No. 96172-7

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

HEIDI K. KAPLAN,

Petitioner,

and

DONALD C. KAPLAN,

Respondent.

REPLY IN SUPPORT OF PETITION FOR REVIEW

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A. INTRODUCTION

In his answer to Heidi Kaplan's petition for review, Donald Kaplan seeks conditional cross review of the Court of Appeal's holding that the trial court improperly imputed income to an unemployed, stay-at-home mother who left the workforce over 20 years ago and dedicated herself to caring for the couple's children and supporting her husband's career. Because Donald's answer raises this additional issue, this reply is warranted. RAP 13(d).

In its well-reasoned analysis, Division One correctly held that it would not impute income in this case where "a spouse in a long-term marriage stays home to care for the children and manage the household while the other spouse works outside the home." *Matter of Marriage of Kaplan*, __ Wn. App. 2d ___, 421 P.3d 1046, 1057 (2018). That holding is supported by the facts of the case, does not conflict with Court of Appeals precedent, and should not be disturbed by this Court.

B. REPLY ON STATEMENT OF THE CASE

Heidi has been out of the workforce since 1996. CP 599, 600. Since that time, she was a full-time homemaker, caring for the family's two children and supporting Donald's career. *Id.* The family moved four times to promote Donald's career advancement, further precluding the development of her own career. *Id.*; RP 41-42, 45-47. The workforce she

left changed significantly since 1996. Heidi presented expert testimony that she would need significant retraining and is only employable at a "low end" job. RP 179-82.

Given these facts, the Court of Appeals was correct, and did not stray from other precedent, in holding that imputing income to Heidi was unjustified. Review on this issue is unwarranted.

C. ARGUMENT IN REPLY

(1) Review of the Imputed Income Issue is Unwarranted Where the Court of Appeals' Holding Is Supported by the Facts

The Court of Appeals' decision on imputed income was supported by the facts and does not conflict with the law in this state. RCW 26.19.071(6) allows a court to conclude that a parent is "underemployed" and attribute income to that parent consistent with what that parent should actually be earning in the market. In making this assessment, the court must consider an array of factors including the parent's "work history, education, health, and age," or any other relevant factor. RCW 26.19.071(6); *In re Marriage of Peterson*, 80 Wn. App. 148, 153, 906 P.2d 1009 (1995), *review denied*, 129 Wn.2d 1014 (1996).

As discussed above, Heidi presented significant evidence that she was employable at only a low level, due to her exiting the workforce over 20 years ago to care for the children and support Donald. Additionally, her

own career was made nearly impossible by the family's several relocations around the country to support Donald's career. The trial court concluded as much stating that "Ms. Kaplan put her employment advancement on hold in support of the community; specifically, so that she could care for the children as well as support Mr. Kaplan's career goals that took him out of town extensively." *Marriage of Kaplan*, 421 P.3d at 1056. Yet bafflingly it still made the insulting determination that she was "voluntarily underemployed." The Court of Appeals correctly noted the inconsistency in those findings. *Id.* Caring for the children and the community fall under the "other relevant factors" a court should consider under RCW 26.19.071(6) when determining whether a parent is voluntarily underemployed. *Id.*

Donald continues to rely on three cases, *Matter of Marriage of Jonas*, 57 Wn. App. 339, 788 P.2d 12 (1990); *In re Marriage of Wright*, 78 Wn. App. 230, 896 P.2d 735 (1995); and *In re Marriage of Pollard*, 99 Wn. App. 48, 991 P.2d 1201 (2000), and argues for a rule that anytime a parent who is employable in any capacity choses to stay home and care for the children and the home, a court *must* impute income because they are purposefully "underemployed." Answer at 18-19. The Court of Appeals correctly noted that those cases are distinguishable and do not support the

draconian holding that a stay-at-home parent is underemployed as a matter of law.

Jonas was a case where *both* parents were unemployed post-dissolution. In a very limited analysis, Division II held that they both chose to be underemployed "for personal…reasons." 57 Wn. App. at 340. *Wright* involved a primary caregiving parent who had two nursing jobs, one half-time and one part-time. There was evidence that the parent "could obtain full-time employment" if she wanted. 78 Wn. App. at 234. Under the facts of that case, including the fact that she received an unequal distribution of the property to improve her financial position, Division II held that imputation of some modest income was proper. Finally, in *Pollard* Division III imputed income to a mother who left her job after her divorce was finalized to raise two children she had with her new husband. 99 Wn. App. at 54. Critically, this was a voluntary choice based on the dynamic of her new family, not a decision to support the community at issue in the dissolution. *Id.*[1]

The Court of Appeals properly distinguished these cases and articulated the rule that it is not always appropriate to "impute income

[1] The only other case Donald cites, *Curran v. Curran*, 26 Wn. App. 108, 611 P.2d 1350 (1980), did not involve a stay-at-home parent. Rather the court imputed income to a father, who shared custody of the children, because he chose to run an underperforming family business rather than obtain gainful employment on the open market, which the Court found he could do. *Id.* at 109. *Curran* has no bearing on this case.

anytime a spouse voluntarily stays home in support of the community to raise children." *Marriage of Kaplan*, 421 P.3d at 1056. That well-reasoned holding comports with RCW 26.19.071(6) and should not be disturbed by this Court.

(2) Review is Unwarranted Because the Court of Appeals' Holding is Fair

The rule articulated by the Court of Appeals is fundamentally fair and properly attributes value to the work done by spouses who stay home to care for the children and community. As discussed in Karl A. W. DeMarce, *Devaluing Caregiving in Child Support Calculations: Imputing Income to Custodial Parents Who Stay at Home with Children*, 61 Mo. L. Rev. 429, 466, 468 (1996):

> The practice of imputing income to a custodial parent who chooses to stay at home with minor children raises questions going to the heart of our legal and societal values. To conclude that a parent who chooses to stay at home with children is "voluntarily unemployed or underemployed," a court must implicitly find a parent's work in the home to be of lesser worth than employment in the marketplace, or that it is not work at all.
>
> ….
>
> A judicial determination that a parent staying at home with minor children is "voluntarily unemployed or underemployed" carries with it a powerful value judgment about the relative worth of different roles in our society. Such a determination, in addition to denigrating the hard work of those who raise children, ignores the eloquent pleas for recognition of the caregiving role made by commentators

> in the field such as Estin and Laughrey. Moreover, it is inconsistent with the progress the law has made toward recognizing the value of the caregiving function in such diverse areas as wrongful death, equitable property distribution upon divorce, and the law of decedents' estates.

The rule Donald argues for penalizes full time parents like Heidi for her caregiving role in a long-term marriage, thereby effectively failing yet again to honor the *Rockwell* principle.[2] Division I was correct to recognize that a full-time parent is, in fact, "gainfully employed" in providing the extraordinary valuable maternal services to the children and in supporting the career and ambitions of the spouse who works outside the home. This Court should not disturb that sound holding.

D. CONCLUSION

This Court should grant review of Division I's published opinion only on the issue of allocation of the marital resources pursuant to the

[2] This principle, which Heidi asks this Court to review and affirm, states, "In a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives." *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055 (2008). Donald's argument that this long-recognized rule, *e.g.*, Answer at 12-13 (citing *Friedlander v. Friedlander*, 80 Wn.2d 293, 297, 494 P.2d 208 (1972) (marriage approximately than 10 years); *Konzen v. Konzen*, 103 Wn.2d 470, 472, 693 P.2d 97, 98, *cert. denied*, 473 U.S. 906 (1985) (same)), is not really a rule, adopted by Division I's opinion here, is belied by the authorities cited in Heidi's answer and the course of proceedings in *Rockwell* itself. On remand in *Rockwell*, the trial court implemented the principle Division I articulated. Donald's counsel specifically argued for the principle while representing the prevailing party in *Rockwell II*. *In re Marriage of Rockwell*, 168 Wn. App. 1047, 2012 WL 2369519 (2012), *review denied*, 176 Wn.2d 1012 (2013), (affirming disproportionate split of property in favor of party with lower earning capacity to ensure a relatively equal financial position for both parties post-dissolution of a 26-year marriage).

Rockwell principle. Review of Division I's well-reasoned holding on the imputation of income issue is unwarranted under RAP 13(d). The Court should award Heidi her costs, including reasonable attorney fees, on appeal.

DATED this 21st day of September, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Reply in Support of Petition for Review*** in Supreme Court Cause No. 76306-7-I to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 21, 2018, at Seattle, Washington.

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September 21, 2018 - 2:57 PM

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Reply in Support of Petition for Review

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