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No. 63414-3-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

PATRICIA PAPPAS,

Respondent,

and

CHRISTOPHER PAPPAS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE PATRICIA CLARK

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REPLY BRIEF OF APPELLANT

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## I. Introduction

The court has broad discretion in family law matters, but it is not unbounded. For example, the court's discretion "does not extend to completely overlooking factors material to the determination." Marriage of Landauer, 95 Wn. App. 579, 975 P.2d 577 (1999) (in valuing property, cannot disregard possible effect of federal restraints on alienation).

Here, the court overlooked the undisputed evidence of the husband's financial circumstances. As a car salesman, Chris has seen his income plummet 73% since 2004. He has had to change jobs and has been unemployed at times. His fortunes have reflected those of the auto industry more generally. And, as the wife's expert corroborated, the economic forecast is grim. Past earnings cannot predict future earnings if the circumstances are radically altered. Yet he ignored the reality of Chris's industry.

In short, there was no substantial evidence to support the court's finding that the husband "will likely increase his earnings substantially over the next (8) eight years." Yet, the court ordered the husband to pay maintenance and child support totaling \$7,853 a month, despite that he only nets \$9,636, and ordered him to pay the wife's attorney fees, the daughter's horse expense, and the

lion's share of the community liabilities. These orders force him to consume his share of the assets while allowing the wife to maintain a standard of living that has been out of the parties' reach since 2004.

This result is inequitable, unjust, and contrary to statute and case law.

## **II. Reply Regarding the Facts**

Chris stands by his statement of the facts and by the record, which speaks for itself. Patty's criticisms and counter-narrative are not similarly supported by the record. She responds to facts with assertions from her trial brief, which are not evidence. She fabricates an allegation of financial misconduct, which, again, is not evidence. And she makes assertions about events occurring at trial, without satisfying the requirements of RAP 9.11. Where corrections and clarifications are necessary, they are included in the argument below.

## **III. Reply Argument**

- A. The court here failed to comply with the statutory duty to impute income to Patty.

Patty seems to argue three things in regard to the trial court's failure to impute income to her: (1) that the court "imputed

income” to Patty in the amount of the maintenance she receives monthly from Chris (Br. Respondent, at 22); (2) that Patty is unemployable (Br. Respondent, at 21-23); and (3) the correct child support would mean only a \$35 difference in Chris’s favor, which is not worth correcting (Br. Respondent, at 24). In each case, she is wrong.

First, statute requires that all income and resources of each parent’s household shall be disclosed and considered by the court when the court determines the child support obligation of each parent. RCW 26.19.071(1). In particular, statute mandates the imputation of income from employment. RCW 26.19.071(6) (requiring imputation where parent is voluntarily underemployed or voluntarily unemployed). Contrary to Patty’s claim, income derived from employment is separate from income derived from maintenance, and both must be counted. RCW 26.19.071(3) (a) (salary), (b) (wages), and (q) (maintenance). The fact that Patty has passive income in the form of maintenance does not relieve her from the requirement of employment income (actual or imputed). See, e.g., Marriage of Holmes, 128 Wn. App. 727, 117 P.3d 370 (2005) (court imputing income for voluntary unemployment along with passive income).

Second, Patty concedes she is voluntarily unemployed, but also claims “she had no choice” but to return to school Br. Respondent, at 22. She did not argue she was unemployable below and the record makes clear the contrary: that she is currently employable at wages above the minimum wage.

Third, rather than simply concede the court erred in failing to impute income, Patty argues the statutory mandate can be disregarded where the difference, according to her calculation, is only \$35/month. That is not what the statute says. Moreover, Chris does not agree with Patty’s calculation, since he arrives a difference closer to \$100/month for basic child support alone (based on an estimate of Patty’s proportional share of 61.3%). This difference magnifies the savings to Chris when applied to the extraordinary expenses. Regardless, the court must comply with the statutory mandate to impute income to Patty. See Marriage of Scanlon, 109 Wn. App. 167, 174-175, 34 P.3d 877 (2001) (court abuses its discretion if decision is based on erroneous view of the law).

Finally, Patty seems to argue the court can disregard the statutory child support scheme in favor of a more discretionary process, for example, one where child support can be used to

punish a parent for having “sporadic” contact with a child. See Br. Respondent, at 23-24, citing Marriage of Fernau, 39 Wn. App. 695, 699, 694 P.2d 1092 (1985). However, this is the wrong decade in which to make that argument. The authority Patty cites has long ago been superseded the current version of the statute, which limits and structures the court’s discretion as part of a national trend responding to federal guidelines. 42 U.S.C. § 654. Under the current scheme, the court does not have the discretion to relieve Patty of her child support obligations.

B. The court also must base income on the evidence.

The court is also constrained to derive the income figures used in the child support calculation from the evidence of verified income. Here, again, Patty does not get her facts straight. She argues that the court set Chris’s gross monthly income \$96 higher than the verified amount because it found that he failed to provide documentary evidence of his income; that he maintained side businesses that provided him with additional income; and that he admitted that he was earning \$16,000 per month. Br. Respondent, at 25. She is wrong. The \$16,000 figure was for 2007, not current, verified income. The allegation of “side businesses” was not made by Patty at trial; in any case, the allegation appears to apply only to

a period in 2006 when she and Chris received funds from Chris's parents, so it is not a current source of income at all.<sup>1</sup> Certainly, the court did not make findings that Chris's income was more than proved by the pay stubs and W-2 forms, most of which Patty submitted (because they were in her possession). See Ex. 2, 3, 4, 5, 14, 15, 23. This evidence established Chris had gross monthly income of \$11,453.83 in 2008. Ex. 23, 179; CP 137, 150. The court simply erred in calculating his income as \$96 higher than this amount, unsupported by any evidence or written findings, and contrary to the statute. RCW 26.19.035(2), .071(1)-(5).

Again, Patty responds to this error by arguing the law may be ignored. She says the court was "free to choose between the income figures actually provided at trial" and was free "to adjust" Chris's income regardless of the proof. Br. Respondent, at 25. Actually, the statute requires that the income be verified by tax returns and pay stubs. RCW 26.19.071(2).<sup>2</sup> The court cannot pick a number out of a hat (or from the distant past). Here, because the

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<sup>1</sup> There was no evidence of a side business; Patty merely claimed that Chris unofficially worked for his father for a few months in 2006 when he was unemployed and bound by a noncompete agreement.

<sup>2</sup> RCW 26.19.071(2) provides: "Verification of income. Tax returns for the preceding two years and current paystubs shall be provided to verify income and deductions. Other sufficient verification shall be required for income and deductions which do not appear on tax returns or paystubs."

facts “do not meet the requirements of the correct standard,” the court abused its discretion. RCW 26.19.071(2), (3); Marriage of Littlefield, 133 Wn. 2d 39, 47, 140 P.2d 1362 (1997).

Finally, Patty argues that this \$96 error does not matter because it would not change the monthly child support payment, since the table is determined in \$100 increments. Br. Respondent, at 25. Chris agrees the basic child support would not change, because the figure is derived from the top of the advisory amount (\$7,000). But correction would change Chris’s proportion of the net income, another little error that adds up. In any event, he is entitled to a statutorily correct calculation.

C. The court ordered additional support for private tuition and a horse without justifying the “extraordinary expense” as required by statute.

This case involves childrearing expenses often called “extraordinary.” See State ex. Rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 427, 154 P.3d 243 (2007) (“Under RCW 26.19.080(3), private school tuition and ‘special child rearing expenses’ are extraordinary expenses not included in the basic child support calculation”). Chris does not claim these expenses must be justified by extraordinary need, as Patty argues. Br. Respondent, at 28. Rather, these expenses are “extraordinary” because they

are not included in the basic child support obligation. Here, they appear on the child support worksheet in the space reserved for them. CP 195.

By statute, the court must analyze any special child rearing expense for “necessity and reasonableness.” RCW 26.19.080(4). As part of that analysis, the court must make findings on the parent’s ability to pay. Van Guilder, 137 Wn. App. at 429. The court did neither of these tasks. Rather, the court’s findings merely describe that the additional amount of support is for “the child’s private school tuition and the cost of the child’s competitive horseback riding program.” CP 188 (Order of Support, FF 3.5). This is reversible error, plain and simple.

The same result is reached if the court’s action is viewed as a matter of exceeding the economic table, as opposed to being about special childrearing expenses.<sup>3</sup> See, e.g., Br. Respondent, at 26-27 (court has discretion to exceed economic table). Where a trial court seeks to impose a higher basic support obligation than provided in the economic table, it must do so commensurate with

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<sup>3</sup> Until last year, the economic table was criticized for failing to keep up with the times, since it failed to account for combined parental incomes above \$7000. To compensate, courts occasionally penciled out the table, a process called “extrapolation.” McCausland, at 613-621. Not only has our supreme court put an

the broad purposes of the child support statutory scheme.

McCausland v. McCausland, 159 Wn.2d 607, 610, 620-621, 152 P.3d 1013 (2007) (“RCW 26.19.001 requires the amount of support to be based on the child's or children's needs, and commensurate with the parents' income, resources, and standard of living”). In such cases, written findings of fact are necessary to “demonstrate that the trial court *properly exercised its discretion* in making the award.” McCausland, at 620 (emphasis the court’s). cursory findings and record support are inadequate. *Id.* See, also, Marriage of Krieger and Walker, 147 Wn. App. 952, 965, 199 P.3d 450 (2008) (order of support must be vacated if the trial court’s findings and conclusion “do not evince such a comprehensive examination”).

Here, the court took neither route. It did not determine whether private school and a horse are necessary and reasonable child rearing expenses, nor whether Chris had the ability to pay for them.<sup>4</sup> Nor did the court attempt to justify exceeding the advisory

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end to that practice, the legislature has updated the economic table. RCW 26.19.030.

<sup>4</sup> Neither party has the ability to pay for these expenses. Chris had a monthly net income of \$9,636 with which to pay Patty \$5,500 and his expenses of \$7,956. RP 304, CP 150, Ex. 23, 179. Patty had monthly income of \$5,500 and expenses of \$8,434, including \$3,800 for the horse and private school. RP 136, Ex. 1.

amount in the economic table as required by McCausland. The court made none of the necessary findings.

Thus, contrary to Patty's argument, the court's error is not cured by pointing to the court's findings in support of maintenance, relating to the lifestyle enjoyed by the parties historically, or to Patty's bare assertions that the daughter needs a horse and private school. Br. Respondent, at 27-28. A family economy changes after divorce. Luxuries enjoyed previously may be out of reach. Here, the divorce followed a period during which the wage earner's income declined steadily and dramatically. Now, Chris's smaller income must support two households. Whether or not the daughter needs a horse or private school (unproven, in any case), the court cannot order Chris to pay for them if he does not have the ability.

D. The trial court did not find good cause for ordering support that exceeded Chris's net income by more than 45%.

The court also ignored the statutory requirement to find good cause before ordering child support in excess of 45% of Chris's income. RCW 26.19.065(1)(1998); RCW 26.19.035(2). Patty contends that the court's "various findings" show good cause. Br. of Respondent, at 29. In fact, as demonstrated above, the court did not make the required findings in respect of the amount of support ordered. These nonexistent findings can hardly show good cause.

Patty gets no help from the case she cites, since the court there followed the proper procedure. In Marriage of Glass, 67 Wn. App. 378, 835 P.2d 1054 (1992), the court ordered an upward deviation in support such that it exceeded the father's monthly net income by more than 45%, but only after making findings of good cause, supported by substantial evidence, that the father's business was income-producing and set to turn a profit. Id. at 383-387. More importantly, the court there "made a thoughtful and sincere effort to devise an economic plan" that accounted for the father's financial difficulties but also for the father's substantial resources. Id., at 387.

Here, by contrast, there is no evidence of such careful deliberation, particularly when considering the multiple errors discussed above. The court did not look for, let alone find, good cause. Though this flaw is fatal, Patty ignores it in favor of simply declaring good cause exists (i.e., she argues Chris will earn more in the future). Br. Respondent, at 30. However, the court, not Patty, must actually make this determination, and it did not do so.

E. The award of maintenance was unjust because it is based entirely on mere speculation that Chris will earn more money, despite the evidence all to the contrary.

Chris has always agreed that some maintenance is appropriate here so that Patty can be competitive when she re-enters the job market. However, it is neither appropriate nor fair to

award maintenance to Patty for the purpose of reinstating her in a lifestyle that ended in 2004, when Chris's income fell. Chris simply cannot afford it. To pay Patty, he must liquidate his (lesser) share of the assets awarded him, while Patty need only economize slightly to avoid dipping into her \$1.2 million asset award.

The court's wishful thinking, in the form of a finding that Chris will regain his "substantial six figure income," is not supported by substantial evidence. CP 171-172. It is undisputed that Chris lost his job of 18 years and his income steadily declined 73% from \$565,997 in 2004 to \$137,446 in 2008. Ex. 2-5, 23. He has had to change jobs, has been unemployed for a time, and has always worked in an industry hard hit by current economic troubles. No evidence was offered that exempts him from the grim prospects to which Patty's expert testified as prevailing in the current and foreseeable economy.

Patty attempts to counter the actual evidence with unsupported allegations, including, for example, dissipation of assets. Br. Respondent, at 36. Of course, the trial court did not find any financial misconduct on Chris's part. Patty alludes to a "side business" and to "side deals" and asks this Court "to assume that [Chris] may have similar deals and additional income now." Br.

Respondent, at 36. But neither the trial court nor this Court can simply speculate. See, e.g., Magnuson v. Magnuson, 141 Wn. App. 347, 354, 170 P.3d 65 (2007) (trial court's speculation about the future is not an appropriate basis for awarding custody). There simply was no evidence that presently Chris has a side business or side deals or any other source of income than what was disclosed.

Moreover, Patty mischaracterizes, at best, those instances where Chris received non-employment income. For example, Patty points out that, in 2006, Chris worked unofficially in a "side business" for his father, but the trial court found that a significant portion of the money his father paid him (\$68,000) was a loan, not compensation. CP 164. At the time, Chris had been fired from his job of 18 years and was barred by a noncompete agreement from finding a new job, which did not stop Patty from accusing him of depressing his income by "working less." RP 209-210, 215, 262-263. Patty further claims that, after they separated, Chris was dissipating his own assets by taking out a personal line of credit to meet his monthly financial obligations, which he could not do with his income alone, and to finance a trip to Mexico, despite her own testimony that he went there for a job interview. BR 36, RP 213-214. The trial court did not find any financial misconduct in these

expenditures and assigned the liability for them to Christ without any dispute on his part. RP 315-316, 324, CP 164.

F. The award of maintenance is unjust because it restores Patty to a lifestyle she enjoyed before hard economic times while leaving Chris to deal with the financial reality.

Patty received a substantial property award of \$1.2 million, as well as payment of attorney fees and payment for horse expense, and with few liabilities. She is relatively young and has both prospects and a plan for entering the job market in four to five years at a reasonable salary level. Nevertheless, she contends the maintenance award is necessary to compensate her for the loss of the life of ease and comfort that she enjoyed prior to 2005, comparing herself to the wife in Marriage of Washburn, 101 Wn.2d 168, 677 P.2d 152 (1984). Br. of Respondent, at 30-31, 33. The comparison is inapt.

In Washburn, the wife sacrificed her standard of living during the marriage by working full time to support her husband through professional school; upon dissolution, the marital estate consisted mainly of his professional degree. Id. 173-174, 178-179. The court awarded maintenance to equalize the parties' standard of living for a period of time to allow her "to share, temporarily, in the lifestyle which he or she helped the student spouse to attain," even though

she may be capable of supporting herself after the marriage is dissolved. Id. at 178-179.

Here, the parties' standard of living, which was made possible by Chris's pre-2005 income levels, was gone. Patty was not somehow entitled to live at the former level at Chris's expense. The court did not equalize the parties' post-dissolution standard of livings; it tilted them heavily in Patty's favor. In addition to her property and other awards, she receives \$7,853 a month in child support and maintenance, and has time to pursue schooling and employment. By contrast, Chris, working fulltime, is left paying his family support with only \$1,780, from which he must pay the liabilities assigned him and his own expenses. Obviously, he must either liquidate the assets awarded him or borrow money to live.

Not only does Patty argue she is entitled to a particular lifestyle before she enters the job market, she exaggerates the duration of her dependency. Falsely, she claims her vocational expert testified that she needs ten years "to qualify for truly gainful employment." Br. Respondent, at 34-35. In fact, at trial, Ms. Reha and Patty agreed that in four to five years Patty would graduate and start earning \$40,000-\$45,000, and in "two or more years," rise to \$60,000-\$91,920. RP 92, 185-186, 189-190, 341, 344, 348, Ex. 7.

By any measure, employment at these income levels is gainful employment.

In short, the evidence simply does not support the amount or duration of the maintenance award. Nor do the facts of this case justify the disparate circumstances in which the trial court left the parties. Finally, these results do not square with Washington law.

G. The trial court failed to consider the parties' economic circumstances in awarding property and liabilities.

The trial court failed to consider the parties' economic circumstances "at the time the division of property was to become effective," in allocating the property and liabilities, as required by RCW 26.09.090(4). As a result of paying support, maintenance, and his expenses, Chris goes another \$6,176 in debt each month or \$74,112 each year. CP 150, 165, 171-172, 188-189, Ex. 179. Without considering his circumstances, the court awarded him only 40% of the approximately \$2,000,000 in property—or about \$800,000—and about \$122,300 in liabilities, for a net property award of about \$677,700. CP 162-165, 169-171. This decision was unjust. With a relatively small share of the property, made smaller by the disproportionately large share of the liabilities, Chris will consume his entire net award of assets in order to meet his financial obligations in a matter of nine years—the duration of maintenance, especially given the additional, ninth year, due to the

typographical error. CP 150, 164, 166, 171, Ex. 178. Patty's contentions to the contrary are all based on bad math.

Patty will not need to consume her share of the assets to support herself, as she claims. Patty receives \$7,853.44 in support and maintenance each month. CP 165, 171-172, 188-189. She has expenses of \$6,551.80, after adjusting for private school and horse expenses by replacing her stated amount of \$3,800 with her proportionate share of \$2,017.80, under the child support order. CP 188-189, 195, Ex. 1. Accordingly, she will have about \$1,300 remaining each month after expenses and will not need to tap her nest egg of almost \$1,200,000.

The maintenance award findings could not possibly support the property award, as Patty also claims, as they are not supported by substantial evidence in the record regarding the parties' respective financial circumstances, and they do not account for the fact that the property award itself made Patty financially independent.

The record does not reflect that Chris now has lower expenses because the older daughter graduated from college after the trial date, as Patty claims, is not in the record, and not before this Court. BR 40. The record also does not reflect that he has access to additional funds, as described above, and, further, he is still liable for his use of his line of credit to fund his travel to Mexico

for a job interview. The allegations of secret income were all hot air. RP 213-214.

H. The typographical error should be corrected.

Patty concedes that the trial court made a typographical error in the decree, resulting in an unintentional additional, ninth year of maintenance. BR 31-32, CP 165. Accordingly, the parties' agree that this Court should remand to correct this error.

I. Patty was double dipping on horse expenses.

Patty got away with double dipping on past horse expenses. In January 2008, they mutually decided to buy the horse for their daughter, using community funds from their joint savings account. RP 104-105. For all her expenses, including the horse, Chris gave her \$8,000 per month until May 2008 and then \$5,500 until the trial in January 2009. RP 98, 136, 139, 319. These were his separate, post-separation funds. They also liquidated a CD, which consisted of community funds, and Patty received \$10,000 for horse expenses. RP 136, 256. Patty included \$2,300 in horse expenses in her total monthly expenses on her financial declaration. Ex. 1. She testified that she was to pay the horse expenses from these funds. RP 136, 256. The fact is that neither of them could afford to pay for the horse expenses out of their incomes in 2008. But it is

disingenuous for Patty to claim that she should be paid twice for \$17,300 in past horse expenses, when Chris already paid his fair share.

J. The award of attorney fees should be reversed.

The attorney fees award is likewise ill-considered and unwarranted. The court's findings fail to justify the award; they merely recite that the wife has the need and Chris has the ability to pay and simply declare Chris was intransigent. See Marriage of Bobbitt, 135 Wn. App. 8, 30, 144 P.3d 306 (2006) (court must provide sufficient findings of fact and conclusions of law to develop adequate record for appellate review of fee award). Neither the facts in the record nor the law suggest any justification exists.

First, the trial court does not explain how Patty has the need for fees and Chris has the ability to pay, when all the facts point to the opposite conclusion. CP 161, 166, 172. Patty received \$1.2 million and few liabilities. She has the ability to pay her own fees. Chris received fewer assets, many more liabilities, and was burdened with outsize family support payments. CP 150, 165, 171-172, 188-189, Ex. 23, 179. These are not the circumstances contemplated by the need/ability provisions of RCW 26.09.140.

Second, the trial court failed to make findings specifying what conduct constituted intransigence; the findings say nothing about how Chris “increased the expenditure of attorney’s fees by the wife.” CP 172. And it is far from apparent.

In her brief, Patty claims that Chris “made the case needlessly expensive and contentious,” alleging that he was unprepared for trial and there was a history of discovery issues involving motions to compel. Br. of Respondent, at 44. In fact, neither of them were prepared on the original trial date in December 2008. RP 13-55. Only Chris had a financial declaration; Patty did not even have a pen. RP 19, 24, 26. When the trial court discovered the size of the community estate and the length of the marriage, and that neither party had documentation of their income or assets, the court gave them about a month to settle their case in mediation or to appear ready for trial. RP 23, 42, 51. When they next appeared in court, on January 9, 2009, Chris “was surprised” that Patty had an attorney, yet they proceeded to trial without delay. RP 23-24, 42, 51, 59, 61. That Chris attempted to represent himself or that he went to trial, instead of settling on Patty’s terms, does not justify a finding of intransigence. Similarly, the fact of motions to compel discovery, without any indication

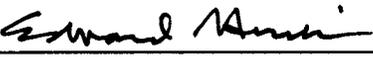
about their disposition or merit, do not justify the finding of intransigence. There is no substantial evidence to support the award of attorney fees based on intransigence and it should be reversed. If nothing else, the court should at least segregate what fees were incurred on this basis. Marriage of Crosetto, 82 Wn. App. 545, 918 P.2d 954 (1996) (fee award should be segregated, separating those fees incurred because of intransigence from those incurred by other reasons).

K. No attorney fees or costs should be awarded on appeal.

Patty's request for an award of attorney fees on appeal should be denied. As stated above, Patty's financial position is better than Chris's, particularly in light of the disproportionate award of assets to her. Further, Chris's appeal has significant merit. For example, the trial court obviously failed to comply with the statutory requirements in making the child support order and it also made a typographical error that awarded an additional year or \$66,000 in maintenance.

Dated this 24 day of February, 2010.

  
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**DECLARATION OF MAILING**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 24, 2010, I arranged for service of the foregoing Reply Brief and the parties to this action as follows:

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DATED at Seattle, Washington this February 24 2010.

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