IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of	)	
	)	No. 66213-9-I
IRENE C. BUBERNAK,	)	
	)	DIVISION ONE
Appellant,	)	
	)	UNPUBLISHED OPINION
and	)	
	)	
THOMAS GIRAULT BUBERNAK,	)	
	)	FILED: February 13, 2012
Respondent.	)	

Grosse, J. — In making child placement decisions, the trial court is in the best position to observe the parties to determine their credibility and to sort out conflicting evidence. Because of the trial court's unique opportunity in this regard, appellate courts are reluctant to disturb a trial court's decision. Here, the trial court's credibility determinations and decisions as to the weight to assign conflicting testimony are supported by substantial evidence. Its determinations as to the placement of the parties' son were both reasonable and tenable. Nor do we find that the conduct of appellant's counsel at trial warrants reconsideration, a new trial, or relief from the judgment. Accordingly, we affirm the trial court's parenting plan and order of child support.

FACTS

Thomas and Irene Bubernak were married in September 1996. Their son was born in March 2004. Irene filed a petition for dissolution in December 2008. After a trial, the court entered a final parenting plan making Thomas the primary residential parent. The court also entered an order of child support under which

Irene is obligated to pay $553.40 per month. Although she appeals the child support order, Irene does not make any arguments regarding it in her brief.[1] The trial court denied Irene's motion for reconsideration, a new trial, and relief from judgment.

Additional facts regarding the court's decision as to the residential placement and as to other issues Irene raises on appeal will be discussed below where relevant.

ANALYSIS

Standard of Review

We review a trial court's parenting plan decisions for an abuse of discretion.[2] A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.[3] Because of its "unique opportunity to observe the parties to determine their credibility and to sort out conflicting evidence," the trial court's discretion in this regard is broad,[4] and appellate courts are reluctant to disturb a trial court's child placement decisions.[5] Determining the credibility of witnesses and the weight to assign conflicting testimony is for the trial judge, whose findings are reviewed only to determine whether they are supported by substantial evidence.[6]

Challenges to the Parenting Plan

[1] The child support order appears only as an attachment to Irene's notice of appeal, and the notice of appeal is not in the trial court record.
[2] In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997).
[3] Littlefield, 133 Wn.2d at 46-47.
[4] In re Marriage of Woffinden, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982).
[5] In re Marriage of Kovacs, 121 Wn.2d 795, 801 n.10, 854 P.2d 629 (1993) (citing In re Marriage of Murray, 28 Wn. App. 187, 189, 622 P.2d 1288 (1981)).
[6] In re Pennington, 142 Wn.2d 592, 602-03, 14 P.3d 764 (2000).

1. Relative strength, nature, and stability of the child's relationship with each parent.

RCW 26.09.187(3) sets out the factors a trial court must consider in making residential provisions for a child in a parenting plan. Under RCW 26.09.187(3)(a)(i), the trial court is required, in making residential provisions, to give the greatest weight to the relative strength, nature, and stability of the child's relationship with each parent. Irene argues that the evidence as to this factor favors her because she did not work full time for two years after their son's birth and was, at all times before trial, his primary provider. This fact, even if true, does not, however, necessarily mean that application of the "relative strength, nature, and stability of the child's relationship with each parent"[7] factor must weigh in Irene's favor. Moreover, Irene herself testified at trial that she worked four days a week for the first two years after their son's birth and had an in-home nanny care. And, although Irene testified that she was the primary parent since their son's birth, Thomas testified that, aside from breastfeeding, he did the bulk of the parenting. The trial court's determination that Thomas's testimony on this issue was more credible than Irene's is supported by substantial evidence, and we will not disturb that determination.

More importantly, Jennifer Keilin, the court-appointed parenting plan evaluator, submitted an extensive report in which she recommended that Thomas be the primary residential parent. Keilin's report is based on interviews with Thomas and Irene, home visits with each parent and the child, parent-child observations with both parents, a review of an interpretation by Dr. Marsha

[7] RCW 26.09.187(3)(a)(i).

Hedrick of her psychological testing of Irene and Thomas, the pleadings filed in the dissolution action, parent questionnaires completed by Irene and Thomas, and various other materials Irene and Thomas provided.

As to the relative strength, nature, and stability of the child's relationship with Irene and Thomas, Keilin opined that the child appeared to have a somewhat stronger, more positive, and more stable relationship with Thomas. Keilin concluded:

> No significant concerns were noted regarding Tom's parenting or relationship with [the child]. Regarding Irene, concerns regarding her history of depression were supported by the data, and some problematic personality traits were noted, including difficulties managing time and other details, rigidity, and a tendency to become overwhelmed. Intervention services are recommended. Concerns were noted regarding Irene's parenting history and current parenting and relationship with [the child], including communication problems, some acting out by [the child], and Irene's difficulty meeting [the child's] emotional needs for consistency and routine at times. . . .
>
> Both parents love [the child] and put effort into prioritizing his needs. The data supports that, of the two parents, Tom has better emotional health and has consistently provided [the child] a stable, loving relationship. He also has somewhat stronger parenting skills, including a greater ability to provide structure and routine. Tom's schedule is more flexible and he has greater availability than Irene. Finally, [the child] loves both parents, but he has a stronger affinity for and a better relationship with Tom. The current schedule [the child residing primarily with Irene] could be exacerbating the difficulties in [the child's] relationship with Irene by not meeting [his] needs for time with Tom. Based on all the data provided to me, it is my recommendation that [the child] reside primarily with Tom.

The trial court found no indication that Keilin's report and her assessments of the parents were biased or unsound in their analyses and agreed with Keilin's application of the statutory factors and her conclusion that,

based on the factors, Thomas should be the primary residential parent. Keilin's testimony during trial was substantively the same as the statements in her written report.[8] Also, the statements of the various friends, colleagues, and others whom Keilin interviewed, included in her report, were consistent with the testimony of those witnesses at trial. For instance, Nancy Burza, the child's kindergarten teacher, testified that he seemed more stressed on the days Irene brought him to school and that, on those days, it took him longer to get into the day's routine than on the days Thomas brought him to school. She also testified that the child seemed more excited to be with Thomas and more comfortable with Thomas than with Irene. Jennifer Mathis, who lived across the street from the Bubernaks when they were married, testified that in her opinion Thomas and the child had a great relationship. She also testified that as a parent, Irene seemed a bit withdrawn. In sum, substantial evidence supports the conclusion that the child's relationship with Thomas is stronger, more positive, and more stable than his relationship with Irene. We will not disturb the trial court's determination.

2. Allegations of domestic violence.

Irene argues that the trial court erred in finding that none of the

[8] For example, Keilin testified: "It was my opinion based on the data that Mr. Bubernak had the stronger parenting skills. He had the better relationship with [the child], the greater availability of time, the better ability to support [the child] meeting his needs and that his overall mental health and day-to-day functioning was greater such that would sustain [the child]." She also testified: "I felt that the data supported that Ms. Bubernak struggles in her relationship with [the child]. She had more difficulty managing his behavior. She had more difficulty meeting his needs, such as getting him to school on time and that their communication didn't seem as strong."

restrictions in RCW 26.09.191 applied, including any restriction related to domestic violence. Irene claims that the evidence showed that Thomas had been physically and emotionally abusive.[9] The trial court, however, found: "I find specifically that Tom has not committed domestic violence in the relationship as defined by State law. This finding is made after listening to the testimony of Tom and Irene and considering the other evidence in this case. On balance, domestic violence has not been proven."

Keilin's conclusion as to whether Thomas committed domestic violence was based on reports of Joan Oncken, the parties' joint counselor, and Dr. Roland Maiuro, who conducted a domestic violence evaluation. Keilin concluded that Thomas committed "two minor acts of physical aggression as well as some coercive controlling behavior, including criticism, belittling and persistent requests that wore her down." At trial, however, Oncken testified that she told Keilin that she heard from only evaluators and reporters that there may have been some shoving, but never saw that behavior personally during two and a half years of counseling, never heard domestic violence allegations from the parties themselves, and never saw bruises on Irene's arm, even though Irene claimed that Thomas grabbed her so hard on one occasion during the time the parties were in counseling that she was left with bruises on her arm.[10] She also testified that, had allegations of domestic violence been made during her counseling, she would have made a note of that fact and referred the parties to a

[9] A domestic violence protection order was issued on December 15, 2008, shortly after Irene filed for dissolution, effective for one year.

[10] This incident involved Irene's throwing a knife in the kitchen sink and, according to Thomas, his grabbing her arm as she reached for a fork to throw.

domestic violence expert. Apparently, Oncken's notes do not mention domestic violence, although her notes are not in the record.

Dr. Maiuro did not submit a written domestic violence evaluation, but rather only spoke with Keilin. Keilin testified that Dr. Maiuro made a "qualified finding" of domestic violence, meaning "it technically meets the criteria but he's not fully confident in the strength of the data such that he could defend it as being super-strong." Keilin testified that Dr. Maiuro misunderstood Oncken and thought that Oncken had heard the shoving allegation directly from Irene, when in fact Oncken heard it from other people.

In support of her allegation of domestic violence, Irene relies to a great extent on the report and testimony of Doug Bartholomew, a mental health counselor, who performed a risk assessment for Thomas and concluded that Thomas committed domestic violence. The trial court completely discredited Bartholomew's report, stating: "In 22 years on the bench, I have never reviewed any expert report such as this. It is internally inconsistent, not at all neutral, and so sloppily drafted that the author never even proofread it, as he admitted. Consequently, I give no credence to the Bartholomew report."[11] The trial court also gave no credibility to the testimony of Marion Hilfrink, Irene's counselor, as to domestic violence, finding that Hilfrink's testimony was biased. The court found no credible evidence that Thomas was physically violent to Irene or that Irene was ever in reasonable fear of any physical violence.

The evidence supporting the domestic violence allegations is not

[11] Bartholomew's report is an exhibit on appeal. The trial court's description of the report is a fair description.

substantial, aside from the testimony the trial court deemed not credible. In fact, even Bartholomew concluded that "[i]t can't be determined in this evaluation whether or not he assaulted her." The trial court was in the best position to make credibility determinations. Its credibility determinations, as well as its finding of no domestic violence, are supported by substantial evidence.

3. Meeting the statutory objectives of a parenting plan.

Irene argues that the parenting plan fails to meet some of the objectives of a parenting plan set out in RCW 26.09.184(1). One such objective is to minimize the child's exposure to harmful parental conflict.[12] Irene argues that the provision for an in-person exchange on Sunday evenings, where Irene would return the child to Thomas, increased the child's exposure to harmful parental conflict. She claims that the trial court should have instead ordered Irene to return the child directly to school on Monday mornings. But, Irene cites to no evidence in the record showing that Irene and Thomas engaged in any conduct harmful to their son when they met to exchange custody on Sunday evenings. And, Nancy Burza, one of the child's teachers, testified that Thomas was never late bringing the child to class, but the child was frequently late to school when Irene brought him. Burza also testified that children who are tardy tend to feel that they are behind the rest of the class and are denied the chance to socialize before classes begin. "A lot of times when the child arrives late and it's very unsettling for them, it takes them a while to just feel like they're fitting in. They don't get to greet teacher and kids in the morning." Having Irene return the child

[12] RCW 26.09.184(1)(e).

to Thomas on Sunday evenings, rather than having Irene drop him off at school on Monday mornings, would reduce the times the child would be tardy. Given Burza's testimony, this arrangement is better for their son. Also, as stated, Irene fails to cite any evidence of parental conflict occurring during the Sunday evening exchanges.

Another objective of a parenting plan Irene claims is not met is the objective of providing "for the child's changing needs as the child grows and matures, in a way that minimizes the need for future modifications to the permanent parenting plan."[13] Irene does not make an extensive argument in support of this contention, nor does she indicate what sort of provisions she claims should have been included in the parenting plan.

Irene's argument that the trial court's determination should be reversed on the ground that the parenting plan fails to meet certain of the statutorily-prescribed objectives of a parenting plan is without merit.

4. Joint decision making.

Irene argues that the trial court erred by not giving both parents the right to make decisions as to the day-to-day care and control of the child and the right to make emergency decisions affecting his health or safety. This contention is completely without merit. The parenting plan clearly gives both parents this decision-making authority:

> Each parent shall make decisions regarding the day-to-day care and control of each child while the child is residing with that parent. Regardless of the allocation of decision making in this parenting plan, either parent may make emergency decisions affecting the health or safety of the child.

[13] RCW 26.09.184(1)(c).

The parenting plan gives Thomas the right to make major decisions as to the child's education and non-emergency health care. The plan also provides as to major decisions:

> For all major decisions, father shall send an e-mail to the mother regarding the issue or potential appointment for [the child]. If mother does not respond within 48 hours, then it is assumed her approval is given. If there is a conflict in the approach to be taken, mother may submit via e-mail her objection and the father shall in good faith consider her input and attempt to be flexible before making his final decision.

Irene argues that the trial court failed to follow RCW 26.09.187(2) when it gave Thomas sole decision making. However, the statute requires a trial court to order sole decision making when it finds that (1) a limitation on the other parent's decision making is mandated by RCW 26.09.191; (2) both parents are opposed to mutual decision making; or (3) one parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in subsection (c). Subsection (c) requires the court to consider the following criteria in allocating decision-making authority: (1) the existence of a limitation under RCW 26.09.191; (2) the history of participation of each parent in decision making in each of the areas in RCW 26.09.184(5)(a); (3) whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(5)(a); and (4) the parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.[14]

Here, the trial court based its decision as to sole decision making on its

[14] RCW 26.09.187(c).

finding that one parent is opposed to mutual decision making based on the parties' lack of cooperation in the last 18 months and such opposition is reasonably based on the statutory criteria listed above. Irene ignores this provision in the parenting plan and argues instead that the trial court made no finding to support its decision to award sole decision making. Further, the trial court's decision is supported by Keilin's parenting plan evaluator's report in which she states that joint decision making may not be feasible and that if the court favors ordering sole decision making due to the parents' history, the court should award it to Thomas. And, as Thomas notes, Irene herself testified that she did not feel that she could have joint decision making with Thomas. The trial court's determination as to sole decision making was not an abuse of discretion.

5. Increased time and involvement by Irene.

Irene argues that the trial court erred by failing to provide in the parenting plan a mechanism that would allow Irene to return to court to obtain increases in her residential time. She cites no authority in support of her argument that this was error and claims, without explanation, that a modification action would not be a sufficient remedy. We reject Irene's unsupported argument.

6. Conclusion

The overwhelming amount of the evidence the trial court heard and read supports the court's decision to make Thomas the primary residential parent. The court determined that Bartholomew's and Hilfrink's testimony, which conflicted with the majority of the evidence, was not credible. The trial court's credibility determination is supported by substantial evidence, and we will not

disturb it. The court's decision to make Thomas the primary residential parent was based on competent, substantial evidence, was not an abuse of the court's broad discretion in parenting plan matters.

Motion for a new trial, reconsideration, and relief from judgment

Irene appeals the trial court's denial of her motion for reconsideration, a new trial, and relief from judgment. The first issue is whether Irene's motion was timely filed.

The final parenting plan was entered October 8, 2010. Irene filed her motion on October 18, 2010. CR 59(b) requires motions for a new trial or reconsideration to be filed not later than 10 days after the entry of the judgment, order, or other decision. Thomas argues that Irene's motion was untimely because the trial court stated, in its oral ruling rendered on August 12, 2010, that its order was effective immediately because, "[i]n a family law case, just saying it on the record has the effect of an order." Thomas cites no authority to show that the trial court was correct in its assertion and that Irene's motion was untimely. Moreover, pursuant to CR 58(b), an order is deemed entered for all procedural purposes from the time of delivery to the clerk for filing. And, a court's oral decision is subject to change by the trial judge at any time before entry of the judgment.[15] Under these authorities, the trial court's order was entered, for purposes of the 10-day period for filing motions for reconsideration, on October 8. We reject Thomas's argument that Irene's motion was untimely.

In Washington, a strong policy favors the finality of judgments on the merits.[16] We review the grant or denial of a motion for a new trial under CR 59, where, as here, the motion is not based on an allegation of legal error, for abuse

[15] El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 857, 376 P.2d 528 (1962).
[16] Stanley v. Cole, 157 Wn. App. 873, 887, 239 P.3d 611 (2010).

of discretion.[17] The abuse of discretion standard of review also applies to a trial court's order on reconsideration[18] and to a trial court's order on a motion for relief from judgment under CR 60(b)(11).[19]

Irene sought a new trial or reconsideration, as well as relief from judgment, based on the conduct of her counsel at trial, Jan Dyer.[20] Irene argues she is entitled to a new trial or reconsideration under CR 59(a)(1), providing for a new trial or reconsideration on the ground of an irregularity in the proceedings by which she was prevented from having a fair trial, and CR 59(a)(9), providing for a new trial or reconsideration on the ground that substantial justice has not been done. She claims she is entitled to relief from judgment under CR 60(b)(11), providing for relief from judgment for "[a]ny other reason justifying relief from the operation of the judgment."

The trial court admonished Dyer about her sarcastic tone while cross-examining Thomas. This occurred on August 10, two days before closing arguments. After the court's admonishment, Dyer launched into a lengthy discussion in defense of her actions and accused the court of embarrassing her and of degrading her in another case eight years earlier. She eventually apologized to the court. Dyer then moved for a recusal, and the trial court denied her motion. She then began to cry and asked permission to withdraw, saying that she had "reached [her] max," could not continue, and would likely cry throughout the remainder of the trial. The court allowed both attorneys to argue

[17] Edwards v. Le Duc, 157 Wn. App. 455, 459, 238 P.3d 1187 (2010).
[18] Sligar v. Odell, 156 Wn. App. 720, 734, 233 P.3d 914 (2010).
[19] In re Marriage of Shoemaker, 128 Wn.2d 116, 120-21, 904 P.2d 1150 (1995).
[20] Irene has new counsel on appeal.

for and against a continuance, and then denied Dyer's motion.

The court then allowed Thomas's counsel to call Keilin, the parenting plan evaluator, who was arguably the most important witness for purposes of the parenting plan and who clearly favored designating Thomas as primary residential parent. The record reflects that during Keilin's testimony on direct examination, Dyer was "sobbing" in the courtroom and, apparently, made such noise by slamming furniture that the court reporter noted "loud crash" on three occasions. Also during Keilin's direct examination, Dyer's cell phone rang, causing the court reporter to note a "barking cellphone interruption." Dyer's antics stopped, however, when she began her cross-examination of Keilin. She engaged in a long cross-examination and also examined the remaining witnesses without incident.

Dyer's next confrontation with the trial judge occurred after the court gave its oral ruling on August 12. Dyer stated she objected to the court's retaining jurisdiction over the case and renewed her request for a recusal. The court informed Dyer that he had "no personal bias whatsoever" with regard to her, although he did have concerns about her performance at trial, which he previously noted on the record. Dyer informed the court that she had already "consult[ed] people" and would be filing a complaint with the Judicial Conduct Commission.[21]

[21] According to Irene and one of her friends who attended trial, one morning before trial, Dyer told them she left a note in the trial judge's mailbox in which she quoted a Bible passage which, according to Irene, contained a veiled threat that the judge would "die young" because of his words to her. The trial judge did not mention receiving any note from Dyer, and no such note appears in the record.

Despite the fact that, judging from her argument on appeal, Irene had problems and concerns with Dyer's performance almost from the outset of Dyer's representation of her, Irene did not attempt to replace Dyer with new counsel until the conclusion of the proceedings in the trial court.[22] Dyer's behavior was indeed somewhat unusual at times, and she did request a number of continuances due to her physical problems. Also, early in the proceedings, she claimed to have been affected by anesthesia. But, the record shows that Dyer thoroughly examined and cross-examined the witnesses and appears from the record to have provided competent representation. And the trial court maintained its composure throughout the trial and appeared to be unfazed by Dyer's behavior. The court specifically stated that it had no personal bias against Dyer, and there is no indication that the trial court was in any way influenced by its disapproval of Dyer's sarcastic tone on cross-examination. The court carefully explained the bases for its decision, namely the evidence presented and the application of the statutory factors to that evidence. The record does not show that Irene was prevented from having a fair trial due to any irregularity in the proceedings, as required for relief under CR 59(a)(1). Further, the evidence before the court was overwhelmingly in favor of naming Thomas as the primary residential parent. Accordingly, the record does not show that substantial justice was not done, as required for relief under CR 59(a)(9).

[22] Thomas claims that, at the time of trial, Irene was working with three attorneys with regard to her mother's estate and was dating a family law attorney, the implication being that, had Dyer's representation been so incompetent, these attorneys would have advised Irene and helped her retain new counsel. There is, however, nothing in the record to support this allegation.

Moreover, given the weight of the evidence, the outcome of reconsideration or a new trial with different counsel would in all likelihood have been the same; accordingly, Irene cannot show prejudice.

CR 60(b)(11), providing for relief from judgment for "[a]ny other reason justifying relief from the operation of the judgment," is confined to extraordinary circumstances that are substantial deviations from a prescribed rule.[23] Relief is granted sparingly under this subsection.[24] The general rule is that a party is not entitled to relief under CR 60(b)(11) based on an attorney's gross negligence. Rather, the incompetence or neglect of a party's own attorney is generally insufficient to justify relief from a judgment in a civil case.[25] This court in Barr v. MacGugan[26] recognized an exception to this general rule, but carefully limited its application. In Barr, the trial court dismissed the plaintiff's case with prejudice and without resolution on the merits after the plaintiff's attorney failed to comply with the trial court's order compelling responses to discovery requests. The plaintiff left several phone messages with her attorney to check on the status of her case, but the attorney never responded. The plaintiff learned from a third party that her case had been dismissed and also learned that her attorney had been suffering from severe clinical depression. The plaintiff hired new counsel and filed a motion to vacate the dismissal order under CR 60(b)(11). The trial court granted the plaintiff's motion, and this court affirmed. While

[23] In re Marriage of Furrow, 115 Wn. App. 661, 673-74, 63 P.3d 821 (2003).
[24] In re Marriage of Knutson, 114 Wn. App. 866, 872, 60 P.3d 681 (2003).
[25] Lane v. Brown & Haley, 81 Wn. App. 102, 107, 912 P.2d 1040 (1996); Stanley, 157 Wn. App. at 886.
[26] 119 Wn. App. 43, 78 P.3d 660 (2003).

acknowledging the general rule that an attorney's negligent conduct is binding on the client, the court concluded that this general rule did not necessarily apply when a lawyer's severe mental illness or disability interfered with the attorney-client relationship. The court in Barr specifically limited this exception to the general rule "to situations where an attorney's condition effectively deprives a diligent but unknowing client of representation."[27]

Here, unlike in Barr, the case was fully tried and resolved on the merits. Also, unlike in Barr, Irene was aware of Dyer's condition during trial. For example, in her declaration in support of her motion, Irene stated that Dyer's behavior in and out of court "was bewildering" and turned out to be worse than she initially believed. She also stated that throughout the case, she "began to have [her] own concerns about Ms. Dyer's mental stability." The exception in Barr is not available here and Dyer's conduct is not grounds upon which Irene can obtain relief under CR 60(b)(11).

Attorney fees

Irene makes a one-sentence request for an award of attorney fees under RCW 26.09.140. Also, at the very end of his brief, Thomas asserts that he "should be awarded attorney's fees for having to defend a frivolous appeal." These one-sentence requests are not sufficient. A party requesting attorney fees must devote a section of its opening brief to the request.[28]

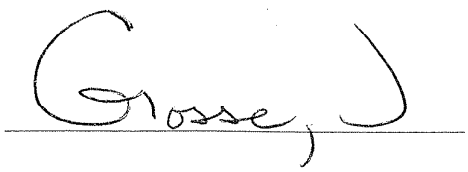
Thomas also requests an award of attorney fees under RCW 26.09.140, and properly devotes a section of his brief to his request. Under that statute,

[27] Barr, 119 Wn. App. at 48.
[28] RAP 18.1.

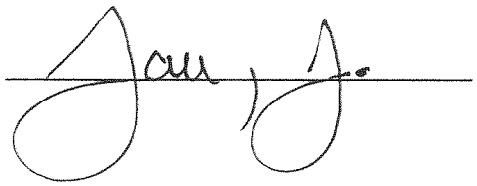
this court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal, including attorney fees, in addition to statutory costs. This provision gives the court discretion to award attorney fees to either party based on the parties' financial resources, balancing the financial need of the requesting party against the other party's ability to pay.[29] Both Thomas and Irene filed financial declarations. Based on these financial declarations, we deny Thomas's request for an award of attorney fees under RCW 26.09.140.

Conclusion

We affirm the trial court's parenting plan and order of child support. We deny both parties' requests for an award of attorney fees on appeal.



WE CONCUR:



[29] In re Marriage of Pennamen, 135 Wn. App. 790, 807-08, 146 P.3d 466 (2006).