75157-3

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Court of Appeals No. 75157-3-1

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION 1

JOHNATHAN WALKER

Appellant

v.

JENNIFER JOHNSON

Respondent

RESPONDENT'S BRIEF

By:

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I. INRTODUCTION

The Court of Appeals is not a court of unlimited power. It cannot find facts, assess the credibility of witnesses, or weigh the evidence. It cannot grant a request that was never presented to the trial court, absent certain extenuating circumstances. It cannot create policy or rewrite statutes. In his appeal, Johnathan Walker asks the Court to do all of these things.

The majority of the relief Johnathan Walker seeks is simply beyond the authority of this Court. The remainder of Mr. Walker's requests are directed to questions regarding sufficiency of the evidence or matters of discretion: areas where this Court shows great deference to the trial court. However unhappy he may be with the result of trial, Mr. Walker cannot demonstrate any abuse of discretion or factual insufficiency. The trial court should be affirmed in all respects.

II. RESTATEMENT OF THE CASE

A. Pre-trial proceedings.

Appellant Johnathan Walker and Respondent Jennifer Johnson have one child together, MJW. 4 RP 23.[1] MJW is currently 16 years old.

[1] Reports of Proceedings are cited as follows: 1 RP – 3/11/14; 2 RP – 4/1/14; 3 RP – 4/3/14; 4 RP – 5/5/14; 5 RP – 5/5/14 Volume II; 6 RP - 5/6/14; 7 RP - 5/15/14; 8 RP – 6/20/14; 9 RP – 3/4/16; 10 RP – 4/1/16.

CP 277. The parties were never married and had no formal parenting arrangement for the first 12 years of MJW's life. 4 RP 23.

On April 30, 2013, Mr. Walker filed a petition to establish a parenting plan. CP 1-3. On May 14, 2013, before Ms. Johnson filed any responsive documents, Mr. Walker submitted an amended petition, which added a request for a child support schedule. King County Superior Court No. 13-3-08138-9, Docket No. 18.[2] On May 16, 2013, Ms. Johnson submitted a motion for a temporary order of child support, and asked the trial court to appoint a GAL. CP 645; Docket No. 29.

On June 12, 2013, the trial court entered a temporary parenting plan that largely resembled Ms. Johnson's proposed plan. CP 214-21. The temporary plan allowed for residential time for Mr. Walker and ordered the parties to agree upon a family reunification counselor who was not from Ms. Walker's former employer. CP 216-17. The trial court also entered a temporary order of child support, based on the actual reported incomes of both parties, obligating Mr. Walker to pay Ms. Johnson $484.14 per month, starting May 1, 2013. CP 222-35.

Despite the court's order, MJW refused to spend time with her father, who had never been a consistent presence in her life. 4 RP 16; CP

[2] Respondent filed a supplemental designation of clerk's papers on December 27, 2016. As an index has not yet been prepared, citations to new portions of the record are marked by the Superior Court docket number.

646. The parties agreed to forego the visitation schedule and arranged for Mr. Walker and MJW to attempt reunification through family counselor Jacqui Parkes, consistent with the trial court's temporary orders. CP 279, 646.

B. Trial

Trial in this matter began on May 5, 2014 and concluded on May 15, 2014. The trial court heard testimony from, among others, Mr. Walker, Ms. Johnson, Lisa Barton, Jennifer Knight, and Annette Walker.[3] Docket No. 136, 181. These individuals testified as follows:

Lisa Barton

Lisa Barton is the GAL appointed by the trial court in this matter. As ordered by the trail court, Ms. Barton prepared a full and complete report on the matter, including her recommendations for a final parenting plan. 4 RP 32; CP 643-75. The report was entered into evidence as Exhibit 1. CP 265. In preparing her report, Ms. Barton interviewed numerous people involved in MJW's life, including Mr. Walker, Ms. Johnson, Ms. Johnson's parents, Mr. Walker's mother, Ms. Johnson's fiancé Greg Clapshaw, Mr. Walker's wife Annette, MJW's therapist

[3] Joanna Barber, Gary Johnson, Virginia Johnson, and Greg Clapshaw also testified at trial, but their testimony was omitted from the report of proceedings. Docket No. 136, 181.

Jennifer Knight, family therapist Jacqui Parks, MJW's school principal Nate Salisbury, and MJW herself. 4 RP 33; CP 643-44.

When Ms. Barton first spoke to her, MJW "was adamant that she didn't want a relationship with her father." 4 RP 35. MJW told Ms. Barton that "she's felt that he's chosen is relationships with women over her," and that Mr. Walker seemed to change his personality with every new woman he was with. 4 RP 38. Ms. Barton noted other causes for the impairment of MJW's emotional ties to her father, including Mr. Walker's inconsistency and long periods of absence, MJW's abuse at the hands of one ex-girlfriend, and the sudden introduction of a new step-mother and four step-siblings. 4 RP 35. In Ms. Barton's opinion, it was not the litigation that caused MJW's reluctance to spend time with her father, but rather it was "[MJW] never really having a consistent schedule, and knowing when she could count on seeing her dad." 4 RP 35-38.

Ms. Barton recommended that the trial court implement a phased-in parenting plan, gradually increasing the residential time provided to Mr. Walker. CP 673. In her opinion, temporary restrictions were warranted given that "there is some impairment to the emotional ties between the child and the father." 4 RP 35. She testified that the reason for her recommendation of a phased-in visitation schedule was:

> I think it's important that the therapeutic process be allowed to- to go on. Um, both Jennifer Knight, who is the child's therapist, and the reunification therapist are of the opinion that forcing [MJW] to just go see her father is not going to be good for her; it's going to backfire.
>
> And I think that makes a lot of sense.
>
> I think it's important that [MJW] see her father trying, and that she put some effort into it, as well, and go to counseling, and do what she needs to do, um, to see that this is an important relationship for her.

4 RP 39. Ms. Barton recommended that the initial phases involve only MJW and Mr. Walker, because "having other people involved just muddies the waters there, doesn't make her feel important to him." 4 RP 40. Ms. Barton further stated that a traditional parenting plan, without restrictions, would only be detrimental to MJW. 4 RP 40-41. Ms. Barton also recommended that Ms. Johnson have sole decision-making on medical, school, and non-emergency decision, given Mr. Walker's lack of involvement in those decisions prior to and during the litigation. 4 RP 45.

Jennifer Knight

Jennifer Knight is MJW's therapist, who MJW has been seeing since prior to the litigation. 5 RP 312;[4] 7 RP 22. Ms. Knight has been a mental health and family reunification therapist since 2004, and has a master's degree in marriage and family therapy. Ex. 47. Previously, Ms.

[4] Respondent's counsel received two versions of Volume II of the report of proceedings from May 5, 2014, one beginning on page 311 and another beginning on page 25. Because the volume beginning on page 311 is the most recent version received, this pagination is used herein. Both versions omit Ms. Knight's direct examination.

Knight worked as forensic child interviewer from 1997 to 2007. Ex. 47. She also currently provides training to the Pierce County Bar Association and King and Pierce County Guardians ad Litem on parental alienation, re-unification, and co-parenting counseling. Ex. 47; 5 RP 324.

Ms. Knight had a brief lapse in her licensure in 2002 due to a processing backlog at the Department of Licensing. 5 RP 325. Around that time, the State modified the licensing requirements for mental health and family therapy counseling associates.[5] 5 RP 326. Although Ms. Knight timely submitted her renewal paperwork, the State was so backlogged that they were not able to process her paperwork until after the renewal deadline. 5 RP 326-28. Ms. Knight testified that the backlog was such a widely-known problem that the brief lapse in her licensure has never raised any red flags with either her insurance carrier or anyone else. 5 RP 326-27.

Ms. Knight's observations of MJW were similar to Ms. Barton's. Ms. Knight observed that MJW "definitely feels abandoned" by her father, because there were "a couple of years where she didn't see [Mr. Walker] much," and that "women [were] coming and going out of [his] life." 5 RP 323. Ms. Knight also testified that "she's angry; there's no doubt about

[5] Though not specified by name, the rule change to which Ms. Knight was referring is WSR 01-17-113, which modified thirteen rules in chapter 246-809 of the Washington Administrative Code.

that," but that MJW was not likely to exhibit that anger to her father because "she's kind of a people-pleaser ... she worries very much about what people think." 5 RP 314-15. Ms. Knight recommended that MJW and Mr. Walker undergo reunification counseling, to repair the strain in their relationship that had developed for most of MJW's childhood. 5 RP 313.

Jennifer Johnson

Like most of the other witnesses, Ms. Johnson testified about Mr. Walker's lack of consistency in his relationship with MJW. During her examination by Mr. Walker,[6] Ms. Johnson testified that Mr. Walker picked up MJW from school approximately two times per week, but rarely saw her on weekends. 4 RP 26-27. During the summer of 2011, two years before Mr. Walker filed his petition, he had very little contact with MJW, "pretty much absent, except for maybe a random Saturday, for a half a day, or something, at [his] parents" house. 4 RP 31-32. Mr. Walker also did not inform MJW about his marriage to Annette until three or four months after the fact. 4 RP 32. When Ms. Johnson asked MJW if Mr. Walker had talked to her about the wedding, MJW told her, "No, he doesn't care about me." 4 RP 32.

[6] All of Ms. Johnson's testimony from her case in chief was omitted from the report of proceedings. Only her testimony from the Petitioner's case in chief appears in the record on appeal.

Mr. Walker paid child support to Ms. Johnson prior to 2013, despite the lack of an order to do so.[7] 4 RP 29-30. Mr. Walker also listed MJW on his medical insurance, up until his policy was canceled in May 2013. 4 RP 34. However, Mr. Walker failed to timely inform Ms. Johnson about the cancelation of his insurance. 4 RP 35. When she found out about the policy cancelation, Ms. Johnson obtained health insurance through Regence, to ensure that MJW had continued coverage. 4 RP 34. Mr. Walker then listed MJW on Annette's insurance policy, but did not inform Ms. Johnson until September 2013. 4 RP 36. Mr. Walker also did not send Ms. Johnson an insurance card. 4 RP 33. Instead, he sent her a poor-quality paper copy of the card. 4 RP 33. Ms. Johnson described the problems she encountered trying to use the copy:

> When you go to the doctor's, they need to know subscribers, where the subscriber works, her birthdate, all of that information. So, when I hand them a- a photocopied, tattered card, they can't put it through their reader; and they hand it back to me, and say, "Do you have any -- a card?"
>
> And I say, "No, I don't."
>
> 'Cause you- you mailed me -- I have a copy. I have it in my purse; it's so tattered, and it's been photocopied. It's unreadable.
>
> So, I have to handwrite -- I have to handwrite 'em, or I have to have the medical company, the doctor's office, call it to verify the insurance company.

4 RP 33-34.

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[7] Mr. Walker submitted copies of checks for support he paid dating back to 2004. Ex. 119. These checks demonstrate that Mr. Walker was paying Ms. Johnson $500 per month, albeit not always consistently. Ex. 119.

Ms. Johnson submitted a number of exhibits to the trial court to verify her income. Ms. Johnson is currently employed as a gemologist. Ex. 8, 23. Ms. Johnson's 2011 and 2012 tax returns were admitted as exhibits, as was her 2013 W-2. Ex. 8-10. Ms. Johnson's tax returns show that her income for the years 2011 and 2012 was $17,119.00 and $23,253.00, respectively. Ex. 9-10. Ms. Johnson's 2013 W-2 shows her income for the year to be $13,654.00. Ex. 8. Ms. Johnson also submitted a statement from her employer, Ted Irwin, who stated that available work at his business, as of 2013, was limited due to industry conditions. Ex. 23.

Annette Walker

Ms. Walker has four children from previous marriages. 4 RP 45. Mr. Walker and Ms. Walker were married in January 2013. CP 667. For the first year of their marriage, Mr. and Ms. Walker lived in a home rented from Ms. Walker's ex-husband, Russell Betteridge. 6 RP 30. For a portion of the time they lived there, Ms. Walker had an active restraining order against Mr. Betteridge, based on allegations that he stalked and assaulted her. 6 RP 31-33. Ms. Walker maintained that as of the date of trial, she was on good terms with Mr. Betteridge, even though she was still litigating the assault allegations only a month prior. 6 RP 30, 33, 150. She and Mr. Walker no longer live in Mr. Betteridge's house, because the home was foreclosed upon. 6 RP 29.

Ms. Walker also previously had a restraining order against her ex-mother-in-law, Janice Stafford. 6 RP 37. Ms. Walker testified that she is now on good terms with Janice Stafford, and her children see Ms. Stafford regularly. 6 RP 37. Ms. Walker also stated that there was a distinct possibility that Ms. Stafford would have contact with MJW as well. 6 RP 38.

Ms. Walker admitted during her testimony that she had, on more than one occasion, inserted herself unnecessarily into this litigation. For example, on May 1, 2013, Ms. Walker sent a series of text messages to Ms. Johnson, in which she stated that she is a child therapist and shared her opinion on the parenting plan action. Ex. 2; 6 RP 51. Ms. Walker admitted that she sent these text messages to Ms. Johnson to shame her. 6 RP 52. Ms. Walker also admitted that she believed it was appropriate for her daughter to text MJW about the pain MJW was allegedly putting the Walkers through by withdrawing from her father.[8] 6 RP 42-44.

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[8] Q. Ok. And, on page 1 of Exhibit 59, it says in the first text: We have carried a heavy burden for you. We've gone through grief for you, we've gone through struggle and turmoil again, for you. Why can't you at least give me an answer?

...

Q. You believe that's inappropriate for your 12-year-old to be texting Maddie in that way, don't you.

A. No, I don't.

Q. That's appropriate.

A. She -- yes. She's sharing honest feelings, and that is not something that I would reprimand my child for.

6 RP 42-43.

Ms. Walker testified that she does not believe that Mr. Walker needs to engage in reunification therapy, despite the recommendations of the GAL and two therapists. 6 RP 66-67.

Johnathan Walker

Mr. Walker's testimony was generally consistent with what MJW had told the GAL. He admitted that he had introduced MJW to four different women over the last 12 years and that one of those women, Bonnie, caused MJW to have trust issues. 7 RP 19-20. Mr. Walker also admitted that MJW exhibited anxiety about spending the night in his care. 7 RP 18.

Further, Mr. Walker admitted that he had been less than consistent in his relationship with MJW. He admitted that he has never attended a parent teacher conference at MJW's school. 7 RP 39. He also admitted that there have been times when MJW was in the hospital, but he did not go visit her. 7 RP 21. Mr. Walker further testified that, when MJW was around 5 or 6 years old, he failed to show up for some scheduled visits. 7 RP 29. Perhaps failing to grasp the affect this had on MJW, Mr. Walker stated, "I realize that she probably got frustrated." 7 RP 30.

Mr. Walker agreed that MJW needed counseling, as did he. 7 RP 6. His objections to Ms. Knight as MJW's individual therapist were her cost and her prior specialty working with abused children. 7 RP 6. Mr.

Walker challenged his obligation to pay for MJW's treatment under Jennifer Knight while proceedings were pending. 7 RP 28, 38. An administrative hearing, to be conducted by telephone, was scheduled to address his objection, but Mr. Walker failed to appear. 7 RP 28.

Mr. Walker submitted his 2011 and 2012 tax returns with his amended petition for a parenting plan and to establish child support. CP 46-56. However, Mr. Walker did not offer these tax returns as exhibits at trial. CP 265-73. Although Mr. Walker's 2013 W-2s were marked for identification, it is not clear from the record whether Mr. Walker ever submitted a redacted version to have entered into evidence. 7 RP 4. The only documentary evidence concerning Mr. Walker's income that was admitted was his financial declaration, which included only some balance statements concerning a bank account he held with his wife. Ex. 104. Mr. Walker testified that he was currently attending Highline Community College for a respiratory care certificate, but he provided no documentary evidence of his enrollment. 7 RP 4. Respiratory care was not within Mr. Walker's field of work prior to being laid off in November 2013. Ex. 103, 104.

C. Post-trial

The trial court issued a preliminary ruling in a letter to the parties on June 9, 2014. CP 274-76. The trial court scheduled a hearing on the

presentation of final orders for June 20, 2014, and directed counsel for Respondent to prepare the orders prior to that date. CP 276.

The trial court entered its findings of fact and conclusions of law on June 20, 2014, along with an order of child support and a final parenting plan. Docket No. 136. In its findings of fact and conclusions of law, the trial court made the following relevant findings:

> The Court finds that it is in the best interest of the child to reside with the Respondent/Mother, and that:
> 1. It is not in the best interest of the child to have visitation with the Petitioner/Father, except through a phased plan similar to that recommended by the Guardian Ad Litem;
> 2. The prior sporadic parenting by the father has not been conducive to the emotional well being of the child;
> 3. Until the bonds of trust can be established between the child and the father, attempts to introduction [sic] the child into the father's new family would be detrimental to her emotional and psychological well being;
> 4. The recommendations of the Guardian ad Litem should be adopted, with some minor modifications.

Docket No. 136. In accordance with these findings, the parenting plan entered by the trial court included a phased-in visitation schedule similar to that recommended by the GAL. CP 274-76, 279-80, 673-74. This schedule is articulated as follows:

> Upon enrollment in school, the child shall reside with the mother. Residential time with the father should be reserved for family therapy.
>
> Through therapy, contact between the child and the father should be addressed pending scheduled residential

> time, such as the father's attendance at school and sporting events, email, telephone/texting, etc.
>
> Once both therapists (Jennifer Knight and Jacqui Parkes) agree, or by further order of the Court, that [M.J.W.] has established necessary bonds of trust with the father to be ready for residential time, such time shall be phased:
>
> Phase I. One dinner visit every other week, for 3 hours to include only the father and [MJW];
>
> Phase II. 4 hours every other weekend in addition to Phase One, to include only the father and [MJW] unless otherwise agreed in consultation with the therapists;
>
> Additional phases of visitation shall be reserved pending an evaluation of the progress of re-integration. Each phase of visitation shall be followed by the father on a consistent basis. The termination of therapy for whatever reason shall be reported to the Court.

CP 279. At that time, the trial court awarded Ms. Johnson fees in the amount of $5,000. CP 330.

Mr. Walker filed his initial appeal in 2014, asserting that he had not been presented with the proposed final orders as required by CR 15. This Court agreed with respect to the order of child support, but not as to the final parenting plan. *In re MJW*, 191 Wn. App. 1006, 2015 WL 6872225 at *1 (Div. I, November 9, 2015). The Court then remanded for proper service, presentation, and entry of a final order for child support. *Id.* at *9.

Ms. Johnson, via Pegasus Process Service, served Mr. Walker with a copy of the Notice of Presentation of Final Orders after Remand, and Second Motion for Presentation of Final Orders with attached declarations

of service on January 15, 2016. Docket No. 173. The presentation hearing was initially set for January 29, 2016.

Prior to the scheduled hearing, Mr. Walker submitted a new financial declaration and sealed financial documents for the years 2015 and 2016. CP 609-42. On January 26, 2016, Mr. Walker contacted counsel for Ms. Johnson asking for a continuance, as he was in the process of seeking an attorney to assist him in the final steps of the proceeding. 10 RP 7. Respondent's counsel agreed, and the presentation hearing was re-noted for March 4, 2016. 9 RP 2.

At the hearing on March 4, 2016, attorney Desmond Kolke appeared on behalf of Mr. Walker. 9 RP 1. Mr. Kolke filed a motion for continuance, asserting that he needed time to obtain transcripts from the trial. 9 RP 1. The trial court granted the motion and rescheduled the presentation hearing for April 1, 2016. 9 RP 5.

Despite having over three months to do so, Mr. Walker did not file any objections to the proposed orders. Instead, Mr. Walker submitted his own proposed orders one day before the hearing and verbally argued that the findings in Respondent's proposed orders were not supported by caselaw. *See generally* 10 RP.

The trial court declined to enter Mr. Walker's proposed orders, as they relied upon evidence not presented at trial. 10 RP 25 ("[T]he

proposed findings by the petitioner rely on 2016 figures. That wasn't the evidence at trial."). The trial court entered Respondent's proposed Order of Child Support and Amended Judgment and Order Establishing Residential Schedule/Parenting Plan, as it was "satisfied that they, in fact, correspond to the findings that the Court intended when the trial concluded on this particular matter." 10 RP 24. The trial court also designated the Order of Child Support as nunc pro tunc, dating back to June 20, 2014. 10 RP 25.

In the Amended Order of Child Support, the trial court found that Mr. Walker was voluntarily underemployed, and imputed his income at $3,448.00, a figure based on census information issued by the State. CP 315. The trial court found that Ms. Johnson's actual monthly income was $964.13. CP 315. Based on these figures, the trial court ordered Mr. Walker to make child support payments of $787.43 per month, starting on April 1, 2013. CP 316. The trial court further found that prior to the filing of this action, the parties had an agreement that Mr. Walker would pay $500 in child support each month. CP 321. The trial court entered judgment for child support under that agreement dating back to April 2008, crediting Mr. Walker with all payments that he presented evidence of. CP 321. The trial court awarded additional fees in the amount of

$1,200 for the second, and unnecessary, continuance requested by Mr. Walker's counsel. 10 RP 25; CP 313.

Mr. Walker filed a motion for reconsideration, which the trial court denied. CP 371-83; Docket No. 203A. Ms. Johnson also filed a motion for reconsideration to correct a scrivener's error that omitted the previously awarded $5,000 in attorney fees, which the trial court granted. CP 330-54; Docket No. 200. Mr. Walker then filed this appeal.[9]

III. ARGUMENT

A. Mr. Walker's challenge to RCW 26.09.191 is a political question, which cannot be addressed by appeal.

In his appeal, Mr. Walker asks that this Court find that the language of RCW 26.09.191 is not reflective of the realities of parenting and should not have been followed in entering the parenting plan. Mr. Walker does not assert that RCW 26.09.191 is unconstitutional. Rather, Mr. Walker asserts simply that RCW 26.09.191 is an ill-conceived statute. The wisdom of the wording of a statute is a question for the legislature, not the courts. Neither this Court nor any other court has the authority to address political questions such as this. *Brown v. Owen*, 165 Wn.2d 706, 719, 206 P.3d 310 (2009) ("Where the judicial branch is involved, our primary concerns are that the judiciary not be drawn into tasks more

[9] Mr. Walker did not include the notice of appeal in his designation of clerk's papers, in violation of RAP 9.6(b).

appropriate to another branch and that its institutional integrity be protected."). The Court should therefore disregard Mr. Walker's challenge to RCW 26.09.191.

B. Mr. Walker cannot assert new arguments on appeal.

In his opening brief, Mr. Walker asserts repeatedly that Ms. Johnson was "intransigent" in her litigation techniques and her parenting style. "Intransigence" refers to litigation conduct which forces the other party to incur additional legal expenses, such as failing to comply with discovery or filing unnecessary motions. *In re Marriage of Greenlee,* 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). A finding of intransigence entitles the opposing party to an award of attorney's fees in family law cases. *In re Marriage of Foley,* 84 Wn. App. 839, 846, 930 P.2d 929 (1997). Mr. Walker never requested attorney's fees, for intransigence or otherwise. Arguments that are not raised in the trial court are waived. RAP 2.5(a). Mr. Walker cannot raise this issue for the first time on appeal.

Similarly, Mr. Walker's requests that the Court consider financial information from 2015 and 2016, and that the Court consider Ms. Johnson's post-trial decisions about MJW's upbringing are without merit. A trial court may, within its discretion, reopen a case for the submission of additional evidence upon the motion of a party. *In re Welfare of Ott*, 37

Wn. App. 234, 240, 679 P.2d 372 (1984). Mr. Walker never filed a motion to reopen the case. Because Mr. Walker never asked the trial court to reopen the case after trial, he cannot do so on appeal.[10] RAP 9.11(a). It was not error for the trial court to disregard Mr. Walker's improper submission of additional evidence, and additional evidence should not be considered now.

Finally, Mr. Walker attempts to assign error to the trial court's oral statement from the hearing on June 20, 2014:

> Mr. Walker, just one piece of advice: MJW needs your relationship to be between her and you, and to be consistent. And, based on her experience with prior other significant others, you need to make sure that you're consistent, and that your efforts are directed strictly to her, and her and your relationship; and not try to force her into the new family that you have.

8 RP 5. Oral decisions are not reviewable unless they are incorporated into the final written orders. *State v. Hescock*, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999). The trial court's statement here is not even a decision: it was nothing more than practical advice, and is not subject to review.

C. The trial court did not err in its admission of Respondent's exhibits.

Mr. Walker additionally attempts to challenge the admission of multiple exhibits, but fails to specify which exhibits he believes are

[10] With regard to the child support schedule, Mr. Walker is not without remedy. The law permits Mr. Walker to file a petition to modify his child support obligations at any time. RCW 26.09.170. He has not done so.

inadmissible. This Court cannot review an error that is not adequately identified. RAP 10.3(g).

It is possible that Mr. Walker is referring to evidence regarding his wife's prior litigation. If so, any evidence concerning Ms. Walker, and who she lets her children interact with, is relevant, given that Mr. Walker's prior girlfriends had a significant impact on MJW, 4 RP 35, 38, and that Ms. Walker would be present for any residential time given to Mr. Walker. Furthermore, before the trial court may issue a parenting plan, it is first required to review any court proceedings relevant to where the child might reside. RCW 26.09.182.[11] Relevant evidence is admissible. ER 402. Mr. Walker has failed to articulate how the evidence is irrelevant or otherwise inadmissible. The Court should not consider this argument any further.

D. The trial court did not abuse its discretion by awarding back child support.

"Child support orders are within the discretion of the trial court." *Foley*, 84 Wn. App. at 842 (citing *In re Marriage of Healy,* 35 Wn. App. 402, 404, 667 P.2d 114, *review denied,* 100 Wn.2d 1023 (1983)). Pursuant to RCW 26.26.134, a trial court may award back child support for the five years prior to the commencement of the action. Here, the trial

[11] "Before entering a permanent parenting plan, the court shall determine the existence of any information and proceedings relevant to the placement of the child that are available in the judicial information system and databases." RCW 26.09.182.

court found that Mr. Walker and Ms. Johnson had a preexisting agreement by which Mr. Walker was to pay Ms. Johnson $500 per month for support of MJW.[12] CP 321. It awarded back child support for all months that went unpaid under that agreement for the five years prior to the commencement of this action. CP 321. As this action was expressly authorized by statute, the trial court did not abuse its discretion in awarding back support.

The trial court may also make its decision on child support retroactive to the date of filing; however, this is not considered an award of "back support." *In re Marriage of Holmes*, 128 Wn. App. 727, 741, 117 P.3d 370 (2005) ("The trial court has discretion to make the modification effective on the filing date of the petition, the date of the order, or at any time in between."); *Matter of Marriage of McDaniel*, 87 Wn. App. 827, 833, 947 P.2d 1225 (1997) ("After a trial court determines that modification is appropriate, its calculation of the amount of support owing between the date of filing and the order date is not an award of back support."). Here, the trial court opted to make its order of child support retroactive to the date of the petition. This was not an abuse of discretion.

[12] This finding is adequately supported by evidence submitted by Mr. Walker himself. Ex. 119.

E. The trial court did not abuse its discretion in designating its orders as nunc pro tunc.

A nunc pro tunc order is an order entered by the court to reflect what actually happened during the proceedings. *Pratt v. Pratt*, 99 Wn.2d 905, 911, 665 P.2d 400 (1983). "A trial court has discretionary power to enter a nunc pro tunc judgment where justice so requires. Such discretionary action may not be disturbed on appeal except upon a clear showing that the ruling was manifestly unreasonable." *State v. Rosenbaum*, 56 Wn. App. 407, 410, 784 P.2d 166 (1989) (citing *In re Estate of Carter,* 14 Wn. App. 271, 276, 540 P.2d 474 (1975)). Here, the trial court designated its child support order and judgment as nunc pro tunc to reflect the evidence presented at the trial over two years prior. 10 RP 25. Mr. Walker presents no argument as to why this was manifestly unreasonable, nor could he, as the entire purpose of remand was for proper presentation of a child support order reflecting the evidence entered at trial.[13] There was no error by the trial court in designating its orders nunc pro tunc.

[13] The two statutes Mr. Walker cites have nothing to do with the entry of orders after remand or nunc pro tunc orders. RCW 2.24.050 deals with orders entered by commissioners. RCW 4.72.020 addresses motions to vacate under CR 60.

F. The trial court's factual findings are supported by substantial evidence.

A trial court's findings of facts should be upheld if they are supported by substantial evidence. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). "'Substantial evidence' exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *In re Marriage of Fahey,* 164 Wn. App. 42, 55, 262 P.3d 128 (2011). The substantial evidence standard requires the Court to examine the record as a whole. *City of Fed. Way v. Pub. Emp't Relations Comm'n*, 93 Wn. App. 509, 512, 970 P.2d 752 (1998). The record must be viewed in the light most favorable to the party who prevailed at the trial court. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

Courts of Appeal "do not review credibility determinations or weigh evidence on appeal." *Fahey*, 164 Wn. App. at 62 (citing *In re Marriage of Meredith,* 148 Wn. App. 887, 891 n. 1, 201 P.3d 1056, *review denied,* 167 Wn.2d 1002, 220 P.3d 207 (2009)). Rather, "the trier of fact, which observes the witness's manner while testifying, alone passes on a witness's credibility and measures the weight of the evidence." *In re Estate of Palmer*, 145 Wn. App. 249, 266, 187 P.3d 758 (2008).

1. Mr. Walker is voluntarily underemployed.

In its order for child support, the trial court found that Mr. Walker was voluntarily underemployed at the time of trial. CP 315. In deciding whether a parent is voluntarily underemployed, the trial court examines the level of employment a parent is capable and qualified to perform. *In re Marriage of Sacco,* 114 Wn.2d 1, 4, 784 P.2d 1266 (1990). If a parent fails to provide credible evidence of his earning potential, the court may consider him voluntarily underemployed. *In re Marriage of Dodd*, 120 Wn. App. 638, 646, 86 P.3d 801 (2004).

Mr. Walker presented no evidence about his work history and qualifications. The only information on record regarding Mr. Walker's work history is his financial declaration submitted with his initial petition, which lists his former employer as T&A Supply Company. CP 46-56. Mr. Walker presented no evidence[14] about his attempts (if any) to locate a job similar to the one he held at T&A. He also presented no evidence indicating that he is unable to hold a similar job. Mr. Walker's only evidence about his current employment position is his self-serving statement that there is a "lack of demand." Ex. 104.

Mr. Walker testified that he is currently enrolled at Highline Community College to earn a respiratory care certificate. 7 RP 4. Mr.

[14] Such as testimony about how many applications he has submitted since November 2013, copies of any applications, etc.

Walker provided no verification of his enrollment. Further, respiratory care is not within Mr. Walker's line of work. See Ex. 103 (describing obtaining "new skills").[15] Choosing to attend school instead of obtaining work constitutes voluntary un- or underemployment for purposes of calculating child support. *Matter of Marriage of Jonas*, 57 Wn. App. 339, 340, 788 P.2d 12 (1990). Mr. Walker's decision to attend school rather than find work, combined with his failure to present any evidence about his efforts to locate work, adequately support the trial court's finding that Mr. Walker is voluntarily unemployed. The trial court did not abuse its discretion.

2. The trial court correctly calculated Mr. Walker's child support obligations.

Mr. Walker's challenges to the trial court's calculation of child support are two-fold. First, he contends that his income was imputed at the wrong amount. Second, he contends that the trial court should have found Ms. Johnson voluntarily underemployed.[16]

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[15] Although there was no testimony about what type of business T&A Supply is, one can easily infer from its name that it is most likely not involved in the provision of healthcare services.

[16] Mr. Walker also contends that the trial court should never have awarded child support because Ms. Johnson did not properly assert a counterclaim. It was Mr. Walker who first requested that the trial court determine the child support obligations of the parties. Docket No. 18. A party may not assert a claim in his pleadings and then assert a contrary position either at trial or on appeal. *See Procter & Gamble Co. v. King Cnty.*, 9 Wn.2d 655, 659, 115 P.2d 962 (1941) ("Ordinarily, one is bound by the allegations of his pleading."); *see also State v. Hood*, 196 Wn. App. 127, 382 P.3d 710, 712 (2016) ("The

Mr. Walker's first argument is largely premised on his 2015 and 2016 income, which is not part of the evidence offered at trial. This argument lacks merit, as discussed in section B, *supra*. To the extent that Mr. Walker argues that the court should have used his most recent income in calculating child support, his contention fails for lack of evidence. Mr. Walker never submitted his 2011 and 2012 tax returns for admission into evidence at trial. Mr. Walker did not move to admit his Employment Security Department stubs. Ms. Walker's 2013 W-2s are not part of the evidentiary record.[17] Thus, the trial court could not have imputed Mr. Walker's income at his prior rate of pay, because it had no evidence of what that prior rate of pay was. The only available option for the trial court was to impute income using census data, RCW 26.19.071(6)(e), which it did. There was no abuse of discretion.

Mr. Walker further argues that the trial court should have imputed income to Ms. Johnson, rather than using her actual earned income. First, this Court cannot address this argument, because Mr. Walker deliberately omitted all testimony from Respondent's case in chief, including Ms.

---

basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial.").

[17] Although Mr. Walker moved to have his W-2s (marked as Exhibit 105) admitted, the trial court directed him to redact his social security number before it would admit the documents. 7 RP 4. There is no indication in the record that he ever did so, and the exhibit list marks Exhibit 105 as For Identification Only. CP 271. The clerk's minutes from trial also does not list Exhibit 105 as admitted. Docket No. 181.

Johnson's testimony, from the report of proceedings. *See Story v. Shelter Bay Co.*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988) (citing *Reed v. Pennwalt Corp.*, 93 Wn.2d 5, 604 P.2d 164 (1979)). Second, the trial court exercises its discretion in calculating the amount of child support owed. *George v. Helliar*, 62 Wn. App. 378, 385, 814 P.2d 238 (1991). Unlike Mr. Walker, Ms. Johnson introduced her 2011 and 2012 tax returns and her 2013 W-2, all of which were admitted into evidence pursuant to ER 904. CP 267. Ms. Johnson also offered a letter from her employer, Ted Irwin, in which he explained why she was not working 40 hours per week. Ex. 23. Based at least in part on this information, the trial court declined to find that Ms. Johnson was voluntarily underemployed. CP 315. It did not abuse its discretion in doing so.

3. Temporary restrictions on Mr. Walker's residential time are in MJW's best interests.

Mr. Walker contends that the trial court's restrictions on his visitation time are not supported by the evidence. This Court should deem this argument waived. On the first appeal, this Court held that Mr. Walker received adequate notice of the parenting plan prior to its entry. *In re MJW*, 191 Wn. App. 1006, 2015 WL 6872225 at *1 (Div. I, November 9, 2015). Mr. Walker could have challenged the provisions of the parenting plan at the initial presentation hearing. He did not. Mr. Walker could

have challenged the provisions of the parenting plan on his first appeal. He did not. He does not get a third bite at the apple now. RAP 2.5(a); *Folsom v. Cnty. of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988) (quoting *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965)).

Assuming *arguendo* that Mr. Walker may still challenge the parenting plan, his argument is without merit. This Court reviews a trial court's parenting plan for abuse of discretion. *Katare v. Katare*, 125 Wn. App. 813, 822, 105 P.3d 44 (2004). A trial court's primary concern in developing a parenting plan is the best interests of the child. RCW 26.09.002. Pursuant to RCW 26.09.191, a trial court may restrict the visitation or residential time of a parent if doing so is in the best interests of a child. This statute states, in relevant part,

> A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:
>
> (a) A parent's neglect or substantial nonperformance of parenting functions;
>
> (b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;
>
> (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;

> (d) The absence or substantial impairment of emotional ties between the parent and the child;
>
> (e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;
>
> (f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or
>
> (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

RCW 26.09.191(3). Here, the trial court found that restrictions to Mr. Walker's visitation time were warranted, given the history of his relationship with MJW. Specifically, the trial court found that "[t]he prior sporadic parenting by the father has not been conducive to the emotional well being of the child" and that "[u]ntil the bonds of trust can be established between the child and the father, attempts to introduction [sic] the child into the father's new family would be detrimental to her emotional and psychological well being." CP 274; Docket No. 136.[18]

These findings are well-supported by the record. Ms. Johnson, Mr. Walker, and MJW all discussed Mr. Walker's lack of involvement at various points throughout MJW's childhood. MJW's counselor, Jennifer Knight, testified that this lack of involvement caused MJW to feel angry

[18] Mr. Walker argues briefly that the trial court failed to enter any findings of fact and conclusions of law. This is incorrect, as findings of fact and conclusions of law were entered on June 20, 2014, and the entry of these findings was not overturned by this Court's prior decision. Additionally, the parenting plan and child support orders contain findings and conclusions, although not expressly marked as such.

and abandoned by her father.[19] 5 RP 314, 323. Both Ms. Knight and reunification therapist Jacqui Parkes informed the GAL that immediately forcing MJW to spend significant time with her father would only backfire, and cause MJW to withdraw from the relationship even more. 4 RP 16; CP 659, 661. In Ms. Barton's opinion, MJW and Mr. Walker needed to continue the reunification process through therapy, to create the bond that had been missing for most of her life. 4 RP 15.

There was also testimony from Mr. Walker and the GAL that Mr. Walker's prior relationships had caused MJW to develop trust issues. 7 RP 19-20. One former girlfriend, Bonnie, was abusive toward MJW, and MJW told the GAL that Mr. Walker seemed to care about other women more than her. 4 RP 14. The GAL believed that having Ms. Walker and her children around for visits would continue to make MJW feel unimportant to Mr. Walker. 4 RP 16. There is additional evidence to suggest that immediate integration into Mr. Walker's new family would not alleviate, and could exacerbate, those trust issues. Ms. Walker testified that she allowed her children to be around persons who she had previously alleged to be dangerous or abusive, which could be problematic

[19] Mr. Walker contends that the trial court should have discounted the testimony of Ms. Knight because she is "biased" and "unethical." These are questions of credibility, which cannot be reviewed on appeal. *In re Estate of Palmer*, 145 Wn. App. 249, 266, 187 P.3d 758 (2008). Mr. Walker's arguments about the admissibility of Ms. Knight's testimony are waived, as he never objected to her testimony prior to or during trial. RAP 2.5; *see* CP 248-55 (Mr. Walker's motion in limine).

given MJW's experience with Bonnie. 6 RP 31-33, 37. There was also evidence that Ms. Walker and her oldest child had shamed MJW and her mother (and felt no regret over it) for MJW's reticence, which is not exactly conducive to MJW's well-being. 6 RP 42-44, 51-52. Even Mr. Walker himself admitted that under the circumstances as they existed at trial, visitation should not occur at his house with his new family. 7 RP 30.

In sum, there is ample evidence that Mr. Walker neglected his parenting functions for a long period of time, that there is a substantial impairment of emotional ties between Mr. Walker and MJW, and that immediate integration into Mr. Walker's new family is not in the best interests of MJW. RCW 26.09.191(3)(a), (d), (g). Based on these findings, the trial court was warranted in imposing temporary restrictions on Mr. Walker's visitation time.

G. The trial court did not abuse its discretion in directing the parties to pay their proportionate share of expenses.

The order of child support calls for the parties to split costs for agreed upon extracurricular activities and school expenses in the same proportion as the split in the cost of basic needs under the child support schedule, 78% Mr. Walker, 22% Ms. Johnson. Mr. Walker challenges this determination, contending that the provision is essentially a "blank check"

for Ms. Johnson to increase his child support obligations.[20] This argument should be deemed waived, as he failed to assert it to the trial court in his motion for reconsideration. RAP 2.5(a); CP 371-83.

Even if Mr. Walker has not waived this argument, his contention still fails. The trial court has broad discretion to order the payment of reasonable and necessary expenses beyond the basic support obligation. RCW 26.19.080(4). "[T]he court is not required to make an itemized list of each and every particular activity and its specific cost." *In re Marriage of Aiken*, 194 Wn. App. 159, 173, 374 P.3d 265 (2016). General categories of activities are enough. *Id.* "Once the trial court determines that extraordinary expenses are 'reasonable and necessary,' it is required to allocate them in proportion with the parents' income." *In re Yeamans*, 117 Wn. App. 593, 600, 72 P.3d 775 (2003).

Here, the trial court ordered the parties to split the costs of the following types of expenses: agreed-upon extracurricular activities, school expenses, and orthodontia expenses. CP 359. There is ample evidence regarding the necessity and reasonableness of these categories of expenses. MJW is a high school student, subject to mandatory fees for

[20] This exact argument has been advanced to the Court of Appeals before. *In re Parenting & Support of C.K.M.-S*, 143 Wn. App. 1038, 2008 WL 699444 at *3-4 (Div. I, March 17, 2008). Though this opinion is not binding, the Court may nevertheless wish to consult it.

things such as field trip costs and ASB dues.[21] There is voluminous evidence referring to MJW's participation in soccer.[22] 6 RP 103; Exs. 107-110. A letter from MJW's orthodontist was admitted that speaks to her need for braces. CP 268, Ex. 20.

The court's relegation of decision-making authority to Ms. Johnson was required under RCW 26.09.187(2)(b), because Mr. Walker is subject to RCW 26.09.191 restrictions and Ms. Johnson had a reasonable objection to joint decision making. This does not mean that Ms. Johnson a "blank check" to increase child support. Mr. Walker's obligation is limited to those expenses actually incurred, and he may seek reimbursement from Ms. Johnson for any expense he incurs that falls within this provision.[23] RCW 26.19.080(3). In light of the evidence about the types of costs MJW normally incurs, and the provisions of the parenting plan allocating decision-making power to Ms. Johnson, Mr. Walker fails to demonstrate any abuse of discretion. The trial court's order should be upheld.

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[21] All public schools in Washington have an Associated Student Body (ASB) fund, as expressly contemplated by the Office of the Superintendent of Public Instruction. OSPI ACCOUNTING MANUAL FOR PUBLIC SCHOOL DISTRICTS CHAPTER 6 61 (FY 2015-16), http://www.k12.wa.us/safs/INS/ACC/1516/06FC.pdf. This fact is appropriate for judicial notice. ER 201(b).

[22] There was also testimony that MJW participated in skiing, and that this activity was organized by the Walkers. 6 RP 104.

[23] For example, if MJW needs to go to the emergency room while she is in Mr. Walker's care, Mr. Walker can seek reimbursement from Ms. Johnson for her share of the deductible he paid to the hospital.

H. The residential schedule is adequately defined.

Finally, Mr. Walker contends that the residential schedule entered by the trial court is inadequate, as it calls for a phased-in increase in residential time, with each step being implemented upon the recommendation of both Ms. Parks and Ms. Knight. This Court should deem this argument waived, for the reasons articulated in section F-3, *supra*.

Assuming *arguendo* that Mr. Walker has not waived this argument, the argument still fails. Mr. Walker asserts that this phased-in schedule grants judicial power to non-judicial actors, i.e. the therapists, and is therefore invalid. This contention is foreclosed by *Kirshenbaum v. Kirshenbaum*, 84 Wn. App. 798, 929 P.2d 1204 (1997).

In *Kirschenbaum*, the trial court permitted an arbitrator to temporarily suspend parental visitation rights, with judicial review available upon request. 84 Wn. App. at 804. The mother argued that this provision exceeded the trial court's statutory authority. *Id.* In rejecting this argument, the Court of Appeals noted, "Nowhere does the act specifically prohibit the appointment of private practitioners to oversee the performance of a parenting plan or make alterations." *Id.* at 806-07. The Court held that the temporary suspension of visitation did not constitute a modification and that, regardless, the mother had a right to judicial review

of the arbitrator's decision. *Id.* at 807. Permitting the arbitrator to temporarily suspend visitation was good policy because

> Courts frequently rely on the recommendations of mental health professionals in fashioning and making alterations to visitation schedules. *See, e.g., Helliar,* 62 Wn. App. at 385, 814 P.2d 238. Allowing an appointed counselor's chosen course of action to be effective immediately, rather than awaiting a decision by the court, provides an efficient and flexible solution to disputes and threats to the children's welfare as they arise.

Id.

Here, the parenting plan states, "Once both therapists (Jennifer Knight and Jacqui Parkes) agree, or by further order of the Court, that [M.J.W.] has established necessary bonds of trust with the father to be ready for residential time, such time shall be phased..." CP 280. Allowing MJW's therapists to decide upon the transition date allows for efficiency and flexibility in increasing Mr. Walker's residential time, rather than having to attend court every time increased visitation would be in MJW's best interests. The decision to increase residential time is not a modification, because the parenting plan already calls for multiple phases, with the exact amount of visitation specified for each phase. By the plain language of the provision, the trial court retained its authority to implement a change in phases, with or without the agreement of the

therapists. CP 280.[24] Further, if any disputes arise regarding the transition between phases, the parties may submit the matter to mediation, from which the parties have a right of review in superior court. CP 283-84. As in *Kirschenbaum,* the trial court did not abuse its discretion in affording some limited power to MJW's therapists.

I. The remainder of Mr. Walker's contentions lack merit.

The remainder of Mr. Walker's arguments can be disposed of briefly. First, Mr. Walker contends that the trial court should not have relied on the GAL's report, because the GAL failed to interview someone named Nancy Paul. This is a question of credibility, which is not reviewable on appeal.

Second, Mr. Walker contends that Ms. Johnson is not entitled to claim the tax exemption for MJW every year, because she claimed it for the first 14 years of MJW's life. By statute, the trial court has the discretion to award a tax exemption to either party, or alternate between both parties. RCW 26.19.100. "Generally under the tax code, the custodial parent is entitled to the dependency exemption." *In re Marriage of Peacock*, 54 Wn. App. 12, 14, 771 P.2d 767 (1989). Ms. Johnson is the custodial parent, and the parent to whom child support is owed. The trial

[24] "Once both therapists (Jennifer Knight and Jacqui Parkes) agree, **or by further order of the Court**, that [MJW] has established necessary bonds of trust with the father to be ready for residential time, such shall be phased..." CP 280 (emphasis added).

court did not abuse its discretion in awarding her the tax exemption for MJW.

Third, Mr. Walker contends that he should not be required to provide life insurance for MJW. "[A] trial court may order a spouse obligated to pay child support to maintain life insurance for the benefit of minor children as security for the support obligation should the spouse die before the children are emancipated." *Standard Ins. Co. v. Schwalbe*, 110 Wn.2d 520, 523, 755 P.2d 802 (1988) (citing *Sutherland v. Sutherland,* 77 Wn.2d 6, 10–11, 459 P.2d 397 (1969); *Riser v. Riser,* 7 Wn. App. 647, 650, 501 P.2d 1069 (1972); *Divorce: Provision in Decree That One Party Obtain or Maintain Life Insurance for Benefit of Other Party or Child,* 59 A.L.R.3d 9 (1974)). That is precisely what the trial court did here. There is no error.

Fourth, Mr. Walker contends that he should not be required to pay a portion of MJW's health insurance premiums, because MJW is listed on Ms. Walker's insurance. The trial court found that Ms. Johnson's insurance policy is more reliable and, therefore, MJW should continue to be covered under this policy, with Mr. Walker contributing to the monthly premiums. CP 319. Ms. Johnson testified at trial that Mr. Walker had let his past policy lapse without notifying her until three months afterwards, and that Ms. Walker's insurance was nearly impossible to use because Ms.

Johnson was never provided with an insurance card. 4 RP 33-36. The trial court was entitled to find this testimony credible and find that MJW would have more reliable coverage under Ms. Johnson's policy. The trial court did not err in including the health insurance premium in calculating Mr. Walker's child support obligation.

Finally, Mr. Walker assigns error to the trial court's allocation of decision-making authority on religion to Ms. Johnson and to the amendment of the Judgment and Order of Child Support to fix a scrivener's error regarding attorney fees. Mr. Walker devotes a single paragraph to each of these arguments, together constituting less than one page in Mr. Walker's 50-page brief. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit appellate review." *Christian v. Tohmeh*, 191 Wn. App. 709, 728, 366 P.3d 16 (2015), *review denied*, 185 Wn.2d 1035, 377 P.3d 744 (2016). These two arguments are underdeveloped and conclusory, and the Court should decline to address them.

J. Ms. Johnson should be awarded attorney fees on appeal.

Where attorney fees may be awarded by the trial court, RAP 18.1 permits this Court to award fees to a party on appeal. RCW 26.09.140 allows for the award of reasonable attorney fees in any action brought under chapter 26.09 RCW, including petitions to establish a parenting

plan. The trial court awarded reasonable attorney fees to Ms. Johnson following trial. CP 354. Ms. Johnson therefore requests that she be awarded fees pursuant to RAP 18.1. In accordance with RAP 18.1(c), an affidavit of need will be submitted 10 days prior to oral argument.

Additionally, this Court may award fees pursuant to RAP 18.9 where the opposing party has failed to comply with the Rules of Appellate Procedure or has used the Rules for purposes of delay. On appeal, Mr. Walker has submitted copies of verbatim reports of proceedings in piecemeal fashion, moved for continuances after court-imposed deadlines, twice submitted briefs that did not comply with the Rules,[25] and failed to adequately develop the record. As a result, adjudication of this appeal has been substantially delayed and Ms. Johnson has had to expend more effort than necessary to respond to what should have been a relatively simple appeal. For this reason, attorney fees are warranted under RAP 18.9.

IV. CONCLUSION

Mr. Walker asks this Court to act in many ways that are beyond its authority. On those issues that are reviewable, Mr. Walker argues that his position is more convincing, arguing for his interpretation of facts and deliberately excluding much of the evidence presented by Ms. Johnson. However, even the incomplete evidence presented to this Court supports

[25] Mr. Walker's third brief also fails to comply with the Rules, as there is no separate section devoted to assignments of error. RAP 10.3(a).

the trial court's findings and determinations. Child support and parenting plans are matters of trial court discretion, and Mr. Walker has failed to demonstrate any abuse of that discretion.

Therefore, Respondent respectfully requests that the decision of the trial court be AFFIRMED, and that she be awarded fees and costs pursuant to RAP 18.1 and 18.9.

Respectfully submitted this 28th day of December, 2016.

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CERTIFICATE OF MAILING

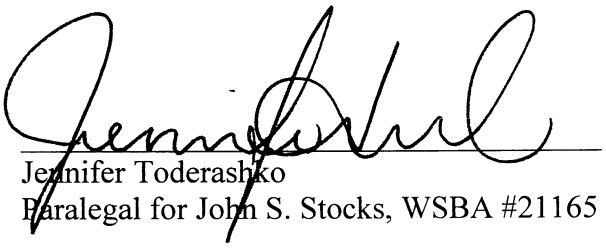
I hereby certify that on the 28th day of December, 2016, I mailed a true and correct copy of the foregoing Brief of Respondent to:

JOHNATHAN L. WALKER
1514 210TH AVE E.
LAKE TAPPS, WA 98391

I also delivered the original Brief of Respondent to the Court of Appeals Clerk's office for filing with Division I Court.

I, Jennifer Toderashko, declare under penalty of perjury under the laws of the State of Washington that the above stated statements are true and correct.

SIGNED at Auburn, Washington on this 28th day of December, 2016.



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APPENDIX A

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191 Wash.App. 1006
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

In the Matter of the Parenting and Support of M.J.W., A Minor Child.
Johnathan L. Walker, Appellant,
Jennifer L. Johnson, Respondent.

No. 72310–3–I.
|
Nov. 9, 2015.

Appeal from King County Superior Court; Hon. Brian D. Gain, J.

Attorneys and Law Firms

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UNPUBLISHED OPINION

SCHINDLER, J.

***1** Johnathan L. Walker filed a petition to establish a parenting plan. Following trial, the court scheduled a presentation hearing and ordered the attorney for the mother Jennifer L. Johnson to "prepare the final orders and provide a copy to" Walker. The record establishes Johnson did not provide Walker copies of the orders before the presentation hearing. Walker appeals, arguing the court erred in entering the final parenting plan and order of child support where he did not receive copies of the proposed orders as required by the Civil Rules and the court's order. We conclude Walker cannot show prejudice as to entry of the final parenting plan but the record establishes prejudice as to entry of the order of child support. We affirm the final parenting plan but reverse entry of the order of child support, and remand.

Johnathan Walker and Jennifer Johnson are the parents of M.J.W., born in 2000. Walker and Johnson ended their relationship in 2002. On April 30, 2013, Walker filed a petition to establish a parenting plan. On June 12, the court entered a temporary parenting plan and appointed a guardian ad litem (GAL).

The GAL submitted a report before trial. The GAL recommended that M.J.W. reside with the mother and that she have sole decision-making authority as to major decisions. The GAL recommended M.J.W. should continue individual counseling and Walker and M.J.W. should continue to engage in counseling together. The GAL recommended that after both counselors agreed, Walker's residential time with M.J.W. should begin with a three-hour dinner visit every other week, increase to include an additional four hours every other weekend, and then increase to weekly dinner visits with one weekend day every other weekend.

Trial began on May 5, 2014. The court heard testimony from Walker, his spouse, Johnson, and the GAL.

On June 9, the court issued a three-page letter ruling addressing the parenting plan. The letter ruling closely followed the GAL's recommendations. The letter ruling states, in pertinent part:

> I have reviewed my notes and the exhibits admitted at trial. Based on the exhibits and the testimony of the witnesses presented, I am persuaded as follows:
>
> 1) That [M.J.W.] should reside with the Respondent/Mother;
>
> 2) That it is not in the best interests of [M.J.W.] to have visitation with the Petitioner/Father except through a phased plan similar to that recommended by the Guardian Ad Litem;
>
> 3) That the prior sporadic parenting by Mr. Walker has not been conducive to the emotional well being of [M.J.W.];
>
> 4) That until bonds of trust can be established between [M.J.W.] and Mr. Walker, attempts to introduce [M.J.W.] into Petitioner's new family would be detrimental to [the child's] emotional and psychological well being;
>
> 5) That therefore, I adopt the recommendations of

the GAL, modified as follows:

a) That residential time with the father is reserved for family therapy;

b) That Mr. Walker and [M.J.W.] should recommence family therapy with Jacqui Parkes;

*2 c) That the number of family therapy sessions shall be as recommended by Ms. Parkes;

d) That contact between Mr. Walker and [M.J.W.] shall be addressed during therapy as recommended in Paragraph 5 of the GAL Report;

e) That contact with [M.J.W.] shall be exclusively with Mr. Walker and not other members of his family until approved by [M.J.W.] in consultation with Mr. Walker and Ms. Parkes;

f) That [M.J.W.] shall continue therapy with Jennifer Knight until released by Ms. Knight;

g) That when both therapists agree or by further order of the Court, that [M.J.W.] has established necessary bonds of trust with Mr. Walker to be ready for residential time, such time shall be phased;

h) Phase One shall be one dinner visit every other week for 3 hours to include only Mr. Walker and [M.J.W.];

i) Phase Two shall be 4 hours every other weekend in addition to Phase One, to include only the father and [M.J.W.] unless otherwise agreed in consultation with the therapists;

j) That an additional phase shall be reserved pending an evaluation of the progress of re-integration;

k) That each phase shall be followed by the Petitioner on a consistent basis;

l) That termination of therapy for whatever reason shall be reported to the Court;

m) That Respondent shall have sole decision-making on major decisions regarding education, non-emergency medical decisions and religious upbringing;

n) That any decision concerning family therapy changes or an increase in financial commitment by the Petitioner-after notice to Mr. Walker–Mr. Walker may request arbitration;

o) That Respondent shall keep the father informed of all major developments in [M.J.W.]'s education, health and well-being.

The court scheduled a presentation hearing for June 20, 2014 at 10:00 a.m. and directed Johnson's attorney to "prepare the final orders and provide a copy to the Petitioner, Johnathan Walker prior to the presentation date."

The parties appeared at the presentation hearing on June 20. Johnson's attorney presented "Findings of Fact and Conclusions of Law on Petition for Residential Schedule/Parenting Plan or Child Support," a "Final Parenting Plan," an "Order of Child Support" and "Washington State Child Support Schedule Worksheets," and a "Judgment and Order Establishing Residential Schedule/Parenting Plan." Walker appeared pro se. The record establishes Walker did not receive copies of the final orders before the presentation hearing. Johnson's attorney told the court, "Mr. Walker's here, and he's reviewing [the orders]. I don't know how far he's gotten." Walker signed the final parenting plan and handed it to the court. The court asked Walker if he needed additional time to review the other orders.

THE COURT: Mr. Walker, have you had an opportunity to take a look at [the orders]?

MR. WALKER: Yes. So far, I've looked at four of them.

THE COURT: Yeah, do you need some additional time?

MR. WALKER: Yeah.

*3 Following a short recess, the court asked Walker if he had additional questions. Walker objected to the order of child support and worksheets.

Your Honor, you have to, first off, excuse me, because I obviously didn't know about this, about the stuff being submitted.

I thought that the judgment would be for every—all the way, across the board—for financial, and for the parenting plan.

I don't agree with the financial side of it, because what's been drawn up, by the amounts that are in there-I never made those amounts.

The monthly child support that's been put in there is even higher than when I was still working, and the temporary order was put in place, and I was paying

child support through the State.

Then, there's the guardian ad litem; I never agreed to having a guardian ad litem, for reasons of not being able to pay for it, in the beginning. And I can't pay for it now.

And that's it.

The court added a provision to the order of child support permitting Walker to "seek adjustment if he becomes employed and the income is less than imputed income herein." The court also stated that it would not allocate any GAL fees to Walker because "based on the testimony at trial, the money is not there to pay it." The court entered the findings of fact and conclusions of law, the judgment and order establishing the residential schedule and parenting plan, and the order of child support.

Walker argues the court erred in entering the final parenting plan and order of child support because Johnson did not comply with the requirement to provide copies of the orders before the presentation hearing.

The Civil Rules require that a party receive findings of fact and conclusions of law as well as proposed orders before the court signs them. CR 52(c) states, in pertinent part, "[T]he court shall not sign findings of fact or conclusions of law until the defeated party or parties have received 5 days' notice of the time and place of the submission, and have been served with copies of the proposed findings and conclusions." CR 54(f)(2) states, in pertinent part, "No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment."

Johnson argues that because Walker did not object to the failure to comply with the Civil Rules, he waived the right to argue that he did not receive notice of the proposed orders. The record does not support Johnson's argument.

At the beginning of the presentation hearing, Walker told the court he did not receive copies of the proposed orders, "Your Honor, you have to, first off, excuse me, because I obviously didn't know about this, about the stuff being submitted." Although Walker did not cite the Civil Rules, he preserved the issue for review. *See Greenfield v. W. Heritage Ins. Co.,* 154 Wn.App. 795, 801, 226 P.3d 199 (2010) (failure to cite specific RCW section did not preclude appellate review where party argued issue).

***4** In the alternative, Johnson asserts Walker cannot show prejudice. Walker asserts prejudice because he did not have time to object to the contents of the final parenting plan or order of child support.

A violation of CR 52(c) or CR 54(f)(2) supports reversal on appeal if there was prejudice to the appellant. *Yakima County v. Evans,* 135 Wn.App. 212, 222, 143 P.3d 891 (2006) (citing *Seidler v. Hansen,* 14 Wn.App. 915, 919–20, 547 P.2d 917 (1976)); *Burton v. Ascol,* 105 Wn.2d 344, 352, 715 P.2d 110 (1986). The purpose of the rules is to afford a party an opportunity to evaluate and object to the contents of proposed orders. *See 224 Westlake, LLC v. Engstrom Props., LLC,* 169 Wn.App. 700, 728, 281 P.3d 693 (2012); *Tacoma Recycling, Inc. v. Capitol Material Handling Co.,* 34 Wn.App. 392, 396, 661 P.2d 609 (1983) ("[Appellant] is entitled to 5 days' notice of presentation of any proposed findings and conclusions in order to evaluate them and prepare all relevant arguments against their adoption."); 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 54, at 318 (6th ed. 2013) (The purpose of the rule is to give a party the opportunity to object to the form or content of the judgment before it is entered.).

Walker cannot show prejudice as to entry of the final parenting plan. The material provisions of the final parenting plan reflected not only the recommendations of the GAL submitted before trial but also the court's June 9 letter ruling.[1] The "Residential Schedule" section of the final parenting plan states, in pertinent part:

3.2 School Schedule

Upon enrollment in school, the child shall reside with the mother. Residential time with the father should be reserved for family therapy.

Through therapy, contact between the child and the father should be addressed pending scheduled residential time, such as the father's attendance at school and sporting events, email, telephone/texting, etc.

Once both therapists (Jennifer Knight and Jacqui Parkes) agree, or by further order of the Court, that [M.J.W.] has established necessary bonds of trust with the father to be ready for residential time, such time shall be phased:

Phase I. One dinner visit every other week, for 3 hours to include only the father and [M.J.W.];

Phase II. 4 hours every other weekend in addition to Phase One, to include only the father and [M.J.W.] unless otherwise agreed in consultation with the therapists;

> Additional phases of visitation shall be reserved pending an evaluation of the progress of re-integration. Each phase of visitation shall be followed by the father on a consistent basis. The termination of therapy for whatever reason shall be reported to the Court.

However, we conclude the record shows prejudice as to entry of the order of child support. The court's letter ruling does not mention child support. The order of child support and the worksheets contain a number of significant provisions. For example, the order of child support imputed income to Walker of $3,448 "because he is voluntarily underemployed." The order of child support states Walker owes a significant amount of back child support and requires Walker to pay 78 percent of the following expenses:

> ***5** 1. Agreed-upon extracurricular activities of the children, including but not limited to horseback riding, soccer and dance lessons. Extracurricular activity fees shall include travel/lodging, gas, airfare, uniforms, pictures, shoes, and other fees;
>
> 2. Camps, clubs, activities, day care, educational expenses, tuition, school costs, [associated student body] fees, senior pictures, prom, homecoming, long distance expenses, any extracurricular or sports activities, orthodontia expenses;
>
> 3. Any one-time expense that is outside the normal basic food and shelter expense for the children.

Despite the recess to allow Walker to review the child support order and worksheets and the court's consideration of Walker's objection to one aspect of the order, the record shows Walker did not have adequate time to evaluate the order of child support and raise additional objections.

We affirm entry of the final parenting plan but reverse entry of the order of child support, and remand.[2]

WE CONCUR: LAU and APPELWICK, JJ.

All Citations

Not Reported in P.3d, 191 Wash.App. 1006, 2015 WL 6872225

Footnotes

1 The record also shows Walker reviewed and signed the final parenting plan without objection.

2 We deny Johnson's request for attorney fees and costs under RAP 18.1 and 18.9.

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APPENDIX B

VAN SICLEN, STOCKS & FIRKINS
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143 Wash.App. 1038

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

In the Matter of the PARENTING AND SUPPORT OF: C.K.M.-S, Child(ren),
Kaye Lee Miller, Respondent,
and
Ty E. Sauve, Appellant.

No. 59706-0-I.
|
March 17, 2008.

Appeal from King County Superior Court, Honorable Glenna S. Hall, J.

Attorneys and Law Firms

Molly B. Kenny, Law Offices of Molly B. Kenny, Mercer Island, WA, for Appellant.

Karma L. Zaike, Michael W. Bugni & Associates, Seattle, WA, for Respondent.

APPELWICK, C.J., and COX and LAU, JJ.

UNPUBLISHED OPINION

PER CURIAM.

*1 Ty Sauve appeals the child support order regarding his daughter C .K., arguing that the trial court failed to make necessary findings of fact to support a $10,000 attorney fee award, certain amounts ordered in excess of the basic child support obligation, and its calculation of back support. Because Sauve fails to demonstrate any abuse of discretion in the trial court's determination of the special expenses, we affirm in part. But because the trial court failed to make sufficient findings detailing its calculation of the attorney fee award and failed to properly calculate back support, we vacate those portions of the order and remand for recalculation of back support and entry of appropriate findings of fact and conclusions of law to explain its awards of attorney fees and back support.

FACTS

Kaye Lee Miller and Ty Sauve are the parents of C.K., who was born in September 2001. Miller and Sauve lived together until April 2003 and C.K. stayed with Miller thereafter. Given Sauve's criminal record and history of drug and alcohol abuse, Miller allowed Sauve only limited supervised visitation with C.K. In August 2005, Miller filed a petition for a parenting plan and child support. In December 2005, the trial court entered a temporary order of child support setting a transfer payment of $705.23, retroactive to September 2005. Following mediation, the parties agreed upon a parenting plan. The parenting plan allocates all major decision making to Miller and imposes significant restrictions on Sauve's contact with C.K., including several phases of increasing visitation based on specified conditions.[1] The plan also provides that the location of Miller's home will not be disclosed to Sauve and that C.K.'s school and daycare would not be disclosed to Sauve for at least a year.

After holding a trial by affidavit to determine child support and attorney fees in November 2006, the trial court signed the order proposed by Miller, awarding her $10,000 in attorney fees and directing Sauve to contribute to private school and daycare expenses and "special expenses," and to pay back child support of $20,451.67 for the period between April 2003 and August 31, 2006.

Sauve appeals. Both Miller and Sauve request attorney fees on appeal.

ANALYSIS

As an initial matter, we consider Miller's motion to strike Sauve's designation of certain documents for this appeal that were not before the trial court at the trial by affidavit or Sauve's motion for reconsideration. RAP 9.1(c) provides that "[t]he clerk's papers include the pleadings, orders, and other papers filed with the clerk of the trial court." Because a party may properly designate as clerk's papers any materials in the trial court record, and therefore available for the trial court's consideration, whether or not the trial court actually considered particular items in the decision on appeal, we hereby deny the motion to strike.

Sauve first contends that the trial court erred by ordering him to pay Miller $10,000 in attorney fees without making findings of fact. Although the original order included no finding regarding the attorney fee award, the trial court granted Miller's motion to correct a clerical error under Civil Rule (CR) 60(a)[2] and added the following finding: "The court finds that based on all of the evidence presented by both parties, that it is fair and equitable to award the Mother $10,000 in attorney's fees payable by the Father."

***2** Sauve complains that the lack of a finding regarding the attorney fee award is a judicial error, that is, an error of substance that may not be properly corrected under CR 60(a). A clerical error is a "mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney." *In re Marriage of King,* 66 Wash.App. 134, 138, 831 P.2d 1094 (1992). Where by inadvertent oversight a trial court fails to memorialize part of its decision, it may properly clarify its order with supporting findings. *In re Marriage of Stern,* 68 Wash.App. 922, 927–28, 846 P.2d 1387 (1993). Here, the trial court did not vacate or modify its attorney fee award and the belated finding is not contrary to any other findings or clear evidence in the record. As such, the trial court did not err in granting Miller's motion to correct the omission.

Sauve also argues that the finding is insufficient to support the attorney fee award. An attorney fee award is within the trial court's discretion. *In re Marriage of Knight,* 75 Wash.App. 721, 729, 880 P.2d 71 (1994). Intransigence is a recognized equitable ground for recovering attorney fees when one party made the trial unduly difficult or caused increased legal costs. *In re Marriage of Greenlee,* 65 Wash.App. 703, 708, 829 P.2d 1120 (1992).

Our review of the record reveals the following pretrial attorney fee awards to Miller: (1) $1,000 by order filed June 26, 2006, based Sauve's bad faith violation of the parenting plan leading to Miller's motion for a contempt finding; (2) $750 based on Sauve's intransigence in noting motions and hearings improperly by order filed July 21, 2006; and (3) $750 by order filed August 24, 2006 for Sauve's failure to provide requested financial information until after Miller filed a motion to compel discovery. The trial court also reserved the following requests for attorney fees for trial: (1) Miller's request for $3,257 for preparation of her response to Sauve's February 2006 motion that he moved to strike before any hearing; (2) Sauve's request for $1,250 in connection with his motion to enforce the agreed parenting plan; (3) Miller's request for $750 for rule violations in Sauve's motion to enforce the parenting plan; and (4) Miller's request for $750 for Sauve's premature motion to compel. The trial court also found in a pretrial order that Sauve "materially misled the court in his moving papers."

In her trial affidavit, Miller requested $10,000 in attorney fees based generally on Sauve's failure to provide complete and current financial information, the trial court's previous findings of Sauve's bad faith, and her various successful motions filed in response to Sauve's dishonesty and abuse of the legal system. In his memorandum for trial, Sauve described in detail his view of Miller's actions during the litigation and argued that Miller's litigiousness caused his fees to be four times greater than necessary and requested $46,000 in attorney fees, 80 percent of the $76,000 he had incurred.

***3** At the hearing, while considering Miller's claim that Sauve failed to provide complete and current financial information, the trial court stated, "I feel pretty clear that there's been not enough material presented to the [c]ourt for current issues," "I'm not pleased with the foot dragging in discovery," and "I'm going to ... take the motion for sanctions under advisement." The trial court also observed, "I'm uncomfortable not having a 2005 tax return. I think that the meaning of the order was pretty clear that there should be one." In addition, the trial court indicated that while Sauve failed to provide evidence to call Miller's credibility into question, his own credibility was harmed by the fact that he was "not generous with his discovery materials."

Although an award based on Sauve's overall intransigence throughout the proceedings is not patently unreasonable in light of this record, there is no finding whether the award was based on intransigence or necessity and ability to pay or some other reason. Further, there is no explanation of how the trial court arrived at the $10,000 as an appropriate amount. The trial court must provide sufficient findings and conclusions to develop an adequate record for a review of a fee award. *Mahler v. Szucs,* 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998). Thus, we remand for entry of specific findings of fact and conclusions of law regarding the attorney fee award.

Sauve next argues that the trial court abused its discretion by ordering him to pay a pro-rata share of private school tuition, daycare costs and "special expenses ... such as music lessons, dance lessons, tumbling, camp fees, etc." Under RCW 26.19.080(4), the trial court "may exercise its discretion to determine the necessity for and the

reasonableness of all amounts ordered in excess of the basic child support obligation." Sauve argues that the trial court's failure to make findings regarding the necessity for and reasonableness of C.K.'s private school, daycare, and any particular extracurricular activities requires reversal.

But the agreed parenting plan allocates all decision making authority regarding education, religious upbringing, daycare and extracurricular activities to Miller. Under the plan, Miller "shall choose the childcare settings," "shall choose the extracurricular activities," and "will be making the major decisions regarding non-emergency health care, school, daycare, extracurricular activities and religion." Following Sauve's successful completion of the various phases of increasing visitation, the plan allows Sauve to give his opinion about Miller's choices, but Miller is required only to consider his opinions before making the final decisions. Sauve complains that the child support order is a "blank check" and ambiguous. While the order is open ended, it tracks the parenting plan, giving Miller the exclusive choice in determining C.K.'s schooling, daycare and activities.

***4** Miller provided testimony of her work schedule as well as testimony and documentary evidence of C.K.'s school tuition and daycare costs. Under RCW 26.19.080(3), Sauve is entitled to reimbursement for overpayment of any such expenses not actually incurred. And Miller must submit proof of any "special expenses" to collect such amounts from Sauve. In light of the record and the provisions of the agreed parenting plan, Sauve fails to demonstrate any abuse of discretion with regard to the amounts ordered for private school tuition, daycare expenses or "special expenses."

Sauve next challenges the trial court's award of $20,451.67 for "back child support and back day[ ]care for the period from 4/03 to 8/31/06." In her trial affidavit, Miller requested the $20,451.67 based on the transfer amount in the temporary order, $705.23 for the 29 months of the period between April 2003 and August 31, 2005. In a paternity action, the trial court may order payment for support provided or expenses incurred for up to five years prior to the commencement of the action. RCW 26.26.134. The trial court may limit liability for past support to expenses already incurred as it deems just or order payments "determined pursuant to the schedule and standards contained in chapter 26.19 RCW." RCW 26.26.130(6). Before setting back support based on income, the trial court must determine actual income under RCW 26.19.071(1)-(5) or impute income for a voluntarily unemployed or underemployed parent pursuant to RCW 26.19.071(6). *State ex rel. Taylor v. Dorsey,* 81 Wash.App. 414, 424, 914 P.2d 773 (1996).

The record reveals that the trial court did not rely on Sauve's actual income during the relevant time period and did not impute income under RCW 26.19.071(6). The trial court's calculation of back support based solely on the temporary support amount reflecting only 2005 income was not one of the reasonable options available under the relevant statutes. We therefore vacate the back support award and remand for recalculation and specific findings of fact and conclusions of law detailing the basis for its determination. In determining Sauve's income for the relevant period, the trial court has discretion to rely on any documents in the court file indicating his actual income whether or not they were attached to his trial affidavit or to impute income under RCW 26.19.071(6).

Sauve next contends that the findings in the body of the order denying reconsideration do not support the judgment summary listing an attorney fee award of $2,500 to Miller. Miller concedes that the trial court clearly intended not to order such an award and that the judgment summary may be corrected on remand.

Both parties request attorney fees under RCW 26.26.140. Miller also requests attorney fees for Sauve's intransigence and under RAP 18.9 for Sauve's failure to provide this court with all relevant portions of the record, including the verbatim report of proceedings. But our review of the record indicates that trial and appellate counsel for both parties contributed to the unnecessary complications of this case. To the extent Miller's attorney failed to draft sufficiently clear and complete proposed findings and orders and requested calculation of back support on an improper basis, Sauve's appeal on the issues controlled by the parenting plan and on the back support award were invited. And Sauve's attorney failed to provide all his documentary support with his trial affidavit and failed to present any argument or worksheets requesting a proper determination of back support, thereby substantially limiting the evidence considered by the trial court. In light of these circumstances, we exercise our discretion and decline to award attorney fees.

***5** Affirmed in part, vacated in part, and remanded.

All Citations

Not Reported in P.3d, 143 Wash.App. 1038, 2008 WL 699444

Footnotes

1 The Agreed Parenting Plan includes the following paragraphs:

2.1 PARENTAL CONDUCT (RCW 26.09.191(1),(2)).

The Father's residential time with the child shall be limited or restrained completely, and mutual decision making and designation of a dispute resolution process other than court action shall not be required because this parent has engaged in the conduct which follows:

A history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

2.2 OTHER FACTORS (RCW 26.09.191(3)).

The Father's involvement or conduct may have an adverse effect on the child's best interests because of the existence of the following factors:

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

2 CR 60(a) provides:

Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

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