

No. 71899-1

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Court of Appeals
Division I
State of Washington

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Parenting and Support of:

OLIVIA ESTELLA DANHOF,

Child,

EVELINA BARHUDARIAN,

Appellant,

and

ANDREW BERNARD DANHOF,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE SUZANNE PARISIEN

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The trial court erred by improperly relying on the “friendly parent” concept, which this Court rejected over a decade ago in *Lawrence v. Lawrence*, 105 Wn. App. 683, 688, 20 P.3d 972 (2001), in placing the child primarily with the father, and granting him sole decision-making, despite undisputed evidence that the mother has been the child’s primary caregiver since her birth. The trial court failed to consider the statutory factors under the Parenting Act and instead relied solely on its belief that the father would be more “flexible” and “provide more contact” between the child and the other parent than would the mother. (RP 520) The trial court’s belief that the mother was “openly hostile” towards the father was irrelevant when the trial court found no basis for RCW 26.09.191 limitations on the mother’s residential time, because “custody and visitation privileges are not to be used to penalize or reward parents for their conduct.” *Lawrence*, 105 Wn. App. at 687-88. Compounding its error was the trial court’s improper reliance on inadmissible hearsay and illegal recordings of private conversations between the parents to conclude that the mother was not credible and had fabricated domestic violence allegations.

This Court should reverse and remand to the trial court for a proper consideration of the statutory factors in crafting a parenting plan.

II. REPLY TO ARGUMENT

A. The trial court failed to use the proper legal standard in making its parenting plan and depriving the mother of decision-making and primary care.

1. The trial court improperly relied on the “friendly parent” concept.

The trial court did not consider the statutory factors under RCW 26.09.187 before designating the father as the daughter’s primary residential parent once she reaches school-age, and granting him sole decision-making. Instead, the trial court improperly based its entire decision on which parent was “most likely to foster the child's relationship with the other parent.” This was error, as the “friendly parent” concept imbibed in that consideration cannot be a basis to designate the father as the primary residential parent under *Lawrence v. Lawrence*, 105 Wn. App. 683, 687-88, 20 P.3d 972 (2001).

A trial court’s discretion in crafting a parenting plan is not unlimited. Its decision must be guided by the factors in RCW 26.09.187(3) and based on the child’s best interests. *Jacobson v.*

Jacobson, 90 Wn. App. 738, 745, 954 P.2d 297, *rev. denied*, 136 Wn.2d 1023 (1998). The trial court's decision here was not guided by the statutory factors or the child's best interests. With the exception of noting that the daughter is presently "doing well" is "very bonded to both parents" and "very bonded" with the mother's older son from a previous relationship (CP 185), the trial court's "findings" were focused entirely on what it perceived was bad behavior by the mother against the father. (*See* CP 186-88) But, as this Court has held, "custody and visitation privileges are not to be used to penalize or reward parents for their conduct." *Lawrence*, 105 Wn. App. at 687-88.

In any event, the mother's conduct described by the trial court occurred shortly after the father unilaterally moved out of the parties' shared residence and before the litigation commenced – a period our courts have acknowledged to likely be a period of "uncooperative" behavior and when there would be no "expectation of perfect harmony." *Jacobson*, 90 Wn. App. at 745; *See* CP 186-88. As the parenting evaluator acknowledged, during the more recent period before trial, she "got the sense that there was a desire to find peace, to be friends with one another and to be able to take care of [the daughter]." (RP 232) Thus, the trial court should not

have held the mother's immediate post-separation conduct against her.

The trial court clearly stated its reason "for adopting, not a hundred percent, but in – substantially adopting [the father]'s parenting plan," and its reason had nothing to do with the factors of RCW 26.09.187. (*See* RP 520) Instead the trial court's "reason" for making its parenting plan was its belief that the father is going "to be flexible" and "provide more contact between the [other] parent and child:"

With that in mind, however, given what I have already discussed regarding the mother's hostility and uncooperative nature toward Mr. Danhof, **it's clear to this court that the only party that is going to be flexible, at least at this point, and perhaps provide more contact between the parent and child is Mr. Danhof and it is for that reason that the Court is adopting, not a hundred percent, but in – substantially adopting Mr. Danhof's parenting plan.**

(RP 520) (*emphasis added*) But designing a parenting plan based on which parent is more "flexible" and will "provide more contact" is exactly the "friendly parent" concept that this Court rejected in *Lawrence*. A trial court is prohibited from deciding "primary residential placement [based on which] parent [is] most likely to

foster the child's relationship with the other parent.” *Lawrence*, 105 Wn. App. at 687-88.

Burrill v. Burrill, 113 Wn. App. 863, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003) (Resp. Br. 25) does not support the father's claim that the trial court could base its designation of primary residential parent on one parent's "high conflict behaviors." Unlike in *Burrill*, the trial court here did not find a basis under RCW 26.09.191 to limit the mother's residential time due to an "abusive use of conflict which creates the danger of serious damage to the child's psychological development." 113 Wn. App. at 868; RCW 26.09.191(3)(e). The mother's actions in *Burrill* directly involved the children and were far more extreme than the mother's conduct here.

For instance, the mother in *Burrill* coached the younger daughter to fabricate sexual abuse allegations against the father, causing his arrest and separation from the children. 113 Wn. App. at 867, 870, 872. While there was no evidence of "actual damage" to the daughters, there was a "danger of psychological damage" as a result of the mother's actions, *Burrill*, 113 Wn. App. at 872, the daughters had either not seen or had very limited access to their father, to whom they were very well bonded, for over nine months.

This “severe impairment of parent/child contact, especially when considered in light of the numerous interviews A.B. was subjected to asking her about the bad things her daddy did to her, constitutes sufficient evidence from which the trial court could conclude that [the mother] created a danger of serious psychological damage to the children.” *Burrill*, 113 Wn. App. at 872.

Here, in contrast, there is no evidence that the mother ever involved the daughter directly in her disputes with the father. While there was evidence that the mother spoke poorly about the father to the daughter’s pediatrician in front of the daughter, the daughter was then only less than 30 months old. (CP 311-12; Ex. 139; RP 226)

This case is also different from *Burrill* because there the father had been at least as equal of a caregiver to the parties’ two daughters as the mother, since he had provided full care of the children during work days. *See* 113 Wn. App. at 872. Placing the children in his primary care did not significantly alter the “existing pattern of interaction between a parent and child,” the prevention of which is a primary policy of the Parenting Act. RCW 26.09.002 (“best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to

the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.”)

Here, the mother has indisputably been the child’s primary caregiver since her birth. (*See* RP 270, 280) Even when the parties shared an equal residential schedule before the legal action was commenced, the mother was a stay at home parent and cared for the daughter full time during her residential time, while the daughter was in daycare during her father’s residential time. (*See* RP 186, 280, 423) Placing the daughter primarily with the father significantly alters the daughter’s “existing pattern of interaction” with her primary caregiver.

Beyond the father’s complaints that the mother was “hostile” towards him, there was no evidence that the mother could not parent the daughter. To the contrary, by all accounts the daughter was “doing well” and “great” after being placed primarily with the mother under the temporary parenting plan. (*See* CP 185, 311; Ex. 139) Despite the pediatrician’s concerns that the mother had “over the top” health concerns for the daughter (which he acknowledged might be a “cultural thing”), he described the daughter as “healthy, quite bright, and developmentally doing great.” (CP 311; Ex. 139)

This is a far different circumstance than that considered in *Velickoff v. Velickoff*, 95 Wn. App. 346, 968 P.2d 20 (1998) (Resp. Br. 22), in which the court affirmed the trial court’s decision modifying the parenting plan and changing the child’s primary residence from the mother to the father, after finding that the child’s present environment in her mother’s home was detrimental. In *Velickoff*, there was evidence that the mother violated orders in a “concerted effort to destroy [the father]’s relationship with their daughter, to the child’s detriment.” 95 Wn. App. at 349. Like the mother in *Burrill*, the mother in *Velickoff* coached the daughter into making sexual abuse allegations against the father, resulting in the daughter being briefly placed in foster care. 95 Wn. App. at 351-52, 356. And there was evidence that the daughter was suffering from the mother’s efforts to frustrate contact between the daughter and father; her behavior “deteriorated” and she began “acting strange and barking like a puppy” after being placed primarily with the mother. *Velickoff*, 95 Wn. App. at 357.

Finally, the mother did not invite the trial court’s error in basing a parenting plan on which parent would “likely foster the child’s relationship with the other parent” – the rejected friendly parent concept – and not on the statute. (Resp. Br. 27-28) In

closing argument, the mother agreed to the GAL's recommendations for "other provisions" in the parenting plan, including that the "parenting plan residential provisions [] be flexible and adaptable in accordance with the child's changing needs," and that this "residential schedule represents a minimum amount of time that the child will reside with the parents and that the child may reside with them at any other agreed to times."¹ (RP 499, CP 222, 224, 321-22; Ex. 139) At the same time, the mother specifically asked the trial court to base its decision on the statutory factors, and addressed each .187 factor to show that a "best interests" parenting plan would place the child primarily with the mother. (See RP 493-96)

The trial court's parenting plan was improperly based on the "friendly parent" concept, and not on a proper consideration of the statutory factors under the Parenting Act. This Court should reverse and remand to the trial court for a proper consideration of the statutory factors.

¹ Had she not agreed to these innocuous provisions, the father undoubtedly would have pointed to that as further "evidence" of her "hostility."

2. **Had the trial court properly considered the statutory factors under RCW 26.09.187, it would have concluded that the daughter's best interests would be served by placing her primarily with the mother.**

In making a parenting plan, the trial court must consider the strength of the relationship between the parent and the child; the parent's performance of parenting functions; the emotional needs of the child; the child's relationship with siblings; the child's involvement in school or other significant activities; the wishes of the parent and of a sufficiently mature child; and the parents' employment schedules. *Marriage of Wicklund*, 84 Wn. App. 763, 772, 932 P.2d 652 (1996) (citing RCW 26.09.187(3)(a)). When the trial court's written findings or oral ruling fail to reflect a consideration of these RCW 26.09.187(3)(a) factors, as is the case here, remand is required. *Murray v. Murray*, 28 Wn. App. 187, 189-90, 622 P.2d 1288 (1981).

The father's attempts to show that the trial court considered each of the .187 factors (*see* Resp. Br. 17-22) must fail because neither the trial court's oral ruling nor its memorandum ruling mentions the statute or any of its factors, nor does either state that the parenting plan was made in the best interests of the child. The trial court's decision instead addresses almost exclusively the

mother's behavior toward the father. For instance, the trial court did not consider which "parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child," as required by RCW 26.09.187(3)(a)(iii). It is undisputed that the while the parties lived together, the mother stayed home to care for the daughter while the father worked. (*See* RP 270, 280) After the parties separated, but before the temporary parenting plan was entered, the parties shared equal time. (RP 150) However, during the daughter's residential time with the mother, the mother personally cared for the daughter 24/7, while she was placed in daycare while the father worked full-time during his residential time. (RP 186, 280, 423) Had the trial court properly considered this factor, the trial court would have had to find that it was the mother who had the greater responsibility for the daughter's daily needs.

The trial court also did not consider "each parent's employment schedule, and . . . make accommodations consistent with those schedules." RCW 26.09.187(3)(a)(vii). With the aid of her parents, the mother has been a stay at home parent, while the father worked full-time, plus overtime in the evenings. (RP 194-95, 233) While the father was living with his girlfriend who claimed

she also could be a “stay at home parent” to the parents’ daughter, it is the “*parent’s* employment schedules,” not the schedules of their significant others, that the court must consider. (RP 420) RCW 26.09.187(3)(a)(vii). In her motion for reconsideration, which the trial court denied, the mother even pointed out the parents’ work schedules by asking that she be allowed the first right of refusal to provide care for the parties’ daughter during the father’s residential time if she would otherwise be placed in the care of a third party while the father worked. (CP 189-95) Had the trial court properly considered this factor, it would have found that based on the parents’ employment schedules, the mother was in a better position to care for their daughter on a daily basis.

The trial court also did not consider “each parent’s past and potential for future performance of parenting functions” under RCW 26.09.187(3)(a)(iii). Here, it is undisputed that the daughter and the mother’s older son were both thriving under the mother’s care. The only consideration the father claims that the trial court made on this factor is “that the mother has not started counseling, there was no basis on which to find mother’s potential for future performance of parenting functions would be any different.” (Resp. Br. 21) But whether the mother had started counseling, as

recommended by the GAL, is unrelated to her ability to function as a parent. In any event, the GAL did not require the mother attend counseling, instead merely “encouraging” the “mother . . . to participate in individual therapy [to] cover stress tolerance, communication and other parenting issues.” (CP 320; Ex. 139)

Finally, the trial court failed to consider the daughter’s “emotional needs and developmental level.” RCW 26.09.187(3)(a)(iv). By all accounts, the child was doing well despite the “conflict” between the parents. (*See* CP 185) While no one disputes that the daughter is bonded with both parents, it is the mother who has been primarily responsible for her daily emotional needs and development since birth. An alteration in that “existing pattern” was unwarranted. *See* RCW 26.09.002.

The trial court properly found no basis to limit the mother’s residential time under RCW 26.09.191, but erred in failing to properly consider the statutory factors under RCW 26.09.187. Had it done so, the trial court should have designated the mother as the primary residential parent, and allowed her to participate in decision-making for the child, as it was in the daughter’s best interests. The trial court erred in basing its decision instead on the discredited “friendly parent” concept.

B. The trial court relied on inadmissible evidence to make adverse credibility determinations against the mother that formed the basis for its parenting plan.

1. Recordings of the mother’s conversations with the father during residential exchanges were not admissible under RCW 9.73.030.

The trial court’s error in making its parenting decision was compounded by being largely based on inadmissible evidence. The trial court erred in admitting evidence of communications between the mother and father during exchanges that the father had illegally recorded. (RP 10; Exs. 125, 127) The trial court relied on this improper evidence to make adverse credibility determinations against the mother that drove its decision to place the daughter primarily with the father once she reached school age. (CP 186)

RCW 9.73.030(1)(b) prohibits recording any private conversations “without first obtaining the consent of all the persons engaged in the conversation.” “Any information obtained in violation of RCW 9.73.030 [] shall be inadmissible in any civil or criminal case.” RCW 9.73.050.

“[T]he privacy act is implicated when one party records a conversation without the other party’s consent. Washington State’s privacy act is considered one of the most restrictive in the nation.” *State v. Kipp*, 179 Wn. 2d 718, 724, ¶ 6, 317 P.3d 1029 (2014). Here,

the father's recording of his communications with the mother clearly violated the privacy act, as the mother not only did not consent, but specifically told the father that she "does not consent in being recorded in anyway." (Ex. 33; RP 266-67)

The father claims that the parties' interactions were not "private" because they took place at "McDonald's or other public location in open view to passerby." (Resp. Br. 34) But as the father acknowledges, whether a conversation is private rests on the "intent or reasonable expectations of the participants as manifested by the fact and circumstances of each case." (Resp. Br. 33) "A communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable." *Kipp*, 179 Wn.2d at 729, ¶ 17. Here, the mother *objectively* manifested her intent that the parties' communications remain private by telling the father that he could not record their communications. (Ex. 33; RP 266-67) Her expectation that their communications remain private was reasonable based on her directive that it not be recorded.

Further, while the parties were in a public place during the recorded exchange (Ex. 125; RP 10), there was no evidence that there were any third parties nearby who could hear their

conversation. (Resp. Br. 33, citing *State v. Clark*, 129 Wn.2d 211, 226, 916 P.2d 384 (1996)). The conversation recorded for Exhibit 125 itself was with regard to their daughter's medical care, a subject matter that would typically be considered private and confidential. See RCW 70.02.005 (1) ("health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests"). Finally, the conversation took place between the mother and father, and not an "unidentified stranger." See *Clark*, 129 Wn.2d at 226 (a nonconsenting party's apparent willingness to impart information to an unidentified stranger is not private).

The father claims that even if the conversation was private, it was exempt under the Privacy Act because it purportedly conveyed a threat of bodily harm. (Resp. Br. 35) The purported threat was the mother telling the father that she was "going to tie you to a pole and feed you fish," to which he is allergic. (RP 486, Ex. 125) But this was not an actual threat if viewed in context of their conversation. The mother was explaining the severity of the daughter's lactose intolerance to the father, who she did not believe was taking the matter seriously, by comparing it to the father's allergy to fish, which also gives him diarrhea. (RP 487; Ex. 125)

Further, the father did not feel threatened; after the mother made the statement the father laughed and told the mother why he was laughing because her statement was “funny.” (RP 486; Ex. 125)

In any event, the father did not present the recording as evidence to prove a threat, but to rebut the mother’s claim that she feared him: “I know it sounds more or less like a ludicrous threat, but with everything being said about me being such a violent, dangerous, unpredictable gun-toting thug, if I’m such a person, you don’t – generally speaking, you don’t talk to a person in that manner if – if that is actually what you believe the person to be.” (RP 443) “[E]vidence obtained in violation of the act is excluded for any purpose, *including impeachment.*” *State v. Faford*, 128 Wn.2d 476, 488, 910 P.2d 447 (1996) (emphasis added).

The trial court’s admission of this specific recording was contrary to RCW 9.73.050 and was prejudicial to the mother because the trial court specifically referenced this evidence when finding that the mother was “openly hostile” to the father: the premise of its decision to deprive the mother of decision-making and primary care. (CP 186)

2. The trial court erred in admitting an unsigned letter from the parties' purported joint therapist, and in relying on it to find that the mother fabricated domestic violence claims.

The trial court also erred in admitting an unsigned letter, purportedly from the parties' claimed joint therapist, to find that the mother's allegations of domestic violence were not credible. (Ex. 114; RP 462; CP 186) This letter had not been authenticated under ER 901 and is not an exception to the hearsay rule under either ER 801 or ER 804. Contrary to the father's claim, the mother specifically objected to admission of this exhibit when the father first sought to include it as part of his ER 904 submission before trial: "Exhibit 114 is objected to as hearsay, not authenticated or relevant, Petitioner should have the opportunity to cross examine, and the document is not of the type that falls under ER 904." (CP 332) And while the letter is listed as "authentic" in the Joint Statement of Evidence, the mother objected to it as hearsay (CP 339) and renewed her objection during trial: "114. We objected. It looks like hearsay. It appears – looks like a letter from somebody not signed. We're objecting to that." (RP 462)

The trial court abused its discretion by admitting and relying upon an unsigned and undated letter. *Wagers v. Goodwin*, 92 Wn.

App. 876, 882-83, 964 P.2d 1214 (1998). In *Wagers*, a letter purportedly written by the former wife's new husband described the former wife and former husband's finances. The trial court relied on this evidence to conclude that there were disputed issues of material fact whether the former wife knew about her former husband's pension at the time of their divorce but "did not want any part of it." *Wagers*, 92 Wn. App. at 879. Contrary to the father's claim here, the *Wagers* court did not hold that the letter was inadmissible because it contained settlement negotiations. (Resp. Br. 38) Instead, the court held that the unauthenticated, "unsigned, undated excerpt of a letter," was inadmissible hearsay, "not admissible under any of the hearsay exceptions," and that it was error for the trial court to consider the letter as evidence because "untrustworthy evidence should not be presented to the triers of fact." *Wagers*, 92 Wn. App. at 879.

Even if the letter were authenticated, as the father claims, it was not proper evidence as a "prior inconsistent statement" under ER 613(b). A prior inconsistent statement, for purposes of impeachment, is a comparison of something the witness said out of court with a statement the witness made on the stand. *State v. Spencer*, 111 Wn. App. 401, 409, 45 P.3d 209 (2002), *rev. denied*,

148 Wn.2d 1009 (2003). Here, the letter asserted that the therapist met with the parties three times to help with their goal “to have a healthy strong family and relationship,” and that “there was no mention of abuse or violence during these sessions.” (Ex. 114) The trial court erred in relying on this evidence to find the mother’s claims of domestic violence not credible. (CP 186) The mother never testified that she told their therapist about the domestic violence during the parties’ three sessions, which were purportedly to assist the parties in reconciling. The letter could not be admitted as a “prior inconsistent statement,” because it cannot be compared with a statement the mother “has made on the stand.” *Spencer*, 111 Wn. App. at 409-10.

Further, that the mother did not disclose any domestic violence during the parties’ joint reconciliation sessions is not inconsistent with other evidence that the mother was hesitant to immediately disclose the abuse to others. (*See e.g.* RP 36 (grandmother testified that she asked the mother about a bruise on her face and the mother declined to answer); RP 57-58 (former co-worker testified that the mother initially declined to disclose information regarding her relationship with the father, was “quiet,” and only disclosed the abuse after she “couldn’t hide it anymore.”)

As our Supreme Court has acknowledged, “domestic violence is a widely-prevalent and underreported phenomenon;” “an estimated 43 percent of all battered women talk to no one about the beatings they experience.” *State v. Ciskie*, 110 Wn.2d 263, 272-73, 751 P.2d 1165 (1988). Because the mother never testified that she revealed the domestic violence to the parties’ joint therapist, the trial court improperly relied on the therapist’s unsigned letter as a “prior inconsistent statement” to find that the mother’s allegations of domestic violence were not credible. (CP 186)²

The letter was also not admissible as a “statement made for purposes of medical diagnosis or treatment and describing medical history” under ER 803(a)(4). The mother never made any “statement” to the therapist about domestic violence. It was not alleged that the therapist asked the mother during counseling whether there was any domestic violence and the mother said no. Instead, the letter states only that there was “no mention of abuse or violence during these sessions.” (Ex. 114)

² The trial court’s use of the mother’s silence on the issues of domestic violence is troubling, because it also relied on the mother’s failure to disclose the issues of domestic violence with her former husband, with whom she now has a cordial relationship and co-parents her older child, as another basis to find that her claims of domestic violence with the father of her daughter as not credible.

Because this letter does not fall under any of the hearsay exceptions and was in any event not authenticated, the trial court erred in admitting it as evidence. Admission of the letter was prejudicial to the mother as the trial court relied on it to support its finding that the mother's allegations of domestic violence against the father were not credible. (*See* CP 186)

C. There is no basis for attorney fees to the father. Instead, fees should be awarded to the mother based on her need and the father's ability to pay.

This Court should reject the father's request for attorney fees based on his claim that the appeal is frivolous. The trial court's oral ruling and written findings support the mother's claim that the trial court relied on the impermissible friendly parent concept in changing the child's primary residence. Despite the father's strained efforts, there is no way the trial court's written and oral remarks support the father's claim that the trial court considered the statutory factors under RCW 26.09.187. Even if this Court affirms (and it should not), it would not make the mother's appeal frivolous. "The fact that an appeal is unsuccessful is not dispositive. We consider the record as a whole and resolve all doubts in favor of the appellant." *Marriage of Tomsovic*, 118 Wn. App. 96, 110, 74 P.3d 692 (2003). "All doubts as to whether an appeal is frivolous

should be resolved in favor of the appellant. An appeal is not frivolous merely because the arguments are rejected.” *Marriage of Gillespie*, 77 Wn. App. 342, 349, 890 P.2d 1083 (1995) (citations omitted).

There is also no basis for fees based on the appellant’s designation of the record. Respondent complains that the appellant inadvertently cited to an exhibit (Ex. 136) that was rejected at trial. First, while the respondent is correct that the trial court had excluded Exhibit 136, which was a previously filed declaration of the father, it nevertheless relied on it and other admitted exhibits in its written ruling as evidence of the mother’s hostility. (*See* CP 187) Second, the appellant immediately corrected any error when it was brought to her attention, by filing an errata to her brief. In any event, that exhibit was cited only twice, in each instance among a series of other exhibits that were admitted at trial and that without reference amply support the statements made in the brief. (*See* App. Br. 12-13: “Andrew presented a series of text messages between the parties at trial, purporting to show Evelina’s hostility towards him. (Exs. 117, 122, 136 [deleted], 149) The text messages related to the daughter’s condition after being returned from

Andrew's home or conflicts regarding the residential schedule. (Exs. 117, 122, 136 [deleted], 149)").

Respondent also complains of appellant's designation of pre-trial pleadings. The designated pleadings reflect the procedural history leading up to the initial temporary orders, including the temporary parenting plan, admitted as an exhibit at trial (Ex. 3), placing the child primarily with the mother. The rules do not limit a party's designation of clerk's papers to pleadings "placed before the trial court." (Resp. Br. 49) Instead, "clerk's papers" are by definition "pleadings, orders, and other papers filed with the clerk of the trial court." RAP 9.1(c). It is undisputed that these pleadings were filed with the court and are proper clerk's papers.

Further, RAP 9.6(a) encourages parties to designate clerk's papers "needed to review the issues presented to the appellate court." These pre-trial pleadings, reflecting the procedural history of this action, are "needed to review" appellant's challenge to the final parenting plan, which places the child primarily with the father after a transition period during which the child resides equally between the parents. Nowhere does the respondent claim that the pleadings were used inappropriately or in any manner that would mislead this Court.

Any fees to be awarded should be to the mother under the need/ability standard of RCW 26.09.140. With the support of her parents, the mother was able to stay home with the parties' daughter, who was three at the time of trial. While the mother acknowledges that she will eventually need to seek employment, she will present in her RAP 18.1 financial declaration that she neither has the past, present, or future ability to earn as much as the father. The mother's appeal was brought because it is her belief that the trial court failed to consider the statutory factors, and made a parenting plan that was not in the best interests of the daughter. The father should assist her in paying her fees to pursue a parenting plan that is truly in their daughter's best interests.

III. CONCLUSION

This Court should reverse and remand to the superior court for reconsideration of the parenting plan after due consideration of the statutory factors under the Parenting Act and proper evidence.

Dated this 16th day of March, 2015.

SMITH GOODFRIEND, P.S.

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DECLARATION OF SERVICE

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

That on March 16, 2015, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Todd R. DeVallance Tsai Law Company 2101 Fourth Avenue, Suite 1560 Seattle WA 98121	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Andrekita Silva Law Offices of F. Andrekita Silva 1221 Second Avenue, Suite 500 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 16th day of March, 2015.



Victoria K. Vigoren