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No. ~~70048-4-~~I

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

LALIDA SCHNURMAN,

Respondent,

v.

SETH SCHNURMAN,

Appellant.

ON APPEAL FROM
KING COUNTY SUPERIOR COURT
(The Honorable Jean Rietschel)

LALIDA SCHNURMAN'S RESPONSE BRIEF

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I. INTRODUCTION

This is a frivolous appeal. How to calculate child support in a 50/50 residential arrangement was decided by this Court in *State ex rel. M.M.G. v. Graham*.[1] That holding was affirmed by the Washington State Supreme Court.[2] Moreover, Appellant's suggestion for a new method to change how child support is calculated in an equally shared residential schedule defeats the public policy and stated purpose behind the child support statutes. For these reasons, not only should the trial court's decision be affirmed, but Respondent should be awarded her attorney fees based upon intransigence, frivolous appeal, and RCW 26.09.140 (need and ability to pay).

II. FACTS

Appellant's recited facts are largely correct. Appellant omits, however, that Appellant requested a deviation from the standard calculation for child support, and the trial court denied his request for deviation. The trial court found:

> While the Husband will be spending substantial time with the children, there is no evidence this will significantly increase his costs to support the children or significantly reduce Wife's expenses to support the children. Allowing a downward deviation from the standard child support

[1] 123 Wash. App. 931, 941, 99 P.3d 1248, 1253 (2004)
[2] 159 Wash. 2d 623, 152 P.3d 1005 (2007). Extrapolation then abrogated by *McCausland v. McCausland*, 159 Wash. 2d 607, 152 P.3d 1013 (2007)

calculation will also result in insufficient funds for the Wife's household.[3]

Appellant did not assign error to these findings. They are, therefore, verities on appeal.[4]

III. ARGUMENT

A. The Standard of Review is Abuse of Discretion

The standard of review is abuse of discretion. "The Legislature intended to allow judicial discretion in appropriate circumstances when calculating child support payments..."[5] "The appellate court will overturn an award of child support only when the party challenging the award demonstrates that the trial court's decision is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons."[6] Here, Appellant never provided a verbatim report of any proceedings; he cannot successfully challenge any facts the trial court found because the record Appellant provided is inadequate for review.[7] Appellant must, therefore, show the trial court committed an error at law.[8] This he cannot do. This Court should affirm the trial court's child support determination.

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[3] CP 109, Child Support Order ¶3.8
[4] *Robel v. Roundup Corp.*, 148 Wash.2d 35, 42, 59 P.3d 611, 615 (2002)
[5] *Matter of Marriage of Booth*, 114 Wash. 2d 772, 776, 791 P.2d 519, 521 (1990)
[6] *In re Marriage of Peterson*, 80 Wash. App. 148, 152, 906 P.2d 1009, 1011 (1995)
[7] *Allemeier v. Univ. of Washington*, 42 Wash. App. 465, 472-73, 712 P.2d 306, 310 (1985)
[8] *Peterson*, 80 Wash. App. at 152

B. The Trial Court did not Abuse its Discretion in Requiring Appellant to Pay Respondent the Standard Calculation for Child Support.

The trial court did not abuse its discretion in requiring Appellant to pay Respondent the standard calculation for child support because the trial court followed binding precedent previously established by this Court and affirmed by the Washington State Supreme Court. This Court in *M.M.G. v. Graham* held that in an equally shared residential arrangement "a trial court must calculate the basic child support amount and may then deviate from that amount based on the amount of residential time spent with the obligor parent."[9] The Washington State Supreme Court affirmed this holding, but reversed this Court's opinion that allowed trial courts to extrapolate guideline support when the parents' combined monthly income exceeded the economic tables.[10]

In *Graham* the children were to "spend equal amounts of time with their parents on alternating weeks."[11] The father in *Graham* made the identical argument Appellant makes here, namely that "chapter 26.19 RCW does not adequately guide the trial court in calculating the child support obligation where parents share residential time with their

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[9] 123 Wash. App. 931, 941, 99 P.3d 1248, 1253 (2004)
[10] 159 Wash. 2d 623, 152 P.3d 1005 (2007). Extrapolation then abrogated by *McCausland v. McCausland*, 159 Wash. 2d 607, 152 P.3d 1013 (2007)
[11] *Graham*, 159 Wash. 2d at 628

children."[12] The father in *Graham*, like the Appellant here, claimed the equally shared residential schedule required "the parents to incur equivalent residential costs."[13] This Court rejected the father's argument in *Graham* as it should similarly reject the Appellant's argument here.

The Washington Supreme Court affirmed this Court's holding that child support in equally shared residential parenting arrangements should be calculated and apportioned using the standard child support calculation and then allowing a discretionary deviation affecting the payment amount and apportionment using the discretion provided in RCW 26.19.075.[14]

There is also no statutory provision, or case law, that prohibits a transfer payment from the advantaged parent to the disadvantaged parent in an equally shared residential arrangement. In fact, the child support statutes are flexible enough to apply the uniform child support schedule to equally shared residential arrangements. RCW 26.19.011 defines the "Support transfer payment" as "the amount of money the court orders *one parent to pay to another parent."* Nowhere does it state the parent

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[12] *Id.* at 631
[13] *Id.* at 633
[14] *Id.* at 638 To be sure, this is exactly how this Court has recently interpreted this Court's and the Washington Supreme Court's decisions in *Graham*. *In re Marriage of Stephenson*, 68507-4-I, 2013 WL 1337778 (Wash. Ct. App. Apr. 1, 2013)

receiving the support transfer payment must be the parent with whom the child resides a majority of the time.

The *Holmes*[15] case cited by Appellant does not alter this analysis. In *Holmes* this Court merely affirmed the trial court's decision to not require the father, who was the primary residential parent, to pay the mother a support transfer payment. It held under the circumstances presented there, the trial court did not abuse its discretion in declining to award a support transfer payment to the parent with whom the child did not reside a majority of the time.[16]

Moreover, *Holmes*, while disagreeing with the statutory interpretation in *Casey*[17], approved its conclusion that held a trial court did not abuse its discretion in awarding a child support transfer payment to a mother with whom the child did not reside a majority of the time because there was sufficient evidence to deviate from the standard calculation and failing to do so would have left insufficient funds in the mother's household.[18] Finally, *Holmes* did not address an equally shared

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[15] *In re The Marriage of Holmes,* 128 Wash. App. 727, 117 P.3d 370 (2005)
[16] *Holmes*, 128 Wash. App. at 741, 117 P.3d 370, 376 (2005) ("The trial court did not abuse its discretion by denying her request").
[17] *In re Marriage of Casey*, 88 Wash. App. 662, 967 P.2d 982, 984 (1997)
[18] *Casey*, 88 Wash. App at 667; and *Holmes*, at 737, f.n.1 and 740.

residential arrangement. It even cited this Court's opinion in *Graham* as authority.[19]

Because the trial court used this approved method in calculating child support, it did not commit any error at law and did not abuse its discretion. Its child support determination should be affirmed.

C. The Trial Court did not Abuse its Discretion in Refusing to Deviate From the Standard Calculation.

The trial court did not abuse its discretion in refusing to deviate from the standard calculation. RCW 26.19.075(d) gives trial courts discretion to deviate from the standard calculation based upon the residential time a parent has with the child. RCW 26.19.035(2) requires a trial court to support a deviation, as well as its decision to deny a requested deviation, by written findings. RCW 26.19.075(d) explicitly prohibits a deviation "if the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child." This statute also requires the trial court to specifically consider how much extra the obligor parent must pay for having the additional residential time with the children and how much the obligee parent would save by not having the children during the other parent's residential time.

Here the trial court considered all the required factors and made all the required findings. It expressly found a deviation that would have

[19] *Holmes*. at 739

awarded less child support, which would have resulted in insufficient income in the mother's household. Under these circumstances, a deviation awarding less support based on residential time was expressly prohibited. In addition, the trial court found there was no evidence the Appellant's expenses would increase or the mother's expenses would decrease from this residential arrangement.

Appellant did not assign error to these facts found by the trial court. They are, therefore, verities on appeal.[20] Even if Appellant had assigned error to these findings, he failed to provide a verbatim report of proceedings necessary for meaningful review. This Court is, therefore, duty bound to affirm the trial court's decision.[21]

D. Appellant's Suggested new way to Calculate Child Support in Equally Shared Residential Arrangements Would Violate Public Policy and the Explicitly Stated Purpose Behind the Child Support Statutes.

Even if this Court were to consider whether to depart from its prior holding in *Graham*, it should decline Appellant's invitation in this case because his suggestion would violate our child support statute's explicitly stated public policy and purpose. RCW 26.19.001 states the Legislature's intent behind establishing a uniform child support schedule

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[20] *Robel v. Roundup Corp.*, 148 Wash.2d 35, 42, 59 P.3d 611, 615 (2002)
[21] *Dash Point Vill. Associates v. Exxon Corp.*, 86 Wash. App. 596, 612, 937 P.2d 1148, 1157 (1997) amended on denial of reconsideration, 86 Wash. App. 596, 971 P.2d 57 (1998)

was "to insure that child support orders are adequate to meet a child's basic needs..." Here, the trial court specifically found ordering less child support than the child support set forth in the child support worksheets would result in insufficient funds in the mother's household. Reducing child support for whatever reason, including the new method suggested by Appellant, would thwart the Legislature's expressed intent. Further, the Legislature overtly stated another objective behind setting support using a uniform child support schedule – "Reducing the adversarial nature of the proceedings by increasing voluntary settlements as a result of greater predictability..." Adopting the case-by-case ad hoc approach advanced by Appellant would decrease predictability and, thus, decrease voluntary settlements. This would increase, and not reduce, the adversarial nature of child support proceedings in an equally shared residential arrangement.

E. Respondent is Entitled to Attorney Fees.

The Respondent Mother is entitled to her appellate attorney fees. First, this is a frivolous appeal. RCW 4.84.185 and RAP 18.9(a) allow this Court to award reasonable expenses, including attorney fees, if an appeal is frivolous and advanced without reasonable cause.[22] A frivolous action is one that cannot be supported by any rational argument on the

[22] *Goldmark v. McKenna*, 172 Wash. 2d 568, 582, 259 P.3d 1095, 1102-03 (2011)

law or facts.[23] While Mother recognizes this is a high hurdle, it has been met in this case. Here, this identical matter has already been decided by this Court in *Graham*, a published opinion, and affirmed by the Washington Supreme Court. This Court has even interpreted the *Graham* decisions to prohibit Appellant's argument in a similar equally shared residential arrangement in an unpublished decision.[24] Despite this, Appellant tries to argue the issue was not decided by *Graham*. This is frivolous and imposing fees under these circumstances is warranted.

Second, Appellant is intransigent in bringing this appeal. RAP 18.1(a) allows this Court to award attorney fees to a party based on any grounds attorney fees would be awardable at trial. "Intransigence is a basis for awarding fees on appeal."[25] The financial resources of the parties need not be considered when intransigence by one party is established.[26] Intransigence includes obstruction by making an issue unduly difficult and thereby increasing another party's legal fees.[27] Here, even if this appeal is not frivolous, it certainly made a relatively simple and straightforward application of the uniform child support schedule

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[23] *Goldmark*, 172 Wash.2d at 582.
[24] *In re Marriage of Stephenson*, 68507-4-I, 2013 WL 1337778 (Wash. Ct. App. Apr. 1, 2013). Presumably this decision was unpublished because the holding in *Graham* on how to calculate child support in an equally shared residential arrangement was so patently clear that a further published decision would serve no precedential value.
[25] *Mattson v. Mattson*, 95 Wash. App. 592, 605, 976 P.2d 157, 165 (1999)
[26] *Mattson*, 95 Wash. App. at 605
[27] *Matter of Marriage of Greenlee*, 65 Wash. App. 703, 708, 829 P.2d 1120, 1123 (1992)

unduly difficult. This is especially true where, as here, the trial court made an express finding that awarding less child support to Mother would result in insufficient income to Mother's household. Under these circumstances, this appeal demonstrates intransigence and justifies an appellate attorney fee award.

Finally, Mother is entitled to appellate attorney fees based on need and ability to pay. RAP 18.1(a) allows this Court to award fees on any basis allowed by statute. RCW 26.09.140 allows this Court to award fees based on the parties' relative need and ability to pay considering all the parties' respective resources. Here, Appellant has a superior ability to pay and Mother has a demonstrated need for fees. Mother will file a Financial Declaration within 10 days prior to this matter being argued or otherwise submitted for consideration.

DATED this 27 day of June, 2013.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of Lalida Schnurman's Response Brief to the following via U.S. Mail:

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Signed this 21st day of June, 2013 Seattle, Washington.

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