73119-0

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COURT OF APPEALS NO. 73119-0-I

IN THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

SHEILA KOHLS,

Appellant/Cross-Respondent,

and

KENNETH B. KAPLAN,

Respondent/Cross-Appellant.

REPLY BRIEF OF APPELLANT AND RESPONSE BRIEF OF CROSS-RESPONDENT

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ORIGINAL

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Reply To Respondent's Introduction

It is true that since the parties' began their dissolution proceedings in 2004, "a mountain of litigation has ensued". Like Kohls, Kaplan now returns to this Court with his latest attorney for his fourth appeal.[1] Kaplan's appeal is without merit.

While each of the issues raised by Kohls involve important legal principles, it is also true that Kohls is concerned about the lower court's abuse of discretion in refusing to properly reimburse her for the reasonable attorney fees she has been compelled to incur in this case. Arbitrary reductions in fees, requested pursuant to RCW 26.09.140, make it impossible for attorneys to represent indigent clients---and leave the clients in a worse financial situation than when they began, regardless of the outcome of their case.

[1] Kaplan has initiated three appeals. In his first two, Kohls cross appealed. Kaplan voluntarily dismissed his first appeal, and agreed to pay the trial court award plus Kohls' appellate fees and to modify the parenting plan consistent with her proposal dating back before his appeal was filed. Kaplan's second appeal was denied with a finding from the Court that the Father's "intransigence is well documented in the record;" Kohls' cross appeal was granted, and Kohls was awarded all fees on appeal. The trial court's award of attorney's fees was also affirmed. *Marriage of Kaplan,* 144 Wash. App. 1015 (April 28, 2008). In Kaplan's third appeal, this Court denied his request that Kohls disgorge the attorney fees previously awarded to her when the trial court changed its mind about whether he had been intransigent, noting that he failed to cite any case law "that would support this highly unusual relief". *Marriage of Kaplan*, 158 Wash. App. 1021 (November 1, 2010). Kohls is not citing these unpublished decisions as "authority" in violation of GR 14, but only to identify other appeals between these parties.

This is not a problem unique to this case.

And this problem is particularly acute, in cases like this one, where an impoverished custodial parent is fighting with a well-heeled vindictive spouse, who bullies her with his greater financial resources. Kaplan refused to reimburse her for his share of unpaid health care expenses for their children[2]. He lied about his income.

He then made it as difficult and as expensive as he could for Kohls to get the information which the Court needed to accurately determine his income so their children could get the support to which they are entitled.

If, as Kaplan suggests, this Court should send "a clear message" to these and other parties, on this issue, that message should be that if a custodial parent, like Kohls, is required to incur fees to prove that the economically advantaged non-custodial parent, like Kaplan, is being dishonest about the amount of income he is reporting to the Court for purposes of determining his proper

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[2] This issue is now moot only because, after Kohls filed her Opening Brief, Kaplan finally paid her for his share of these unreimbursed expenses, on July 13, 2015, for which she had been requesting reimbursement for more than two and a half years (since February 1, 2013, CP 304-305, 2453-2529, 3379-3383.(Appx. A. To Brief of Respondent/ Cross-Appellant). While the amounts involved may appear modest, they are particularly burdensome to pay and to carry for a parent with Kohls' limited income.

share of the child support obligation, those attorney fees should be borne by the dishonest parent, rather than by the honest parent.

Reply to Restatement of the Case

Just as he had done in the 2010 Child Support Modification (see Opening Brief, pp. 7-8 and CP 270-271), Kaplan grossly misrepresented his true income throughout this proceeding. In his Response to Kohls' *pro se* Petition, Kaplan represented that "his income has *decreased* by approximately $1,024 per month since the last Order of Child Support was entered," CP 248, to a net monthly income of only $7,112.74. CP 250, CP 241.

Kohls was thus compelled to retain counsel who could undertake the extensive discovery necessary to enable the Court to calculate Kaplan's true income. Throughout discovery, Kaplan continued to be dishonest and disingenuous. CP 272-302.

Accordingly, discovery was not and could not be completed before Kohls was required to serve and file her initial 40 page trial affidavit, and 118 pages of attached exhibits. CP 268-426. As a result, when she alleged that Kaplan's gross income was $55,253 per month, CP 299, 323, she included Kaplan's *cash* payments averaging $20,500 per month to the World Banking Center, CP

299, for his personal and business credit cards, since Kaplan could not identify or provide records of any account showing the source of these funds, CP 292-299.

With his Reply Trial Affidavit, Kaplan provided the Declaration of Richard Sobie, KRES' bookkeeper, who did provide---for the first time---the documents showing the source of these cash payments. CP 809-810, 828-845.

Accordingly, when trial began, Kohls' attorney corrected her previous allegation, and requested that the Court find that Kaplan's net monthly income was $35,702.02. 11/22/13 RP 13.

Kaplan continued to maintain that his net monthly income should be set at $8,294.31, and that his transfer payment be reduced from $750 per month to $710. CP 444, 553-557, 669-670.

At the conclusion of trial, the Honorable Jacqueline Jeske, Family Law Court Commissioner, effectively adopted Kohls' calculations, and imputed a *net* income to Kaplan of $34,871.85 per month---more than four (4) times more than what Kaplan had represented to the Court. CP 1493, 1500.

Following cross-motions for reconsideration, Commissioner Jeske reduced his net monthly income to $31,713.72, based upon

a few agreed upon minor adjustments (eg. double-counting for rent, overpayment of tuition), and the items which are the subject of this appeal. CP 1344-1354; See also, CO 1277, 1287, 190-1291, 1329.

Both parties moved to revise her final orders. CP 1231-1262, 1355-1368; 1547-1548.

On revision, the Honorable Sean O'Donnell found that Commissioner Jeske "correctly concluded that Mr. Kaplan's net monthly income was $31,713.72", CP 1796, a sum that was still nearly four times what Kaplan had represented to the Court.

Additional corrections will be made to Kaplan's Restatement of the Case as they become relevant to the issues raised here.

Argument

A. The Court Abused Its Discretion When It Concluded That The Changes In The Parties' Incomes Between 2010 and 2013 Did Not Create A Substantial Change Of Circumstances Warranting A Modification Of Support.

Contrary to the conclusion of the court commissioner, CP 1207, the revision court concluded there not been a substantial change of circumstances warranting a modification of support. CP 1693-1698.

Whether a change in circumstances is substantial depends on its effect on a parent's monthly net income. *In re Marriage of Bucklin,* 70 Wn. App. 837, 840,855 P.2d 1197 (1993).[3]

Clearly, it was substantial in this case.

The revision court's conclusion was based on its finding that "the disparity between Kaplan's and Kohls' earnings has remained constant and was predicted to do so at the time the 2010 order was entered." CP 1698.[4]

Yet, contrary to what had been "predicted at the time the 2010 order was entered", the disparity between Kaplan's and Kohls' earnings did not remain constant. Kohls' net monthly income decreased from $2,444 in 2010 to $1,812.53, CP 1842. Kaplan's net monthly income nearly quadrupled from $8,137, CP 205, to $31,713.72", CP 1796. That constitutes a substantial

[3] Kaplan's effort to distinguish the *Bucklin* case on the ground that the Court here did not have to guess at Kaplan's income is a red herring. Kohls has never argued that the Court had to guess at Kaplan's income---notwithstanding the fact that her discovery was unable to find all of his income, and the Court Commissioner indicated that she could not say "with certainty...what his actual monthly income really is, but I am confident that it is likely more than this." 11/22/13 RP 58-59. Even the revision court found that the source of many of Kaplan's credit card payments was untraceable. CP 1700-1701.

[4] Contrary to Kaplan's mischaracterization, Kohls has never argued that she did not contemplate an increase in Ken's income. But no one contemplated that his net income would increase four-fold in only two and a half years.

change of circumstances from what was predicted in 2010.

In addition, the quadrupling of Kaplan's net monthly income in a mere two and a half years from $8,137 in December of 2010 to $31,713.72, or more, in June of 2013 is not a "routine change in incomes", and certainly was not contemplated when the Order of Child Support was entered in 2010. *In re Marriage of Scanlon and Witrak*, 109 Wash. App. 167, 173-174, 34 P.3d 877 (2001).

The lower court's conclusion that neither of these events---much less, the two together---constituted a substantial change of circumstances was error and an abuse of discretion.

B. The Court Abused Its Discretion By Finding That The 2010 Order of Child Support Did Not Work A Severe Economic Hardship On Kohls Because Her Economic Situation Was Contemplated At The Time The 2010 Order Was Entered.

The lower court concluded that the existing Order of Child Support did not work a severe hardship on Kohls based on its findings that: (1) the loss of support payments for her son, Zachary, when he moved out of the house to go to college "surely was contemplated at the time the 2010 order was entered" (CP 1696); and (2) "the disparity in her income versus her monthly

expenses...were more acute in 2010 than it is in 2014". (CP 1697).

A court necessarily abuses its discretion if its decision is based on an erroneous view of the law. *In re Marriage of Scanlon and Witrak*, 109 Wash. App. at 174-175. RCW 26.09.170(6) does not require "showing a substantial change of circumstances"

> (a) if the order in practice works a severe economic hardship on either party or the child.[5]

See also, *In re Marriage of Sievers*, 78 Wn. App. 287, 304, 897 P.2d 388 (1995). The present 2010 Order of Child Support works a severe economic hardship on Kohls and the parties' daughter, Idalia. Kohls' monthly expenses are $5,356. CP 235. Her net monthly income is only $1,812.53. CP 1842.

When Kaplan stopped paying his monthly transfer payment for Zachary after he graduated from University Prep, Kohls' economic hardship became more severe. She received $750 less per month to try to bridge the gap between her expenses and her income. Her net monthly income is not sufficient to meet the necessary monthly expenses for her and her daughter. CP 857,

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[5] Notably, Kaplan does not even discuss this statute or provide any legal authority to support his contention that the court applied the correct legal standard.

235. That constitutes a severe economic hardship.[6]

The fact that this severe economic hardship is not based on a substantial change of circumstances and/or may have been foreseeable is irrelevant and immaterial. RCW 26.09.170(6)(a).

C. The Court Erred And Thus Abused Its Discretion In Calculating Kaplan's Income.

1. The Court Abused Its Discretion By Permitting Kaplan To Deduct $10,397 For Depreciation For Undocumented Expenditures For Equipment And Furniture Purchased By LLCs.

Contrary to Kaplan's misrepresentation, "the monthly depreciation expenses of $10,991.89 [which Sheila agrees] were properly added back to [Ken's] net income," CP 1617, 1380, is different from the $10,397 in depreciation which the lower court improperly deducted from his net income at issue here.

In calculating Kaplan's net income, the court abused its discretion by deducting $10,397 for depreciation for undocumented expenditures for equipment and furniture purportedly purchased by certain LLCs in which KRES,LLC held an ownership interest, CP 1345-1346.

[6] Once a basis for modification has been established, a court may modify the original order in any respect. *In re Marriage of Scanlon and Witrak*, 109 Wash. App. at 171.

In *In re Marriage of Stenshoel*, 72 Wn. App. 800, 806, 86 P.3d 635 (1993), the Court held:

> [D]epreciation and depletion expenses should be deducted from gross income *only* where they reflect an actual reduction in the personal income of the party claiming the deductions, such as where, *e.g.,* he or she actually expends funds to replace worn equipment or purchase new reserves.

In his brief, Kaplan asserts that KRES incurred this expense (Brief, p. 31), not him personally. Even so, his accountant, Marianne Pangallo testified that whatever expenses KRES advances for the individual buildings are reimbursed by the individual buildings or LLCs. CP 3713, 3722, 3731-3732. No evidence was produced, apart from Ms. Pangallo's bare assertion, to show that the LLCs purchased this furniture and equipment. Most importantly, there is no evidence that these expenditures reduced Kaplan's personal income.

But this deduction was not even based on an actual expense. It was for depreciation on equipment and furnishings purchased by the LLCs in which KRES held an ownership interest. CP 804. Ms. Pangallo testified that depreciation and amortization expenses are distributed amongst the various members of the

LLCs in proportion to their respective membership shares, <u>and must be added back in</u> to calculate their actual cash flow. CP 3683, 3690. Depreciation and amortization expenses do not reduce income. They shelter it. Hence, the rationale of *In re Marriage of Stenshoel, supra.*

Since the depreciation on this furniture and equipment allegedly made by KRES, or the LLCs in which KRES held an ownership interest, did **not** actually reduce Kaplan's *personal* income, but rather sheltered his income, the court abused its discretion by permitting Kaplan to deduct this sum to calculate his personal income to determine his share of the parties' child support obligation. *In re Marriage of Stenshoel, supra.*

Disallowing this deduction of $10,397 increases Kaplan's actual net income by an additional $866.42 per month, rather than the $911.42 per month stated in Kohls' Opening Brief.

2. The Lower Court Abused Its Discretion By Permitting Kaplan To Deduct Insurance Costs Allegedly Paid By KRES, LLC.

Kohls agrees that the $2,813 KRES paid for its general liability insurance should not be added back to Kaplan's income. But the $2,921 KRES paid for his professional liability insurance,

and the $2,665 paid for his Key Man insurance should be added back in for the reasons set forth in her Opening Brief.

Since these annual expenditures of $5,586 did not actually reduce Kaplan's personal income, his actual net income should be increased by an additional $465.50 per month.

In sum, when both the alleged depreciation for furniture and equipment, allegedly purchased by the LLCs, and these purported expenditures by KRES for Kaplan's personal insurance did not actually reduce his personal income, his actual net monthly income should be increased by $1,331.92 per month, for an imputed total net monthly income of $33,045.64.

D. The Court Abused Its Discretion By Refusing To Address Whether Support Should Be Set Above The Maximum Advisory Level.

Kaplan asserts that Kohls requested that support be set above the maximum advisory level, pursuant to RCW 26.19.065(3), for the first time during argument at trial. That is untrue. Kohls requested this relief in her Petition for Modification. CP 213.

She also provided the Court with a Supplemental Trial Memorandum, with exhibits, on this very issue at trial. CP 990-

1026. While the Court Commissioner disallowed the Supplemental Trial Memorandum, she stated that the issue could still be argued, 11/22/13 RP 5-6, and it was, 11/22/13 RP 16-17.

Kohls raised this issue again in her motions for revision. CP 1232, 1361, and motions for reconsideration, CP 1733-1737.

Contrary to Kaplan's assertion (without any citation to the record), there is no evidence that the court ever rejected this claim. Rather, it failed to even address her claim.

An appellate court has a supervisory responsibility "to ensure that discretion is exercised on articulable grounds." *Mahler v. Szucs*, 135 Wash.2d 398,435, 957 P.2d 632 (1998), *overruled on other grounds* by *Matsyuk v. State Farm Fire & Cas.Co.,* 173 Wash.2d 643, 272 P.3d 802 (2012). The court necessarily abused its discretion by failing to provide any articulable grounds whatsoever in refusing to even address this claim.

While it is true that this Court held in *In re Marriage of Scanlon and Witrak,* 109 Wn. App. at 179, that "it contravenes legislative intent to increase the child support obligation of an obligor parent of moderate means simply because the oblige parent is affluent", this Court also held in *In Marriage of Leslie,* 90

Wn. App. 796, 804, 954 P.2d 330 (1988):

> And consistent with legislative intent, the trial court **must** consider what additional amounts should be paid "commensurate with the parents' income, resources, and standard of living," in light of the totality of the financial circumstances.
> *See* RCW 26.19.001. (emphasis added).

RCW 26.19.001 states in pertinent part:

> <u>The legislature intends, in establishing a child support schedule, to insure that child support orders are adequate to meet a child's basic needs</u> and to provide additional child support commensurate with the parents' income, resources, and standard of living. [emphasis added].

Contrary to Kaplan's assertion (without any citation to the record), Kohls has never "acknowledged that Idalia's needs were met by the standard calculation". Clearly, they are not. It is undisputed that Kohls' monthly expenses are $5,356, CP 235, and her net monthly income is only $1,812.53, CP 1842. The "standard calculation" is not "adequate to meet [the] child's basic needs".

In *In re Marriage of Krieger and Walker*, 147 Wash. App. 952, 963, 199 P.3d 450(2008), this Court held:

> Neither the statute nor the case law[7] limits support awards above the advisory amount to those based on "extraordinary" needs, as the

[7] This Court was referring to *Marriage of McCausland,* 159 Wash.2d 607, 152 P.3d 1013 (2007).

> trial court here applied that term. The statute provides only that the court has discretion to award an amount above the advisory amount "upon written findings," and the case law requires only that the additional support be necessary and reasonable, in light of the parents' financial circumstances.

See also, *In re Marriage of Scanlon and Witrak,* 109 Wn. App. at 17176-177. Support above the advisory amount is appropriate even if---and particularly if---such additional support is necessary to cover expenses "within the realm of basic needs". *In re Marriage of Krieger and Walker*, 147 Wash. App. at 964-965.

The court below abused its discretion by refusing to even address the issue of whether support should be set above the maximum advisory level---much less, to make "findings and conclusions...[which] evince such a comprehensive examination" of "the totality of the [parties'] financial circumstances", required by this Court in *In Marriage of Leslie,* 90 Wn. App. at 804. Given the disparity in the parties' financial resources, this Court should hold that support should be set above the maximum advisory level.

E. The Court Abused Its Discretion By Believing It Was Compelled To Give Kaplan A Deviation For Paying The Private School Tuition For Idalia.

Kaplan's reliance upon *In re Marriage of Trichak,* 72 Wn.

App. 21, 863 P.2d 585 (1993), for the proposition that the revision court was required to give him a "22.2% deviation because he was paying 100% of the children's private school tuition" is misplaced.

The issue in *Trichak,* 72 Wn. App. at 23 was "whether Ms. Trichak [was] precluded, under the doctrine of collateral estoppel, from relitigating whether a deviation from the standard calculation for Casandra's Social Security income was proper." This Court held that she was so precluded because "she [was] not challenging the modifiability of the deviation, but its legality, which was decided by the court in the 1989 decree." *Trichak,* 72 Wn. App. at 23. This Court explained its holding in the quote cited by Kaplan, *Trichak,* 72 Wn. App. at 24:

> While continuing jurisdiction in child custody and support matters is necessary to ensure that all matters affecting the needs of children are addressed, it is not the proper forum for relitigating previously decided legal issues that are unrelated to such needs.

In this case, Kohls did not challenge the *legality* of this deviation, but rather sought to modify it. The Court Commissioner concluded and found that it should be modified. (CP 1494).

The court denied Kaplan's request to revise this ruling. CP

1702. Yet, when Kaplan presented proposed final orders, he gave himself this deviation anyway. Over Kohls' objections, CP 1824, the court included it, because it erroneously believed it was bound by the 2010 Order of Child Support to give Kaplan this deviation (CP 1843). It wasn't.

Contrary to Kaplan's misrepresentation, neither *Trichak*, *supra*, nor any other legal authority, has ever held that a "court does not have authority to modify [a] prior court's deviation decision in an adjustment proceeding".

The court below abused its discretion by granting Kaplan a deviation based on an erroneous view of the law. *In re Marriage of Scanlon and Witrak*, 109 Wn. App. at 174-175.

F. The Court Abused Its Discretion By Refusing To Order Kaplan To Reimburse Kohls For Overpaying Her Share Of Healthcare Insurance Premiums Not Actually Incurred.

Contrary to Kaplan's misrepresentation, Kohls did argue that she should be reimbursed for these overpayments on equitable principles in the court below. CP 1740-1741.

Her claim for reimbursement was not barred by the doctrine of *res judicata* since her request for reimbursement had never

been previously adjudicated. *Rains v. State*, 100 Wash. 2nd 660, 674 P.2d 165 (1993).

There is no legal authority for Kaplan's proposition that such relief is not available in this proceeding.[8]

In *In re Marriage of Krieger and Walker*, 147 Wash. App.at 459-460, this Court held that the "*Stern/Rand* factors" weighed against awarding a judgment for overpayment of support because it "created a substantial hardship on the children by further decreasing an already reduced child support award and was therefore an abuse of discretion."[9]

By the same reasoning, the court here abused its discretion by failing to award a judgment in favor of Kohls to reimburse her for overpaying her share of the actual cost of the children's health insurance premiums which were not actually incurred in the amount of $1,071.94, CP 213; See also, CP 3379-3383, by creating "a substantial hardship on the children by further

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[8] Contrary to Kaplan's misrepresentations, the court did not rule that Sheila could or should seek this relief in any other proceeding, CP 1702, 1856, nor should she be required to do so. Compare eg., CR 1.

[9] *In re Marriage of Stern,* 68 Wn.App. 922, 932, 846 P.2d 1387 (1993); and *Rand v. Rand,* 40 Md.App. 550, 392 A.2d 1149 (1978).

decreasing an already reduced child support award".

G. The Court Abused Its Discretion By Refusing To Order Post-Secondary Support.

Generally, a Petition for Modification is required to obtain post-secondary support. *In Re Marriage of Morris*, 176 Wn. App. 893, 902, 309 P.3d 767 (2013). So when Kohls sought post-secondary support for her children, she filed a Petition for Modification. CP 213-214.

Commissioner Jeske ordered Kaplan to pay Kohls post-secondary support for Zachary, if and when he resided with his mother during the summer months. CP 1217.

Since Kaplan did not identify or claim that this order was error in his motion for revision, as required by KCLR 7(b)(8)(A)[10], it became a an order subject to appellate review, but not revision. RCW 2.24.050; *Robertson v. Robertson,* 113 Wn. App. 711, 714-715, 54 P.3d 708 (2002).

Yet, Kaplan omitted the commissioner's award when he presented final orders to the revision court. And again, over Kohls' objection, CP 1830-1831, the court did not include this award in its

[10] KCLR 7(b)(8)(A) requires that "The motion [for revision] <u>shall</u> identify the error claimed." [emphasis added].

Adjusted Order of Child Support on Revision. CP 1839-1854.

This was error and thus an abuse of discretion.

Kaplan could not avoid the requirements of KCLR 7(b)(8)(A) by asserting that he sought revision of the commissioner's orders "in their entirety", while also identifying "the errors claimed," and thereby deprive Kohls of the opportunity to be heard at the revision hearing on issues for which he claimed no error.[11]

In addition, even leaving aside the previously discussed reasons why the court abused its discretion by concluding there had been no substantial change in circumstances, the Court abused its discretion by converting this modification proceeding to an adjustment proceeding,[12] since no substantial change of circumstances need be shown to support a petition for modification to obtain post-secondary support. *Id.*[13]

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[11] *In re Dependency of B.S.S.*, 56 Wn. App. 169, 171, 782 P.2d 1100 (1989), a Division 2 case relied upon by Kaplan, provides no support for his contention that the revision court could adjudicate issues for which no claimed errors were identified.

[12] Contrary to Kaplan's contention, Brief p. 18, the revision court's "finding" CP 1855, 1856, that Kohls' Petition for Modification should be treated as a motion for adjustment rather than modification proceeding is an erroneous conclusion of law, not a finding of fact.

[13] Once a basis for modification has been established, a court may modify the original order in any respect. *In re Marriage of Scanlon and Witrak*, 109 Wash. App. at 171.

Then, in a "Catch-22" kind of ruling, the revision court ruled that it could not address Kohls' requests for post-secondary support because this was now an adjustment proceeding, rather than a modification proceeding. CP 1856.

This too was error and an abuse of discretion.

In the very case relied upon by the Court; namely, *In Re Marriage of Morris*, 176 Wn. App. at 902- 904, the Court held that it is harmless error to order post-secondary support in an adjustment proceeding where, as here, the objecting party "has not established any specific procedural deficiencies nor any prejudice."

The Court here was thus required to address the issues regarding post-secondary support for <u>both</u> children, which Kohls had requested in her Petition, CP 213-214. In addition, the Court was required to determine whether such relief should be made retroactive to June 1, 2013, the effective date of the modified support, CP 1208, 1843, which Kohls requested in her Motion for Revision, CP 1361-1362.

It abused its discretion by failing to do so.

H. The Court Abused Its Discretion By Upholding The Court Commissioner's CR 11 Sanctions.

Kaplan contends that CR 11 sanctions were properly imposed because, in addition to her mandatory pension contributions, Kohls' proposed Final Order of Child Support Following Reconsideration included a judgment for Zachary and changed the percentage of Kaplan's contribution to college preparatory costs. Brief of Respondent/Cross-Appellant, p. 48. This is not accurate. Kaplan misstates the actual record.

The only issues Kaplan raised in his motion for CR 11 sanctions, CP 1387-1484, was whether Kohls should be entitled to deduct her mandatory and voluntary pension contributions of $141 and $416 respectively per month from her gross monthly earnings; and whether he should be awarded CR 11 sanctions because she did. CP 1387-1389.

As Kaplan acknowledged in that very motion, the issues about whether Kohls should have a judgment for Zachary's residential time with his mother during the summer months following his graduation from high school and the change in the percentage of Kaplan's contribution to college preparatory costs,

had been previously resolved, and were not the subject of his request for CR 11 sanctions. CP 1389-1390, 1392-1393.

Kaplan complained that whether Kohls should be entitled to deduct her mandatory and voluntary pension contributions was never raised at trial, and was being raised for "the first time by way of a notice for presentation of a proposed order of child support following the Court's *Order on Reconsideration*", CP 1388.

Based on Kaplan's allegations, Commissioner Jeske imposed CR 11 sanctions of $500, jointly and severally, against Kohls and her attorney in her Order on Petitioner's Motion for CR 11 Sanctions, CP 1489, and an additional $500 against Kohls individually in her Final Order of Child Support Following Reconsideration , CP 1491. She also refused to permit Kohls to take these mandatory deductions, CP 1500.

But Kaplan's allegations were untrue. These deductions had been included in the 2010 Order of Child Support, CP 230, and the proposed Child Support Worksheets, CP 215, Kohls had attached to her Petition, and in her Financial Declaration. CP 236. For that matter, Kaplan had included these same mandatory deductions in the very child support worksheets he proposed the

Court Commissioner adopt which he had attached to the Trial Brief he had submitted for the Trial by Affidavit. CP 553.

Yet, according to Commissioner Jeske, CP 1499:

> on presentation, revisions were prepared by Mr. Berry III after a second presentation and court ruling. This exceeded the scope of presentation on a very disputed trial and increased cost to Mr. Kaplan's attorney. Court grants CR 11.

But, as the revision court correctly concluded, such deductions from Kohls' gross income are mandated by RCW 26.19.071(5)(c) and (g). Accordingly, it revised the commissioner's ruling to permit these *mandatory* deductions. But then it adopted her "ruling and analysis" regarding her imposition of CR 11 sanctions, CP 1702.

These two rulings are not reconcilable.

Nor was there a finding by either the Court Commissioner or the revision court, as required by *Biggs v. Vail,* 124 Wash.2d 124 Wash.2d 193, 201, 876 P.2d 448 (1994), that the claim for Kohls' mandatory pension deductions "is *not* grounded in fact or law... or the paper was filed for an improper purpose," or as Kaplan now contends, that this somehow constituted intransigence.

Deductions for Kohls' pension contributions are mandatory.

I. The Court Abused Its Discretion By Imposing CR 11 Sanctions Because Kohls' Attorney Provided It With a Post-Hearing Memorandum.

Motions for revision have a different statutory underpinning, RCW 2.24.050, than other civil motions, and are treated differently. See eg. *State v. Ramer,* 151 Wash.2d 106, 113, 86 P.3d 132 (2004). In King County, procedures for Motions for Revision of a Commissioner's Order are prescribed by KCLR 7(b)(8), while the procedures for other civil motions are prescribed by KCLR 7(b)(4). Contrary to Kaplan's contention, the procedures prescribed by KCLR 7(b)(4) no more supplement the procedures prescribed by KCLR 7(b)(8), than the procedures prescribed by KCLR 7(b)(8) supplement the procedures prescribed by KCLR 7(b)(4).

They are separate and distinct procedures applicable to discrete types of motions.[14]

In any event, while these rules do not expressly permit the submission of post-hearing memoranda, neither do they prohibit the submission of post-hearing memoranda. See also, *Spokane Airports v. RMA, Inc.,*149 Wn.App. 930, 935-936, 206 P.3d

[14] In addition, in King County, procedures for Family Law motions are prescribed by KCLFR 6. The procedures for Child Support Modification proceedings are prescribed by KCLFR 14.

364(2009)(motion to strike supplemental brief denied, even though not authorized by rules, where brief "merely formalizes and clarifies what was already before us.").

Kohls did not violate any local court rule, or any other rule, by submitting a post-hearing memorandum to the court.

In addition, there was **no** finding that Kohls' Post-Hearing Memorandum was "*not* grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, *or* the paper was filed for an improper purpose," as required by *Biggs v. Vail,* 124 Wash.2d at 201. Nor did such a filing constitute intransigence---a finding the court did not make.

While the court had complete discretion to use or to not use that "Post-Hearing Memorandum", as it deemed fit, its service and filing is not a basis for finding a violation of CR 11 and imposing sanctions. *Biggs v. Vail,* 124 Wash.2d at 193.

J. The Court Abused Its Discretion By Ordering Interest To Run On Commissioner Jeske's Award Of Sanctions, But Not Her Award Of Attorney Fees, From The Dates Of Those Awards.

On January 15, 2014, Commissioner Jeske entered a judgment against Kaplan and in favor of Kohls for attorney fees in

the amount of $29,500 and costs in the amount of $5,360.31.CP 1211.[15] Thus, the fact that the revision court ruled that, CP 3471:

> In the January 20th, 2015, *Adjusted Order of Child Support On Revision*, at page 3, Section III, this Court specifically ordered that its Order *superseded* the Final Order of Child Support Following Reconsideration entered by Commissioner Jeske on June 16, 2014...,

is of no consequence, and had no effect on the judgment for attorney fees and costs awarded to Kohls against Kaplan in her judgment of January 15, 2014. CP 1211.

In the Judgment Summary contained in its Adjusted Order of Child Support On Revision, entered more than a year later on January 20, 2015, the Court held that its judgment which affirmed the Commissioner's CR 11 sanctions against Berry and Kohls "supersedes these prior judgments, except that interest shall have accrued on this judgment commencing June 16th, 2014, when the CR 11 sanctions were first ordered." CP 1840.

No such "superseding" language appears in the Judgment Summary for the judgment in favor of Kohls against Kaplan for attorney fees and costs, CP 1840, which had been entered on

[15] Although the judgment is dated December 17, 2013, it was not entered until January 15, 2014. See also, CP 1209 and CP 1220, dated January 8, 2014, but not entered until January 15, 2014.

January 15, 2014. The Commissioner's previous judgment for attorney fees and costs was not superseded. The court "adopted" and included it in its judgment of attorney fees and costs, CP 1702.

Contrary to Kaplan's contention, the mere fact that both parties sought to revise the attorney fees awarded to both parties did not render the Commissioner's awards unliquidated. A dispute over the claim, in whole or in part, does not change the character of a liquidated claim to unliquidated. *Hansen v. Rothaus*, 107 Wash.2d 468, 472, 730 P.2d 662 (1986).

Kaplan concedes that those claims became liquidated when the Commissioner entered judgment on her awards. *Nat'l Steel Constr. Co. v. Nat'l Union Fire Ins. Co.*, 14 Wn. App. 573, 577, 543 P.2d 642 (1975). But Kaplan contends that no judgment was entered on Kohls' judgment for attorney fees from which interest could run, unless or until a judgment summary was entered. Kaplan cites no authority for this proposition and is incorrect.

While a judgment summary may be required to enter a judgment *in the execution docket*, a judgment summary is not required to create a judgment. In *Bank of America, N.A. v. Owens*,

173 Wash.2d 40, 51, 266 P.3d 211(2011), the Court held:

> A judgment must be in writing and signed by the judge, CR 54(a)(1), but "need not be in any particular form, ..."

Thus, in *Bank of America, N.A. v. Owens*, 173 Wash.2d at 54, the Court held:

> Documents 1375 [an award of temporary attorney fees] and 1376 did not include judgment summaries and were not entered in the execution docket. Nonetheless, they are valid judgments and, as such, created statutory judgment liens....

Thus, the Court's conclusion that "the *first binding decision* for attorney fees and costs in favor of Respondent Kohls, is set forth in the *Adjusted Order of Child Support on Revision,* entered by this Court on January 20th, 2015", CP 3471, is an error of law. It was not a finding of fact, as Kaplan contends. (Brief, p. 52).

Interest commences from the date that a judgment is entered, pursuant to RCW 4.56.110(4). Pursuant to CR 58(b):

> Judgments shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing...

Statutory interest on attorney fee awards is mandatory, unless the court enters findings justifying a lower rate. *In re Marriage of Knight,* 75 Wn.App. 721,731, 880 P.2d 71 (1994).

Thus, interest runs on the judgment awarded to Kohls for her reasonable attorney fees in the amount of $29,500 and her costs in the amount of $5,360.31, from January 15, 2014, the date that judgment was filed with the clerk. CP 1209, 1211, 1220.[16]

The Court's subsequent failure to award this interest, and its disparate treatment of how interest would run on these awards, was error and an abuse of its discretion. CP 3770-3473.

K. The Court Did Not Err By Not Awarding Attorney Fees Or CR 11 Sanctions Against Kohls When She Refused To Enter A Full Satisfaction Of Judgment When Kaplan Tendered Payment Which Did Not Include The Proper Amount Of Interest Which Was Due.

For each of the reasons discussed in the previous section, Kaplan owes Kohls interest on the Commissioner's judgment for reasonable attorney fees and costs from January 15, 2014.

Accordingly, Kohls' refusal to enter a Full Satisfaction of Judgment when she was tendered less than what she was owed; namely, the principal amount of the judgment plus interest only from January 20, 2015, was not a basis for an award against her

[16] This is the basis for why the court erred in the entering the Order Granting Petitioner's Motion to Strike Partial Satisfaction of Judgment; For Entry of Full Satisfaction, entered on April, 14,2015, CP 3770-3473, which contrary to Kaplan's representation, was argued in Kohls' Opening Brief, pp. 36-39.

and her attorney for CR 11 sanctions. See 3757-3759.

Her refusal was and is based on the law and the facts.

L. The Court Abused Its Discretion By Failing To Award Kohls Her Reasonable Attorney Fees, Pursuant to RCW 26.09.140.

Kohls agrees with Kaplan's observation that "the attorney fees spent by both parties since June 2013 are astounding." Brief of Respondent/Cross/Appellant, p. 43.

But that observation begs the question: Why?

It was not because the court had any question determining Kohls' income or monthly expenses. It was because Kaplan lied about his income and expenses. CP 1353-1354.

Contrary to Kaplan's contention, this proceeding has never been for Kohls' benefit. It has always been for the benefit of the parties' children. Parents are trustees with regard to the support of their children, *Hartman v. Smith,* 100 Wash.2d 766, 768, 674 P.2d 176 (1984); *Hammack v. Hammack*, 114 Wn. App. 805, 808, 60 P.3d 663 (2003). Kaplan thus owed a fiduciary duty to be honest when he disclosed his income for the purpose of determining his child support obligation.

Yet, he breached that duty and lied.

When Kaplan lied, Kohls also had a fiduciary obligation to get the information the Court needed to meet its responsibility to accurately determine Kaplan's income, so that the parties' children could get the support to which they are entitled. Neither she nor her attorney should be penalized for doing so.[17]

The court must indicate on the record the method it used to calculate the award. *In re Marriage of Knight,* 75 Wn.App.at 729. The Commissioner abused her discretion by failing to do so.

Kaplan relies upon what the Commissioner stated, CP 1352-1353, when she denied his motion to reduce her fee award:

> While there is no doubt that Mr. Berry sought extensive information from multiple sources, some of his requests were not crafted in a particularly focused manner. This is not intransigence per se but it does lead to inefficiency and can inadvertently increase the cost of fees to both parties. Such conduct should not be rewarded with a full award of fees as it would only encourage less sensible advocacy and poor lawyering. Advocacy should be balanced with the reasonable potential for increased benefit to a client. The limited duration

[17] For this reason alone, the court should have found that Kaplan was intransigent. *In re Marriage of Mattson*, 95 Wn.App. 592, 605, 976 P.2d 157 (1999). Kaplan's contention that "[T]hroughout the 10 year history of this case, Sheila, and her attorneys, have continued to unreasonably litigate because they counted on receiving fees from Ken under the 'need and ability to pay' standard in RCW 26.09.140" is ludicrous and ignores his own conduct.

> of remaining support for the children herein should be balanced with the reasonable potential for increased benefit to a client. The limited duration of remaining support for the children herein should be balanced with the amount expended by either party in furtherance of seeking relief. The Court considered both of these factors in making the prior award of fees.

If the Commissioner believed that some of Mr. Berry's "requests were not crafted in a particularly focused manner" and that this led "to inefficiency and ... inadvertently increase[d] the cost of fees to both parties",[18] then the Commissioner needed to set forth the facts to support her conclusion by identifying what those requests were and how they inadvertently increased the cost of fees to both parties.[19]

When a court awards substantially less than the amount of fees requested, it should indicate at least approximately how it

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[18] The commissioner's conclusion was not a fact. But, even if it were, it would not be subject to an Assignment of Error, because once the superior court makes a decision on revision, the appeal is from the superior court's decision, not the commissioner's. *State v. Ramer,* 151 Wash.2d 106, 113, 86 P.3d 132 (2004).

[19] Both the commissioner and the court approved all of the costs for the subpoena duces tecums issued by Kohl's attorney, CP 1202-1205, 1211, 1702, so apparently the issuance of those subpoenas was reasonable. Whether Kohls' attorney fee requests should be discounted for "inappropriate pleadings" or excessive time "conferring with his client" scrutinizing the thousands of pages of Kaplan's financial records, as Kaplan now contends, Respondent's Brief, pp. 45-46, and Kohls disputes, is a task which should be determined by the court on remand.

arrived at the final numbers, and explain why discounts were applied, so that proper review is possible. *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 146, 144 P.3d 1185 (2006). The failure to create an adequate record for review will result in a remand of the award to the trial court to develop such a record. *Mayer v. City of Seattle,* 102 Wn.App. 66, 78–79, 10 P.3d 408 (2000).

The court also abused its discretion by discounting the fees Kohls incurred by balancing "the limited duration of remaining support for the children" with the reasonable potential for increased benefit to a client.[20] This is not a proper factor for the court to consider when making an award of fees and costs, pursuant to RCW 26.09.140.[21] Compare, *Marriage of Rideout*, 150 Wash.2d 337,357, 77 P.3d 1174 (2003) (an award of attorney fees under RCW 26.09.140 is based on the financial circumstances of

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[20] When Kohls filed her Petition for Modification, there were at least four more years of post-secondary support due for Zachary and Idalia, and two more years of basic support due for Idalia. The "amount in controversy" is not a conclusive factor for an award of reasonable attorney fees even in other kinds of civil cases. See eg. *Target Nat. Bank v. Higgins*, 180 Wn.App. 165, 183-194, 321 P.3d 1215 (2014); *Taliesen Corp. v. Razore Land Co.*, 135 Wn.App. at 143-145.

[21] This court reviews the legal basis for an award of attorney's fees *de novo*. *Target Nat. Bank v. Higgins*, 180 Wn.App. at 172.

the parties, not on which party "prevails".)

As Kaplan acknowledges, a comparison of hours and rates charged by opposing counsel is probative of the reasonableness of Kohls' request. *Fiore v. PPG Industries, Inc.*, 169 Wn. App.325, 354, 279 P.3d 972 (2012). Kaplan's attorney normally charges $325 per hour for her time, and $120 for paralegal time, but only charged him $300 per hour for her time because that was her rate when he originally became her client, CP 650. Kohls' attorney charges $350 per hour, CP 255, and $100 per hour for paralegal time. All the hourly rates are reasonable.

As of October 31, 2013, Kaplan had incurred fees in the amount of $24,327 for 94.80 hours.[22] CP 650-659. Leaving aside the "professional courtesy reduction" of 8 hours ($2,400), CP 846, his attorney's time sheets show that he incurred additional fees from November 1, 2013 through November 14, 2013 in the amount of $19,470, for an additional 85.25 hours of time, CP 846-850, for total fees incurred of $43,797 for 180.05 hours.

As of November 15, 2013, Kohls had incurred fees in the amount of $46,772 for 140.47 hours of time. CP 255-267, 976-989.

[22] Unlike Kohls, Kaplan typically deducts his attorney fees as "business expenses". 11/22/2013 RP 55.

If Kaplan's attorney had charged her client $350 per hour, like Kohls' attorney, Kaplan's fees and costs would have greatly exceeded those charged by Kohls' attorney. Yet, Kohls' attorney had to engage in extensive discovery and scrutinize literally thousands of documents to try to ferret out Kaplan's true income---tasks which Kaplan's attorney did not have to do.

After the Commissioner ruled that Kohls was entitled to an award of her reasonable attorney fees, pursuant to RCW 26.09.140, and asked her attorney to submit a supplemental declaration detailing what Kohls had incurred, 11/22/13 RP 54-56, Kohls' attorney submitted a declaration showing that she had been billed for a total of 163.45 hours through December 5, 2013---22.98 hours more than what he had billed through November 15, 2013---and requesting fees of $54,959. CP 1092-1109.

Kaplan's attorney submitted a declaration, CP 1159-1171, showing that she had billed a total of 192.35 hours representing Kaplan through December 10, 2013, CP 1170---12.3 more hours than what she had billed Kaplan through November 14, 2013.

But, unlike Kohls' attorney, Kaplan's attorney had not been tasked with drafting the proposed final orders.

By December 15, 2013, Kohls had been billed for a total of 171.45 hours and incurred fees of $57,395. CP 188-1205.

Yet, the commissioner awarded her only $29,500 for her reasonable attorney fees through December 15, 2013, CP 1211, barely half of what had been requested.[23]

The fundamental purpose of RCW 26.09.140 is "to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage...", particularly in disputes involving children and their support. *In re Marriage of Burke*, 96 Wn. App. 474, 478-479, 980 P.2d 265 (1999).

This purpose is particularly important where, as here, an indigent custodial spouse who is seeking support for the parties' children is going up against a wealthy non-custodial spouse who lies about his income, 11/22/13 RP 36; and then makes it as difficult and as expensive as he can for the mother to obtain the

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[23] By January 12, 2015, Kaplan had been billed more than $80,000 for attorney fees. 1/12/2015 RP 8. Yet, Kohls was awarded less than half of what Kaplan had been billed. And again, if Kaplan's attorney had been billing her client at the same hourly rate as Kohls' attorney was billing his client, Kaplan's fees would have greatly exceeded Kohls', even though Kohls had "the laboring oar" in this proceeding. Kohls explained in her Opening Brief, pp. 38-50, why the revision court's award of reasonable attorney fees was an abuse of its discretion. Kaplan does not---and cannot--- defend the revision court's analysis. He just states that Kohls "doesn't like the trial court's decision and demands further explanation." Respondent's Brief, p. 46. That is not a factual or legal defense of why the revision court did not abuse its discretion in its award of barely half of the fees requested to Kohls.

information necessary for the court to fulfill its responsibility to determine his true income to make sure the parties' children receive the support to which they are entitled, 11/22/13 RP 34-45; CP 1698-1701. He then has the *chutzpah* to complain about the amount of attorney fees incurred to determine his income. The use of such a cost/benefit factor incentivizes such non-custodial parents, as it did for Kaplan here, to engage in such deceptive and obstreperous tactics.

If attorneys are going to be able to afford to represent indigent clients in these kinds of disputes, then they must be paid their reasonable attorney fees and costs. Whatever the court does not award must be made up by the court's awards for support, or goes unpaid, thereby defeating the fundamental purposes of both RCW 26.19.001 and RCW 26.09.140.

The proper analysis for determining a reasonable fee is set forth in *Matter of Marriage of VanCamp*, 82 Wn. App. 339, 342, 918 P.2d 509 (1996), as Kohls discussed in her Opening Brief.

As evidenced by Kaplan's own attorney's fee declarations, the time Kohls' attorney found "necessary for preparation and presentation of the case" was reasonable. The factual and legal

questions in trying to determine Kaplan's true income, were very complex, as the court found. CP 1698-1701; See also, 11/22/13 RP 36-45. But the court's award does not reflect "the fees and costs incurred in the process." *In re Marriage of Morrow*, 53 Wn. App. 579, 591, 770 P.2d 197(1989). See also, *Friedlander v. Friedlander,* 58 Wash.2d 288, 290, 297, 362 P.2d 352 (1961); *In re Marriage of Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999), discussed in Kohls' Opening Brief.

For each of the foregoing reasons, the court abused its discretion by awarding Kohls less than half of the fees she incurred and barely half of the fees that Kaplan incurred.

M. Kaplan Is Not Entitled To An Award Of Attorney Fees and Costs Incurred On Appeal.

Relying upon *In Re Marriage of Foley*, 84 Wn. App. 839, 847, 930 P.2d 929 (1997), Kaplan contends he should be awarded his attorney fees on appeal, pursuant to RAP 18.9(a), because the issues raised by Kohls are frivolous, present no truly debatable issues upon which reasonable minds could differ, and are so lacking in merit that there is no reasonable possibility of reversal.

For each of the reasons previously set forth herein, Kohls

respectfully disagrees.

N. Kohls Should Be Awarded The Reasonable Attorney Fees and Costs She Incurred On Appeal.

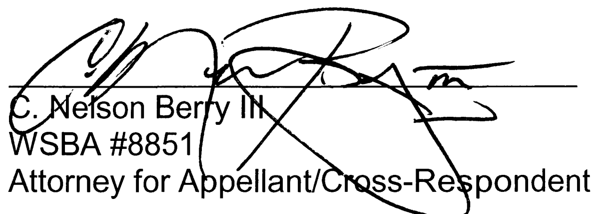
RCW 26.09.140 provides for an award of attorney fees on appeal. In exercising its discretion under this statute, the Court considers the arguable merit of the issues on appeal and the parties' financial resources. *In re Marriage of Raskob*, 183 Wn. App. 503, 520, 334 P.3d 30, 39 (2014). CP 1800.

The legal issues raised by Kohls in this appeal are important and have merit. The courts below are confronted with these same issues every day. And those courts need guidance from this Court on how to properly exercise their discretion when they adjudicate these issues.

It is undisputed that Kohls needs assistance to pay her attorney fees, and Kaplan has the ability to pay them. CP 1800.

Pursuant to RAP 18.1(a), Kohls requests that she be awarded the reasonable attorney fees and costs she has incurred on this appeal.

Respectfully submitted this 2nd day of November, 2015.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 2nd day of November, 2015, I caused a copy of the foregoing Reply Brief of Appellant and Response Brief of Cross-Respondent to be served on the attorney for the Respondent/Cross-Appellant, by e-mail and hand-delivery by ABC Messenger Service, to the following address:

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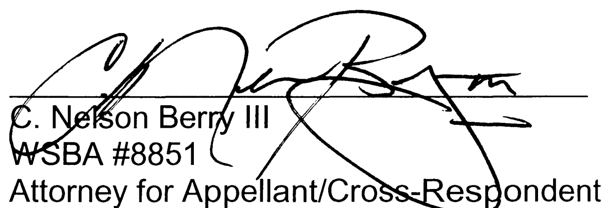
Dated and signed at Seattle, Washington, this 2nd day of November, 2015.



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