASH. STATE BAR ASS'N, WASHINGTON FAMILY LAW DESKBOOK section 65.4(1), at 65-9 (2nd ed. 2006); *Perry v. Costco Wholesale, Inc.*, 123 Wn.App. 783, 792, 98 P.3d 1264 (2004). “Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *In re Marriage of Griswold*, 112 Wn.App. 333, 339, 48 P.3d 1018 (2002) (quoting *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)). *See also Perry*, 123 Wn.App. at 792. “The fact finder measures the witness credibility, and we [Court of Appeals] do not review that determination on appeal.” *Miles v. Miles*, 128 Wn.App. 64, 70, 114 P.3d 671 (2005). The Court in *Miles* further stated, “if supported by substantial evidence, we do not reverse a trial court’s findings of fact on appeal.” *Id.* at 69. *See also In re Marriage of Zahm*, 138 Wn.2d 213 (Wash. 1999), citing *In re Marriage of Crosetto*, 82 Wn.App. 545,556, 918 P.2d 954 (1996).

The higher courts have found that where the trial court has weighed

the evidence, the reviewing court's role is simply to determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the trial court's conclusions of law. *In re Marriage of Greene*, 97 Wn.App. 708, 989 P.2d 144 (1999). A higher court should "not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility." *Id.* at 714 (citing *In re Marriage of Rich*, 80 Wn.App. 252, 907 P.2d 1234 (1996)). In *In re Sego*, the Supreme Court held that the witnesses are before the trial court and the trial court is "more capable of resolving questions touching upon the weight and credibility than we are." 82 Wash.2d 736, 740, 513 P.2d 831 (1973). The Supreme Court further stated that "as an appellate tribunal, we are not entitled to weigh either the evidence or the credibility of the witnesses even though we may disagree with the trial court in either regard." *Id.* at 740.

In this case the trial court, after hearing and seeing the witnesses and reviewing all of the documents properly entered as exhibits, weighed the evidence and made findings based on the law. The trial court entered a parenting plan which is in the best interests of the children. The trial court properly calculated the income of the parties and entered an order of child support. The trial court considered the economic circumstances of the parties, the value of the property and fairly and equitably divided the

property and debts. There is no basis in fact or in law for the court to overturn the orders entered by the trial court in this matter.

B. The Final Parenting Plan Was Entered Based On the Evidence and the Law And Is In the Best Interests of the Children

Trial courts are given broad discretion when determining how to best deal with the welfare of children, as they are in a unique position to weigh the evidence and determine credibility. *In re Marriage of Kovacs*, 121 Wash.2d 795, 801, 854 P.2d 629 (1993), *In re Marriage of Littlefield*, 133 Wash.2d 39, 46, 940 P.2d 1362 (1997). Therefore, a trial court's decision with regard to provisions of a parenting plan is reviewed for abuse of discretion. *In re Marriage of Kovacs*, 121 Wash.2d at 801, *In re Marriage of Wicklund*, 84 Wn.App. 763, 770, 932 P.2d 652 (1996), *In re Marriage of Horner*, 114 Wn.App. 495, 501, 38 P.3d 317 (2002), *review granted*, 149 Wash.2d 1027, 78 P.3d 656 (2003).

A trial court's decision is "manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." *In re Marriage of Littlefield*, 133 Wash.2d at 47. A court's decision is "based on untenable grounds if the factual findings are unsupported by the record." *Id.* The decision would be manifestly unreasonable "if it was based on incorrect standards or the facts do not meet the requirements of the correct standard." *Id.* The final parenting

plan entered by the trial court in this matter is fully supported by the evidence and the record. The terms of the final parenting plan are also based in the law. *See* RCW 26.09.187; RCW 26.09.191.

1. The Trial Court Did Not Violate Appellant's Parental Rights By Entering A Parenting Plan With Restrictions

There is no question that the due process clause of the Fourteenth Amendment establishes a strong constitutional right of parents to the care, custody, and companionship of their children. *See, e.g., In re the Welfare of Sumey*, 94 Wash.2d 757, 621 P.2d 108 (1980). *See also Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972). This right of parents however, is not an absolute protection against State interference. It is now well established that where a parent's actions or decisions seriously conflict with the physical or mental health of their child, the State has a right and responsibility to intervene to protect the child. *See Parham v. J.R.*, 442 U.S. 584, 603, 61 L. Ed. 2d 101, 119, 99 S. Ct. 2493 (1979); *Wisconsin v. Yoder*, 406 U.S. 205, 230, 233-34, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972).

Although the family structure is a fundamental institution of society, and parental prerogatives are entitled to considerable deference, they are not absolute, and must yield to fundamental rights of the child or important interests of the State. *State v. Koome*, 84 Wash.2d 901, 907, 530

P.2d 260 (1975), *In re Parentage of R.F.R.*, 122 Wn. App. 324, 331, 93 P.3d 951 (2004); *In re Custody of Smith*, 137 Wash.2d 1, 18-19, 969 P.2d 21 (1998); *In re the Welfare of Sumey*, 94 Wash.2d at 762. Therefore, in proceedings where the potential consequence is termination of parental rights, the abridgment of parental constitutional rights rightly necessitates an extremely substantial justification. *In re the Welfare of Sumey*, 94 Wash.2d at 111, *citing Roe v. Conn*, 417 F.Supp. 769, 779-80 (M.D.Ala.1976), *Alsager v. District Court*, 406 F.Supp. 10, 26 (S.D.Iowa 1975) *aff'd*, 545 F.2d 1137 (8th Cir. 1976).

However, a residential placement under RCW 26.09 does not infringe upon parental rights as severely as does a dependency adjudication or termination of parental rights under RCW 13.34 or RCW 13.32. The Husband's argument that this case should be likened to a deprivation case is without any merit. This proceeding was not instituted by the State. The State is not a party to the proceedings, and is not seeking custody of the children or any rights with respect to the children. Further, the terms of the final Parenting Plan do not terminate the Husband's rights to the children. CP at 118.

A dissolution proceeding is a private civil dispute, initiated by and involving private parties to resolve their relative legal rights regarding their children. *King v. King*, 162 Wash.2d 378, 385, 174 P.3d 659 (2007).

“The entry of a parenting plan effectuating the legislative purpose of continued parental involvement in the children’s lives does not equate to an action where the State is seeking to terminate any and all parental rights ... severing the parent-child relationship permanently.” *Id.* Even in a case where a final parenting plan results in children spending significantly more, or all, residential time with one only parent, both parents retain substantial rights regarding the children. *Id.* at 386.

In a dissolution proceeding, parental rights are not terminated, but allocated, which is entirely distinguishable from a termination order which leaves the parent without any right to privileges, immunities, duties, or obligations with respect to the child. *Id.* at 394. “The interest at stake here is not commensurate with the fundamental parental liberty interest at stake in a termination or dependency proceeding.” *Id.* at 395.

The Husband contends that the final parenting plan allows him absolutely no opportunity for residential time with the children which amounts to the deprivation of his parental rights, and cites to several child deprivation cases. *Appellant’s Opening Brief*, pgs. 22-23. His argument is simply not based in fact. This is not a deprivation case. Nor have his parental rights been terminated, either temporarily or permanently. The Court ordered visitation between the Husband and the children, but on the condition that any visitation be supervised by a professional supervisor

once the Husband re-enrolled in domestic violence treatment. CP at 118. Further, once the Husband has re-enrolled in domestic violence treatment and had made significant progress in that treatment, he may have unsupervised time with the children. CP at 118; RP at 638 - 639.

Given the ample amount of evidence presented at trial regarding the domestic violence perpetrated by the Husband against the Wife and against at least one of the children, the court's findings pursuant to RCW 26.09.191 are clearly supported by the record. RP at 637-638. Once the trial court made those findings, the trial court then imposed appropriate restrictions to protect the children. RCW 26.09.191; RP at 638-640.

At no time did the trial court terminate the Husband's parental rights. The Husband has the ability to spend time with the children. In fact, the only factor that is standing in the way of the Husband beginning visitation with the children immediately is the Husband's own refusal to re-enroll and participate in domestic violence treatment. RP at 618.

2. The Trial Court Properly Considered All Of The Evidence Before It In Determining Provisions For A Final Parenting Plan.

A trial court shall determine a child's residential schedule and parental responsibilities in accordance with what is in "the best interests of the child." RCW 26.09.187(3)(a). *In re Parentage of J.H.*, 112 Wn. App. 486, 49 P.3d 154 (2002), *review denied*, 148 Wash.2d 1024 (2003); *In re*

Parentage of Schroeder, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001). In determining a parenting plan, a court must considered making findings under RCW 26.09.191. If the court makes findings under RCW 26.09.191 (2)(a) the court shall limit the “parent’s residential time with the child.”

The Husband argues that before the trial court can impose the restrictions under RCW 26.09.191 (2), the court must order the parties to undergo screening and evaluations. Appellant’s Opening Brief at 22. The Husband provides no authority for this allegation. The statutes states that “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.” RCW 26.09.191 (4). Nowhere does the statute or law require the court to order “evaluations” of the parents by any third party. The court is to “screen” the parties and determine if a “comprehensive assessment” is appropriate.

In this case, the trial court properly screened both parties with respect to parenting functions, limitations, and the need for any further assessment by considering all of the evidence before it. RP at 637-638. In fact, the court had the domestic violence evaluation completed by Mr. Woody. Ex. 2. The court also had Mr. Woody’s expert testimony regarding the domestic violence in this case. RP at 281-370.

Substantial evidence supports the court’s finding that the Husband had

a history of domestic violence. RP at 637-639. To the extent that the Husband complains that the trial court relied solely on Stan Woody's opinion to the exclusion of all other evidence, this argument is simply without merit. The record clearly shows that the trial court considered not only Mr. Woody's opinion but all the testimony and evidence presented by both sides, including the Husband's own testimony and that of his witnesses. In its oral ruling, the court stated "[t]here was ample evidence before [it] of domestic violence perpetrated by [Mr. Brunson] against [Mrs. Brunson], and also against one child... but as to one child, yes, that as proved ... I heard all the testimony." RP at 637-638.

In this case, the court engaged in a thoughtful analysis of information provided by and about both parties, and found that the Husband has a history of committing acts of domestic violence. RP at 637-639. In order to appropriately safeguard the best interests and physical safety of the children, the trial court saw fit to impose limitations on the Husband's residential time with the children. RP at 637-9. There was no need for further assessment of either party.

3. Limitations On Appellant's Residential Time and Decision-Making Are Mandatory Under RCW 26.09.191(1) and (2).

When the court finds there has been a history of domestic violence, regardless of the severity of such acts, restrictions are mandatory. *RCW*

26.09.191. If the trial court finds that a parent engaged in physical abuse, it *must* not require mutual decision-making and it *must* limit the abusive parent's residential time with the child. *In re Marriage of Caven*, 136 Wash.2d 800, 966 P.2d 1247 (1998), *emphasis added*. Once there has been a finding that a parent has a history of domestic violence, the Washington State legislature requires courts to impose certain limitations or conditions upon the parent who committed those acts, unless the court also makes specific and express findings why such limitations are not necessary under the specific facts of a case. *In re Marriage of Mansour*, 126 Wn.App.1, 10, 106 P.3d 768 (2004).

Here, after weighing all of the evidence, the trial court found that the Husband had committed acts of domestic violence. RP at 637-8. There is ample evidence in the record to support the restrictions imposed by the court as said restrictions were to protect the children from harm. There was no reason to find that the required restrictions were anything but necessary.

In compliance with the law and to protect the minor children, the court properly imposed restrictions on the Husband's residential time with the children. RP at 638-9. The court also properly imposed limitations on the Husband's decision-making with respect to the children, as required by RCW 26.09.191. RP at 640.

4. The Trial Court Did Not Err In Declining To Appoint A Guardian Ad Litem For The Children.

First, the court should note that decision of the commissioner on February 23, 2013 is not part of this appeal. The Husband requested a Guardian ad Litem (“GAL”) as part of his motion for the hearing on February 23, 2013. The court did not appoint a GAL. That order is not part of the appeal. However, even if the court reviews this request as part of the trial, there was no legal requirement that the trial court suspend the trial and appoint a GAL in this case.

Issues of statutory construction are questions of law that appellate courts review de novo. *Caven v. Caven*, 136cWash.2d 800, 806, 966 P.2d 1247 (1998), quoting *Dioxin/Organochlorine v. Pollution Control Hearings Bd.*, 131 Wash.2d 345, 352, 932 P.2d 158 (1997). In applying statutory construction rules to the unambiguous language of a statute, “the court must give words their plain and ordinary meaning, unless contrary legislative intent is evidenced in the statute”. *Caven* at 806, quoting *Erection Co. v. Department of Labor & Industries*, 121 Wash.2d 513, 518, 852 P.2d 288 (1993).

The current version of RCW 26.09.220 reads in pertinent part; “[t]he court *may* appoint a guardian ad litem to represent the interests of a minor or dependent child when the court believes the appointment of a guardian

ad litem is necessary to protect the best interests of the child in any proceeding under this chapter.” *RCW* 26.12.175(1)(a) (italic added). The use of the modal verb “may” clearly evinces the legislature’s intent to make the appointment of a GAL for the children an option available to the court, not a mandatory requirement. Given that the language contained within the statute is clear and unambiguous, the court must give the words contained within that statute their plain and ordinary meaning, which is that the court has within its discretion to determine whether or not to appoint a GAL for the children. It is obvious from the language of the statute that this is the result that was intended, otherwise the legislature would not have used this explicit language.

In considering whether to appoint a GAL, the court should consider whether sufficient evidence has been presented to determine what is in the child’s best interest. *In Re Marriage of Nordby*, 41 Wn.App. 531, 533, 705 P.2d 277 (1985). Where custody is in serious dispute, and where on the surface both parents appear to be fit, and where both parties have failed to adequately develop the relevant facts, the court should appoint an attorney for the children or order an investigation into those relevant factors so that an objective decision can be made that serves the best interest of the children. *In Re Marriage of Nordby* at 533, citing *In Re Marriage of Waggener*, 13 Wn.App. 911, 917, 538 P.2d 845 (1975).

Further, the present case is similar to that of *Dugger v. Lopez*, 142 Wn.App. 110, 121, 173 P.3d 967 (2007). In *Dugger*, the Appellant argued that the trial court abused its discretion by not appointing a GAL for the minor child. The appellate court held that “the statute is now clear on its face that appointment of a GAL is discretionary in [p]arentage [a]ction actions, as well as in dissolution actions.” *Id.* at 120. Just as in the present case, the trial court in *Dugger* considered testimony from both parents, weighed the evidence, and made findings that were sufficiently supported by the record. *Id.* The appellate court therefore found that the trial court’s decision was not unreasonable or untenable, and it did not abuse its discretion by not appointing a GAL for the minor child. *Id.* at 121.

In this case, the Husband argues that the court failed to follow the statute when it neglected to appoint a GAL or counsel for the children. *Appellant’s Opening Brief*, pg. 23. But Appellant fails to point to any material evidence that the court lacked when it was evaluating the children’s best interests. Additionally, he did not seek revision of the temporary order denying his motion to appoint a GAL, nor did he revisit that request in his motion that was heard on June 28, 2013. CP at 93.

Moreover, only where the elements of RCW 26.09.191 are not dispositive must the court engage in an analysis of the factors in RCW 26.09.187(3). *RCW 26.09.187(3)(a)*. On the surface, the Husband did not

appear to be fit, so further analysis of RCW 26.09.187(3)(a) was not necessary. At the time of trial, the Husband had already been found to have committed physical abuse against one of the children by CPS. Exhibit 1, *See also* RP at 106. He had undergone a Domestic Violence Assessment which found him to be an “intimate terrorist.” Exhibit 2, *See also* RP at 290-291. There was a Domestic Violence Protection Order entered against him. Exhibit 3. And, he had been convicted by a jury of assault against the child. RP at 156-157; Ex. 33.

The Husband points to no precedence binding upon this court where due process necessitates the appointment of a GAL for minor children. The trial court heard testimony from both parents, as well as a CPS social worker, and a domestic violence expert. A wealth of evidence was submitted and considered as to the issue of domestic violence at both the temporary order stage and at trial. RP at 638-639. It simply was not expeditious, economical, or necessary to appoint a GAL. The court exercised its discretion under RCW 26.12.175(1) (a), and properly declined to appoint a GAL.

5. The Court Did Not Commit Evidentiary Or Procedural Errors Related To The Parenting Plan

The Husband claims the court committed several evidentiary and procedural violations in relation to the testimony of Stan Woody and

Janelle Berger. Said allegations have no basis in law.

The Husband claims that somehow Washington Superior Court Civil Rule 26 was violated because there was no CR26 (i) conference regarding the Washington Evidence Rule 904 submission by the Wife. This claim makes no sense. CR 26 addresses pretrial discovery requests. It has nothing to do with an ER 904 submission.

The Husband also alleges the trial court committed error by not addressing his objection to the ER 904 submission until the day of trial. This allegation has no basis in the law. ER 904 is a rule of evidence wherein a party may submit documents thirty (30) days in advance of trial to the other party in order to have those documents admitted at trial without witness authentication.

The purpose of the submission is to allow the documents to be admitted by the court as evidence without having a witness present to authenticate them. “Any party intending to offer a document under this rule must serve on all parties a notice, no less than 30 days before trial, stating that the documents are being offered under Evidence Rule 904 and shall be deemed authentic and admissible without testimony or further identification, unless objection is served within 14 days of the date of notice, pursuant to ER 904(c).” ER 904.

The trial court makes all the rulings regarding evidence for the trial.

Of course, any ER 904 objections would be heard by the trial court immediately prior to starting the trial. Then, the parties would know what documents are being submitted and which will need to be presented through witness testimony.

In this case, the trial court conducted motions in limine immediately prior to beginning the trial. RP at 5-42. The trial court specifically addressed each of the Husband's objections to the documents submitted by the Wife under ER 904. RP at 31-42. The trial court refused to enter three of the documents submitted by the Wife pursuant to ER 904 and required that said documents be presented through witness's testimony. RP at 42.

The Husband further alleges the court committed error by allowing Stan Woody to testify as an expert. Mr. Woody was properly qualified as an expert. RP at 281-285. The Husband did not object to Mr. Woody's testimony. RP at 285. The court asked the Husband if he objected to Mr. Woody testifying as an expert and the Husband did not object. RP at 285.

While it is true that the Husband objected to Mr. Woody testifying by telephone, he did not object to him testifying in person. In fact, when addressing the issue of Mr. Woody appearing by telephone, the Husband states, "Yeah, I object. I believe he should be here in person...And I would like to question the witness live." RP at 8.

Moreover, the Husband did not object to the admission of Mr.

Woody's evaluation of the Husband when it was presented through Mr. Woody. The Husband objected to said evaluation being admitted through ER 904 and, as a result, the trial court did not allow its submission without witness authentication. RP at 42. However, when Mr. Woody testified and the evaluation was offered as exhibit 2, the Husband did not object. RP at 290.

The Court of Appeals in *State v. Ruiz*, 176 Wn.App. 623, 644, 309 P.3d 700 (2013) held, “[t]he failure to raise an evidentiary objection to the trial court waives the objection. *State v. Guloy*, 104 Wash.2d 412, 422, 705 P.2d 1182 (1985); *State v. Boast*, 87 Wash.2d 447, 451–52, 553 P.2d 1322 (1976). As explained in *Guloy*: A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. Since the specific objection made at trial is not the basis the defendants are arguing before this court, they have lost their opportunity for review. *Guloy*, 104 Wash.2d at 422, 705 P.2d 1182 (citation omitted).”

The Husband cannot make allegations of evidentiary error when he failed to object at the trial level. He failed to preserve the objections at trial. The Husband may have not liked what Mr. Woody said but the Husband did not object to his testimony or him being considered as an expert by the court. Further, the Husband did not object to the report prepared by Mr. Woody being admitted as Exhibit 2. RP at 290.

The Husband likewise alleges that the testimony of Janelle Berger, a Child Protective Services Worker, was improper. However, the Husband did not object to her testimony at trial. Ms. Berger was offered as an expert witness for the purpose of “investigation and identifying child abuse”. RP at 96. The Husband did not object but simply asked to add “negligence” to Ms. Berger’s realm of expertise. RP at 96. Further, Ms. Berger’s records, while not admitted under ER 904, were authenticated by her and admitted without objection by the Husband. RP at 105.

RCW 13.50.100 does allow for release of information concerning a child protective services investigation. Under RCW 13.50.100 “(3) Records retained or produced by any juvenile justice or care agency may be released to other participants in the juvenile justice or care system.” Under RCW 13.50.010 “(a) "Juvenile justice or care agency" means any of the following: Police, diversion units, court.”

In this matter, Ms. Berger had conducted an investigation regarding allegations against both the Husband and the Wife. RP at 99-105. She testified to her direct knowledge of that investigation. RP at 99-130. Ms. Berger testified to what she saw and what she heard. Id. Ms. Berger also testified to her findings in that investigation. RP at 106. Neither party objected to her testifying. The information Ms. Berger provided was relevant to the determination of custody. Ms. Berger’s testimony was

properly admitted and considered by the trial court.

6. The Court Did Not Violate the Husband's Fifth Amendment Privilege

The trial court did not violate the Husband's Fifth Amendment privilege when the trial court required the Husband to respond to the question as to whether he had obtained a new domestic violence evaluation. Upon being asked the question, the Husband failed to successfully assert his Fifth Amendment privilege against self-incrimination, as his answer would not have added to the evidence needed to prosecute him for a crime.

In order for a party to successfully assert their Fifth Amendment privilege against self-incrimination, a witness must first establish "sufficient facts to sustain the privilege claim." *Seventh Elect Church in Israel v. Rodgers*, 34 Wn.App. 96, 103, 660 P.2d 294, 298. A witness attempting to assert their Fifth Amendment privilege bears this burden because: "[t]he courts cannot accept Fifth Amendment claims at face value, because that would allow witnesses to assert the privilege where the risk of self-incrimination was remote or even nonexistent, thus obstructing the functions of the courts." *Id.* at 100.

As a result of judicial apprehension to blindly accept a witness's Fifth Amendment claim merely because it was asserted, the court emphasized

that the protection “must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer.” *Id.* (*Quoting Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct 814, 818 (1951)). In regards to the “danger” that a witness must face, “the privilege protects against real dangers, not remote and speculative possibilities.” *Id.* (*Quoting Zicarelli v. New Jersey Comm'n of Investigation*, 406 U.S. 472, 478, 92 S.Ct. 1670, 1675 (1972)).

Although it is not required that a witness go so far as to convince the court that their answer to a question would “support a criminal conviction,” it *is* required that the witness “demonstrate that the answer would furnish a link in the chain of *evidence needed to prosecute the witness for a crime.*” *Id.* (emphasis added). With this standard in mind, the determination of whether a witness has met this burden is “vested in the trial court to be exercised in its sound discretion under all of the circumstances then present.” *Id.* (*Quoting State v. Parker*, 79 Wash.2d 326, 332, 485 P.2d 60 (1971)). If, “based upon the particular facts of the case, it clearly appears that silence is not warranted” then the court “must require the witness to answer.” *Id.*

In this case, the Husband failed to show to the trial court that responding to the question as to whether he had taken a new evaluation would be a basis for a criminal prosecution. In fact, the only statement the

Husband makes is that his attorney told him not to answer any questions. RP at 545-547. As the trial court points out, the issue of a domestic violence evaluation and treatment was significant with regards to the parenting plan in the dissolution matter. RP at 546. The trial court properly concluded that the question was proper and that it was not violating the Husband's privilege.

C. The Order of Child Support Entered By The Trial Court Is Proper Under The Law

1. The Court Correctly Imputed Income To The Husband At The Median Net Monthly Income

RCW 26.19.071(6) states the court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. Imputing income to a voluntarily unemployed or underemployed parent is mandatory. RCW 26.19.071(6); *see also In re Marriage of Goodell*, 130 Wn.App. 381, 390, 122 P.3d 929 (2005); *In re Marriage of Clarke*, 112 Wn.App. 370, 48 P.3d 1032 (2002); *In re Marriage of Pollard*, 99 Wn.App. 48, 52, 991 P.2d 1201 (2000).

A parent cannot avoid obligations to his or her children by voluntarily remaining in a low paying job or by refusing to work at all. The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. RCW 26.19.071(6); *See also In re Brockopp*, 78 Wn.App 441, 445, 898 P.2d 849 (1995).

RCW 26.19.071, goes on to state that “[t]he 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.” RCW 26.19.071 (6). Once the court determines a party is underemployed or unemployed, RCW 26.19.071 (6) provides guidance as to how the court should impute income to that party.

A court may impute income to a parent at census table’s rate when the court finds the parent is voluntarily unemployed or underemployed, and it is “impossible to compute” that parent’s income due to their own “deceptions or concealment”. *In re Marriage of Dodd*, 120 Wn. App. 638, 644-45. 86 P.3d 801 (2004); RCW 26.19.071 (6)(e). In *Dodd*, Mr. Dodd bore the burden of proving his reduced income and failed to do so. *Id.* at 646. In that case, even though Mr. Dodd was working, the court found his situation “was analogous to voluntary unemployment or voluntary unemployment” because the court could not determine his actual income. *Id.* at 646. The trial judge on revision found it was appropriate to impute income to Mr. Dodd based on census figures. *Id.* at 645. The court of appeals affirmed that decision. *Id.* at 646.

In this case, the Husband failed to provide the court with documentation of his income. He provided a copy of one unemployment pay record. Ex. 66. However, he testified that he would be going back to

school. RP at 550. When asked about his future employment, the Husband repeatedly stated he did not know his future income because he was going to go to school. RP at 550, RP at 534, RP at 535, RP at 531. The Husband seemed to believe that because he planned to return to school he would be exempt from a child support obligation which is false. If the Husband chooses to return to school and not work then he is clearly voluntarily unemployed. *See* RCW 26.19.071.

Ample evidence was provided as the Husband's college degree in business and the subsequent work history in the flooring business. RP at 142-143, 169-173, 535-539. The Husband was union member and had extensive experience in the flooring business. RP at 169-171. In fact, the Husband had even managed his own flooring business. He did not provide the court with any documentation of job searches, resumes, job applications or any document showing he had applied for jobs. RP at 536. While it is true that the Husband had suffered a work injury, he had also worked for HTI Polymer after that injury. RP at 170. There was no medical evidence that the Husband was unable to work.

Moreover, the Husband made no effort to show the court a clear picture of his financial situation. The Husband failed to provide his bank statements to the court. He claimed that he did not provide the documents because the Wife had not requested them. RP at 536. It was not the

Wife's responsibility to provide evidence to the court for the Husband.

Based on the evidence presented, the trial court, when rendering its decision stated "as to his [the Husband's] income, I don't really know what it's likely to be in the near future. It's a little bit hard to know, and that's the reason why I'm imputing income at this point, using the statute." RP at 652. The court went on and stated "Mr. Brunson you leave me to guess when you don't provide documents." RP at 661.

The Husband argues that the court should have used minimum wage but there is no factual or legal basis for that claim. RCW 26.19.071 (6)(d). Unemployment is not public assistance or disability benefits. Further, the Husband had only been incarcerated for approximately 13 days and there was no evidence said incarceration affected his ability to work. The Husband provided no proof of any recent jobs, minimum wage or otherwise. RP at 536. The Husband's historical income was far greater than minimum wage. RP at 473; RP at 555. None of the factors under RCW 26.19.071 (6)(d) apply to the Husband such that the trial court should have imputed his income at minimum wage.

Based on the evidence before the trial court, the Husband was voluntarily unemployed. The Husband failed to provide a clear picture of his financial situation and the trial court was unable to determine what his income would be. The trial court properly applied RCW 26.19.071(6) (e)

and imputed income to the Husband at the census rate.

2. The Court Acted Properly In Not Applying a Deviation To The Child Support Calculation

The court should be aware that at no time during the trial did the Husband request a deviation from the standard child support calculation. When asked about child support, the Husband asked the court to adopt his proposed Worksheet, but nothing more. RP at 607. Now, for the first time as part of this appeal, the Husband is claiming a deviation should have been ordered because the order for domestic violence perpetrator treatment equates to an expense for parental reunification under RCW 13.34. RCW 26.19.075 (1) (c) (v).

The failure to set forth adequate reasons for deviation is an abuse of discretion and subjects a decision to reversal. *In re Marriage of Glass*, 67 Wn. App. 378, 384, 835 P.2d 1054 (1992). A deviation might be appropriate under 26.19.075(1)(c) if there are “(v) [c]osts incurred or anticipated to be incurred by the parents in compliance with court-ordered reunification efforts under chapter 13.34 RCW or under a voluntary placement agreement with an agency supervising the child.” RCW 26.19.075. RCW 13.34 applies in child protection service (CPS) actions where children are taken into custody by the State. The children in this matter were never taken into State custody.

This action fails under RCW 26.09, not RCW 13.34. The trial court's order for domestic violence perpetrator treatment is not the same as reunification requirements under RCW 13.34. There is simply no legal basis for the court to even consider a deviation under RCW 26.19.075 (1)(c)(v) because this matter is not subject to RCW 13.34.

Further, when the trial court inquired to the Husband about enrolling into a domestic violence treatment the Husband responded he would believe it to be punitive at this point. RP at 618. The Husband continually made excuses for not entering into a DV program such as he didn't know where he would reside, or if he would even be in the state. RP at 620. The court could not even consider a deviation for something the Husband indicated he was not going to do.

Specific reasons for any deviation granted or denied must be set forth in the written findings. RCW 26.19.035(2); RCW 26.19.075(3), (5). A trial court is required to enter written findings of fact supported by the evidence when it enters an amount for support which deviates from the standard calculation. *State ex rel. Sigler v. Sigler*, 85 Wn.App. 329, 338 (1997).; RCW 26.19.035(2); *In re Marriage of Sacco*, 114 Wash.2d 1, 4, 784 P.2d 1266 (1990). In this case, the trial court could not make any written findings supporting a deviation because the Husband first failed to request one and second, failed to provide any evidence to support such a

request. The trial court cannot make a finding on purported facts that were never presented at the trial.

Husband's argument that he is entitled to a deviation under RCW 26.19.075(1)(c)(v) is incorrect and has no merit. The Husband is not entitled to a deviation from the standard child support calculation.

**D. The Court Distributed The Property and Debts Of The Parties
in a Fair and Equitable Manner**

The Husband falsely alleges that the court failed to properly value certain items of property and, thereby, erred in the division of the property and debts. The Husband also incorrectly argues that the trial court failed to properly characterize certain property and, thereby, erred in the division of property and debts. The court considered all the evidence presented and all the factors in this case and determined a fair and equitable division for property and debts in this matter.

1. The Trial Court Did Value the Properties In This Matter

The Husband is alleging the trial court did not place a value on the marital home and that is an error which would warrant the court remanding the matter. Appellant's Opening Brief, 12. First, the trial court did place a value on the home based on the evidence presented. RP at 643. While it may be true that the trial court acknowledged the evidence presented on the value of the home was "weak", the trial court did place a

value of zero on the home. RP at 643.

Moreover, the issue regarding the value of the home was raised and considered as part of the Husband's Motion for Reconsideration and New Trial. CP at 125. As part of said Motion, the trial court reviewed additional information from both parties and found that the original decision was fair and equitable. CP at 144.

The Supreme Court in *Hadley* stated, "the purpose of requiring that the trial court set forth its valuation of the property in a dissolution action is to provide the appellate court with the opportunity to discover whether there has been an abuse of discretion." *In re the Marriage of Hadley*, 88 Wash.2d 649, 657, 565 P.2d 790 (1977). Further, the Court of Appeals in *Greene*, stated "the appellate court may look at the record to determine the value of the assets." *In re the Marriage of Greene*, 97 Wn.App. 708, 712, 986 P.2d 144 (1999); citing *Hadley*.

In this case, while the Husband may not have agreed with the trial court's valuation of the home, the trial judge did place a value on the home based on the evidence presented at trial.

2. Mischaracterization of the Property Is Not A Basis To Change The Lower Court's Decision

It appears that the Husband is alleging the trial court failed to correctly characterize the \$7000 which he received during the marriage as an L&I

award as separate property and likewise failed to characterize the truck as his separate property.

The Supreme Court in *In re the Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999), stated “this Court has favored characterizing property as community property instead of as separate property unless there is clearly no question of its character.” Further, the courts have held that property is not characterized as separate simply based on the title or the name under which the property is held. *In re the Marriage of Skarbeck*, 100 Wn.App. 444, 448, 997 P.2d 447 (2000).

In this case, the trial judge correctly noted that if the Husband was claiming separate property, it was his burden to show that property was truly separate in nature. RP at 641. The trial court reviewed the evidence and concluded that the Husband had not met his burden and had not proven the truck was separate property. RP at 641.

The court likewise found that the Husband had received his L&I award during the marriage and had co-mingled it with marital funds. RP at 646. The Husband did not present evidence during the trial so as to properly trace the funds. It was the Husband’s burden to trace the funds in order to show the court they were separate property and he failed to do so.

In addition, the Husband failed to meet his burden in proving the alleged debt owed to his mother by the marital community. RP at 644-645.

He failed to provide any documentation of the debt including, but not limited to, a contract for the debt. RP at 444. The flooring business closed in 2012 and the Husband alleged his mother was owed \$26,000 and that is why he gave her said funds from the parties' joint accounts at the time of separation. RP at 442. As the trial court stated, "there isn't really any evidence beyond the bare assertion by the Respondent's [Husband's] mother that she is owed money, and that won't do. Mr. Brunson has failed to carry the burden to establish that any work performed by his mother that benefitted the community was anything other than a gift of services to the community." RP at 645.

Further, while a trial court must determine the nature and extent of the parties' community and separate property prior to making a division of the property, RCW 26.09.080, mischaracterization of property is not grounds for setting aside a trial court's allocation of liabilities and assets, so long as the distribution is fair and equitable. *In re Marriage of Brady*, 50 Wn.App. 728, 731, 750 P.2d 654 (1988). Where there is mischaracterization, the reviewing court will remand if the reasoning of the lower court indicates that the property division was "significantly influenced by characterization and (2) that it is not clear had the court properly characterized the property, it would have divided it in the same way." *In re Marriage of Shannon*, 55 Wn.App. 137, 142, 777 P.2d 8

(1989).

Moreover, the Supreme Court has held, “this court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors”. *In re Marriage of Konzen*, 103 Wash.2d 470, 478, 693 P.2d 97 (Wash. 1985). The Court found that “the statute directs the trial court to weigh all of the factors, within the context of the particular circumstances of the parties, to come to a fair, just and equitable division of property.” *Id.* at 478. “The character of the property is a relevant factor which must be considered, but is not controlling.” *Id.* at 478 (citing *In re Marriage of Hadley*, 88 Wash.2d 649, 656, 565 P.2d 790 (1977)).

In *Marriage of Worthington*, the Washington State Supreme Court ruled that even though the trial court may not have properly characterized the land in dispute, the court’s approach was correct in light of the facts of the case, the statute, emphasizing the necessity of a just and equitable division of the property, and the law which provides that all property of the parties, whether it be community or separate in nature is subject to the jurisdiction of the court. *In Re Marriage of Worthington*, 73 Wn.2d 759, 440 P.2d 478 (Wash. 1968). The foregoing ruling makes clear that the characterization of the property is not necessarily controlling. *Id.* at 768. It is unnecessary to consider in detail whether certain property involved is

to be characterized, piece by piece, as community or separate property. *Id.* at 769.

Pursuant to the findings of fact that the trial court made, all assets and debts before were properly characterized. Furthermore, regardless of the characterization of the property, as cited above, any improper characterization is not grounds for remand because the trial court did not abuse its discretion in subsequently dividing the property in a fair and equitable manner.

3. The Court Did Issue A Fair and Equitable Division of the Property and Debts In The Case

The trial court's distribution of property in a dissolution action is guided by statute, which requires it to consider multiple factors in reaching an equitable conclusion. These factors are outlined in RCW 26.09.080. In weighing the factors, the court must make a "just and equitable" distribution of the marital property. RCW 26.09.080. In doing so, the trial court has broad discretion in distributing all marital property, including separate, and its decision will be reversed *only if there is a manifest abuse of discretion* [emphasis added]. *In re the Marriage of Griswold*, 112 Wn.App. 333, 339, 48 P.3d 1018 (2002) (citing *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992)). A manifest abuse of decision is based on untenable grounds or reasons. *In re Marriage of*

Muhammad, 153 Wn.2d 795, 803, 108 P.3d 770 (2005); quoting *In re Marriage of Littlefield*, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997).

In fact, the real question is what is the fair and equitable division of the parties' property based on the facts of the case and financial circumstances of the parties. RCW 26.09.080. The trial court heard and reviewed the evidence. The court considered the financial circumstances of the parties. The trial court made a fair and equitable division of the property. That decision should remain in full force and effect.

E. The Court Acted Properly By Not Recusing Itself After Full Disclosure To the Parties.

The Husband's claim that the trial court erred for failing to recuse himself from the case after learning that he was employed at the prosecutors' office when the Husband was arrested for domestic violence in 2008 is baseless. The trial court properly disclosed the facts which may have lead to the appearance of bias. RP at 76-81. Upon hearing that there had been a domestic violence criminal case in 2008, the trial court disclosed that he was working in the domestic violence unit of the prosecutor's office at that time. RP at 76-77. Evidence was presented that the 2008 charge against the Husband was dismissed and never prosecuted. RP at 77-80. The trial court and counsel for the Wife questioned the Wife

as to the potential bias. Id. The trial court allowed the Husband to question the Wife and the court about the issue. Id.

The trial court stated that he had no recollection of the case and that he had no prior meetings or contact with either party. RP at 76-81. Each party verified that they had no contact with trial court in his role as a prosecutor. Id. The trial court informed both parties on the record that they could at that time request that he recuse himself if they thought there could be some bias due to this information. Id.

Each party clearly stated on the record they had no issue with the trial court hearing the case and did not believe there was any conflict. RP at 80. After full disclosure both parties stated clearly and concisely that there was no bias. RP at 80-81.

The trial court followed the requirement under the Code of Judicial Conduct (“CJC”) 2.11 and provided any and all necessary information to the parties, and each party made an informed decision. The Husband knowingly and willingly agreed to allow the trial court to hear this matter. RP at 80-81. The Husband cannot now as part of this appeal, claim the trial court should have recused itself when the Husband specifically stated there was no conflict.

F. Wife Requests an award of Attorneys’ Fees on Appeal

The court has the discretion to order a party to pay the other party’s

attorney fees and costs associated with the appeal of a dissolution and modification action. RCW 26.09.140; RAP 18.1. RCW 26.09.140 states in pertinent part that: “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 attorney’s fees in addition to statutory costs.” RCW 26.09.140. Attorney fees can be awarded when they are authorized by contract, statute, or are a recognized for equity. *In Re the Matter of Kourtney Scheib*, 160 Wn.App. 345, 249 P.3d 184, 188 (2011), citing *Mellor v. Chamberlin*, 100 Wash.2d 643, 649, 673 P.2d 610 (1983). If attorney fees are recoverable at trial, then the prevailing party may recover fees on appeal. *Id.*, citing RAP 18.1, see also *Landberg v. Carlson*, 108 Wn.App. 749, 758, 33 P.3d 406 (2001).

RAP 14.2 provides in pertinent part that a commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review. RAP 14.2. The court should consider the abusive litigation that the Husband engaged in during the dissolution action and continues to engage in with this appeal. There is no basis in law or fact for the Husband to have filed this appeal. The Husband made multiple allegations of errors on appeal which he did not even object to at trial. It was filed to continue to harass the Wife and cause her to incur

unnecessary legal expenses; expenses which she cannot afford. It is an extension of the abusive behavior he displayed throughout the parties' marriage and continued throughout the lower court case.

The Husband is held to the same standard as a party represented by counsel. *Edwards v LeDuc*, 157 Wn. App. 455, 460, 238 P.3d 1187 (Wash.App. Div. 2 2010), citing *Westberg v. All-Purpose Structures, Inc.* 86 Wash.App. 405, 411, 936 P.2d 1175 (1997). If an attorney had filed this appeal with the allegations made by the Husband it would be a basis for CR 11 sanctions. This court must hold the Husband accountable for his actions in this matter. The Husband's appeal is frivolous and filed in bad faith. The Wife should not have to incur the expense of defending against such action.

The Wife has properly submitted her affidavit of financial need and, the court can see that she does not have the funds to pay attorney fees to respond to this frivolous appeal which the Husband has filed. The Wife is supporting herself and the parties' two children. The Wife is requesting she be awarded fees and costs incurred in responding to this appeal.

V. CONCLUSION

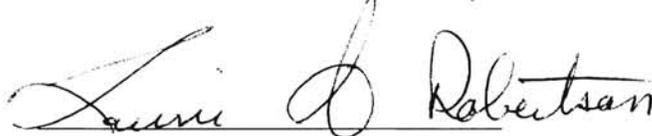
In this case, the trial court carefully reviewed the testimony of the witnesses and the evidence presented in the case. The court properly considered the evidence with regards to the extreme domestic violence

perpetrated by the Husband against the Wife and the child and established a parenting plan which is in the best interests of the children. The court followed the statute and properly imputed income to the Husband as he was voluntarily unemployed. The court entered an final order of child support according to the accurate child support calculation. The court did not order a deviation as one was not requested and would not have been proper had it been requested. The court had the right to award any of the property as it saw fit to achieve a fair and equitable division. In light of the facts of the case and the financial circumstances of the parties, the trial court made a fair and equitable division of the property. The decision of the trial court and the final orders should be affirmed.

The Wife, Jennifer Brunson, respectfully requests that this court affirm the trial court's decision and issue an award of attorney's fees and costs in her favor.

DATED the 19 day of September, 2014.

RESPECTFULLY SUBMITTED,

A handwritten signature in cursive script that reads "Laurie G. Robertson". The signature is written in black ink and is positioned above the typed name and title.

Laurie G. Robertson, WSBA#32521
Attorney for Respondent/Wife