

No. 68053-6-I

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

DOUGLAS MACKENZIE,

Appellant

v.

ALEEN ADAMS,

Respondent.

ON APPEAL FROM
KING COUNTY SUPERIOR COURT
(The Honorable James A. Doerty)

DOUGLAS MACKENZIE'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in disproportionately allocating long distance transportation costs based upon the parties' overall financial circumstances and an unsupported finding that the transportation provisions are adequate to maintain the father-child bond. Findings 2.6 and 2.10; Conclusion 3.3; Parenting Plan 3.11; and Child Support Order 3.15.

2. The trial court erred in failing to impute income to Respondent Aleen Adams because Aleen was voluntarily underemployed when she accepted part time employment weeks before trial and reduced her historical monthly net income by 33%. The trial court's finding that this part time employment was consistent with her prior income is unsupported by any evidence. Findings 2.10, Conclusion 3.3; and Child Support Order 3.3 and 3.20

3. The trial court erred in entering a Judgment Summary against Appellant Doug MacKenzie for attorney fees and omitting any findings or conclusions that support an award of fees. Child Support Order 1.1 and Conclusion 3.3

II. ISSUES

1. Whether income should be imputed to the Mother for full time work at her current wage when she has voluntarily accepted a regular part-time position with her current employer.

2. Whether all long distance transportation costs, including the parents' travel costs, should be apportioned between the parents in accordance with their respective net incomes.

3. Whether the award of fees and costs in the judgment summary should be vacated when there are no findings or conclusions to support it.

III. INTRODUCTION

Father Doug MacKenzie bent over backwards to maintain a loving and supportive relationship with his partner, Mother Aleen Adams, and their child, J., even after Aleen moved across the country after becoming pregnant. RCW 26.19.080(3) requires courts to apportion reasonable travel expenses necessary to accomplish the residential time in a parenting plan. Here, Doug traveled across the country continually to spend meaningful and substantial time with their child. The parenting evaluator found Doug's efforts resulted in Doug and the child having a healthy and secured attachment and well-bonded relationship. With the

parenting evaluator's help, the parents agreed, and the trial court found, the child's best interests required Doug continue his frequent contact with the child. Despite having found this frequent contact with the child was in the child's best interests, the trial court refused to apportion the reasonable travel costs to accomplish this contact between Doug and the child. Instead, the trial court erred by requiring Doug to pay disproportionately more in travel expenses.

Aleen also became voluntarily underemployed immediately prior to trial in this matter. RCW 26.19.071(6) requires courts to impute income to parents who are voluntarily underemployed. Here, Aleen was historically a freelance producer/editor who earned over \$110,000 per year in net business income up until the trial. Then, a few weeks prior to trial she voluntarily accepted a part time job and decreased her income by 30%. The trial court erred by refusing to impute the fulltime equivalent income to Aleen when determining child support and the proportionate share of special child rearing expenses.

IV. STATEMENT OF THE CASE

Doug and Aleen have known each other since they were ten years old; they have been good friends for more than 30 years.¹ Doug is a self-

¹ RP 55:4-5 (Nov. 14, 2011); CP 100 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

employed movement therapist.² He has developed an established clientele in New York City and Massachusetts.³ Aleen has had a career in the field of interactive media, product development, and museum exhibitions since 1995.⁴

Doug and Aleen maintained contact with one another and supported each other when they experienced life's difficulties over the years.⁵ For example, Doug was there for Aleen during the difficult period of her father's political demise.⁶ Aleen was there for Doug when he fractured his elbow in 2004, could not use his arms, and could not work.⁷ Due to his injury, Doug spent Christmas with Aleen and her family in Seattle.⁸ Because Doug did not have health insurance, he had to file bankruptcy in 2005.⁹

During that year, Aleen was supportive, and Doug and Aleen began to make plans to build a life together.¹⁰ Doug proposed marriage during summer 2006, but Aleen refused.¹¹ She stated she was committed

² RP 51:4-12 (Nov. 14, 2011); CP 100 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

³ CP 100 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

⁴ CP 140.

⁵ CP 100 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ CP 101 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

to their relationship, but did not believe in marriage.¹² Doug wanted to continue to live in Massachusetts.¹³ Aleen declared she was ready for a change, that it did not matter where they lived, and that the important thing was to start a family.¹⁴ Doug was adamant that he needed to be near his clients in NYC and New England so he could earn a living.¹⁵ Because Aleen was not inclined toward Massachusetts, the two compromised with a plan to live in New York City, where Doug had established clients.¹⁶ Doug quit his job in Massachusetts and the parties rented an apartment in NYC.¹⁷

In November, 2006, one week prior to moving into their NYC apartment, Doug was in a severe, nearly fatal automobile accident, shattering his femur.¹⁸ Aleen stood by Doug again; due to Doug's accident, the couple moved closer to Doug's hometown in western Massachusetts rather than their NYC apartment, which was a five-flight walk-up.¹⁹ Doug and Aleen cohabitated in Massachusetts from November of 2006 through June of 2007.²⁰

¹² *Id.*

¹³ RP 47:16-20 (Nov. 14, 2011).

¹⁴ RP 46:24-47:5; 47:25-48:1 (Nov. 14, 2011).

¹⁵ CP 101 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

¹⁶ RP 47:20-22 (Nov. 14, 2011).

¹⁷ CP 101 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

¹⁸ CP 134; CP 101 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

¹⁹ *Id.*

²⁰ CP 182.

Aleen told Doug she wanted a child prior to Doug's car accident.²¹ Doug, recuperating from his shattered femur and determined to parent responsibly, was concerned about timing, and proceeded cautiously.²² He would have preferred to stay in western Massachusetts, but Aleen did not like western Massachusetts.²³ Doug insisted that he and Aleen had to live where he could work and earn a living, and so once again, they explicitly agreed to move to NYC.²⁴ Based on this explicit agreement, Doug responsibly consented to having a child despite his ongoing recuperation.²⁵ The couple, therefore, continued planning to move to New York, where they “could both work and thrive.”²⁶ They planned to start a family.²⁷

Doug's condition improved, he began working consistently in summer 2007, and as a result he was also recovering financially.²⁸ When Aleen went to Seattle in July 2007 she told Doug she needed to gather her things for their move to New York.²⁹ After Aleen arrived in Seattle she confirmed her pregnancy with her doctor, and she admitted she had

²¹ CP 101 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ RP 47:23-48:3 (Nov. 14, 2011).

²⁷ RP 46:15-24 (Nov. 14, 2011).

²⁸ CP 102 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

²⁹ RP 38:4-7 (Nov. 14, 2011).

thought she was pregnant when she left for Seattle.³⁰ Once in Seattle, Aleen reneged on her agreement to move to NYC stating it would be too much for her now that she was pregnant and that she did not want to live in western Massachusetts.³¹

Doug was thrilled with having a child, but after he learned Aleen was pregnant and refused to move to NYC, as agreed, or return to western Massachusetts, he had to weigh his options.³² On the one hand, he had a 20-year reputation and established clients in NYC and New England.³³ On the other, he realized it was important that Aleen be comfortable during her pregnancy.³⁴ Aleen's comfort won, and Doug agreed to temporarily try and make things work in Seattle.³⁵ He moved to Seattle so he could be with Aleen until their baby was born.³⁶

The couple cohabitated in Seattle from September of 2007 until December of 2009.³⁷ Doug supported Aleen in many ways throughout the pregnancy.³⁸ He could not, however, maintain his practice or find enough clients in Seattle.³⁹ Aleen grew dissatisfied with Doug's inability

³⁰ RP 48:4-9 (Nov. 14, 2011).

³¹ CP 102 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

³² *Id.*

³³ *Id.*

³⁴ RP 49:8-14 (Nov. 14, 2011).

³⁵ *Id.*

³⁶ *Id.*

³⁷ CP 182.

³⁸ CP 102 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

³⁹ RP 48:25-49:7 (Nov. 14, 2011).

to earn a living.⁴⁰ On March 21, 2008, the couple gave birth to their child, J.⁴¹ Doug helped deliver the baby, catching J. as she was being delivered.⁴² Both parents signed the Acknowledgment of Paternity filed with the Washington State Registrar of Vital Statistics within a week of the birth.⁴³ Doug was attentive to J. and active in J.'s life.⁴⁴

Aleen was rarely intimate with Doug, even before pregnancy, and not at all after; she also dismissed Doug's ideas about their relationship and about J.⁴⁵ The couple continued experiencing communication problems.⁴⁶

Meanwhile, Doug was struggling financially.⁴⁷ His work decreased with the recession.⁴⁸ He could not service his NYC and New England clients while living in Seattle.⁴⁹ Establishing new clientele in Seattle proved difficult because of the recession, but also because it takes a long time to develop a reputation in a new place, and because Seattle already has many therapists.⁵⁰ Doug did receive a promise for a large

⁴⁰ CP 102 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

⁴¹ CP 135.

⁴² RP 49:15-18 (Nov. 14, 2011).

⁴³ CP 182, 135.

⁴⁴ RP 49:19-24 (Nov. 14, 2011).

⁴⁵ CP 102 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

⁴⁶ CP 102-03 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

⁴⁷ RP 48:25-49:7 (Nov. 14, 2011).

⁴⁸ CP 103 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

⁴⁹ *Id.*

⁵⁰ RP 48:12-24 (Nov. 14, 2011).

donation to support his working on an innovative book, and he worked diligently on this for many months, but funding later dried up due to the recession.⁵¹ As a result, Doug had compelling financial reasons to move back to NYC or New England.⁵² Aleen, however, would not seriously discuss this option and got angry every time it was mentioned.⁵³

Finally, Doug was forced to move back to NYC alone.⁵⁴ Doug and Aleen have been separated since December, 2009.⁵⁵

Over the next 22 months, Doug strived to maintain a healthy relationship with J., travelling to visit her monthly.⁵⁶ To develop and maintain this relationship, Doug traveled incessantly between NYC and Seattle at his expense to have as much contact with J. as Aleen would allow.⁵⁷ Although Aleen was at first reluctant to allow Doug any residential time with J., Doug persisted and took whatever time Aleen would offer.⁵⁸ Without any parenting plan, he became a committed, involved long-distance father.⁵⁹

Doug and J. developed a glowing and meaningful relationship, as documented by Jude McNeil and other experts who have observed them

⁵¹ CP 103 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ CP 182.

⁵⁶ CP 183.

⁵⁷ CP 103 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

⁵⁸ *Id.*

⁵⁹ *Id.*

together.⁶⁰ McNeil was appointed by the court as an expert consultant to assist the parents in developing a parenting plan that serves J.'s best interests.⁶¹ McNeil submitted a consultation report on October 6, 2011.⁶² McNeil reported that J. "appears to be developmentally on target and does not present with any special needs. She appears to have an intact bond with both of her parents which needs to be enhanced by frequent contact with each parent," adding, that both parents are "to be acknowledged for their love and commitment to J."⁶³ McNeil found that "both parents demonstrated excellent parenting skills and were keenly aware of and attentive to J.'s needs."⁶⁴ Of special note, McNeil found that it had been "an advantage for J. to have had as much residential time as she has had with her father given the long distance between them."⁶⁵

This healthy relationship has been Doug's sole focus.⁶⁶ Doug's efforts, while worth the trouble and expense, have stretched him thin emotionally and financially.⁶⁷ He has flown countless red-eye flights between Seattle and NYC, he has rented a room for lodging while he is in

⁶⁰ CP 183-85.

⁶¹ CP 182.

⁶² CP 182-188.

⁶³ CP 184.

⁶⁴ CP 184.

⁶⁵ CP 184.

⁶⁶ CP 103 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

⁶⁷ *Id.*

Seattle, he has rented a car while he is here, and he has paid the airfare.⁶⁸

Up until summer 2011, Aleen would not allow J. to travel to NYC without her.⁶⁹ J., age three at time of trial, is still too young to travel unaccompanied by an adult.⁷⁰ Doug and Aleen, therefore, must travel with J. to and from the east coast and the west coast.⁷¹

On July 12, 2010, Aleen filed a petition to establish a residential schedule for J.⁷² By time of trial in 2011, the parents had agreed to Doug having substantial residential time with J.⁷³ Until J. starts school, Doug is going to have week-long visits once per month with J. and several week-long visits where J. will travel to NYC; he will do most of the traveling.⁷⁴

Trial was held November 14, 2011, primarily to resolve issues of child support.⁷⁵ The trial court confirmed and ordered the parents' agreed-upon residential schedule.⁷⁶ At trial Doug requested Aleen contribute her proportionate share of long-distance transportation costs, including air fare for J., air fare for Aleen when she travels, and air fare for Doug when he travels, plus the cost for Doug's room and car rental when he

⁶⁸ *Id.*

⁶⁹ CP 103-04 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

⁷⁰ CP 104 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements

⁷¹ *Id.*

⁷² CP 182.

⁷³ CP CP 104 and RP 50:1-8 (Nov. 14, 2011) adopting as true the trial brief fact statements.

⁷⁴ *Id.*

⁷⁵ RP 4:2-12 (Nov. 14, 2011).

⁷⁶ CP 302-09

travels to Seattle.⁷⁷ Doug's rented room in Seattle costs him \$350 per month.⁷⁸

The other issue that remained unresolved prior to trial was Aleen's income for child support purposes.⁷⁹ Since about 2007, Aleen had been a freelance producer/editor on museum exhibits and interactive media.⁸⁰ As of November, 2011, she was employed only part-time.⁸¹ According to her 2010 income tax return, Aleen earned \$9,600.42 gross monthly income after deducting her claimed business expenses and adding back non-cash business expenses, such as car usage, depreciation, and home usage.⁸² In 2010, she began independent contractor work for the Experience Music Project (EMP).⁸³ According to her 2011 paystubs for April – September, Aleen worked for EMP on average 59 hours bi-weekly or less than 30 hours per week at a regular rate of \$75/hour.⁸⁴ Aleen had earned \$85,425 between January through September 2011 or 9,491 per month.⁸⁵ Aleen voluntarily reduced her income just weeks prior to trial. As of November 1, 2011, Aleen accepted part-time employment

⁷⁷ CP 110.

⁷⁸ RP 54:4-11 (Nov. 14, 2011).

⁷⁹ CP 110.

⁸⁰ RP 33:5-7 (Nov. 14, 2011); CP 140.

⁸¹ RP 34:7-8 (Nov. 14, 2011).

⁸² CP 618-644.

⁸³ RP 33:15-17 (Nov. 14, 2011).

⁸⁴ CP 494-506.

⁸⁵ CP 494-506

with EMP. Her part time salary was \$2,923.10 bi-weekly.⁸⁶ Aleen works between 20 to 30 hours per week.⁸⁷ At an average of 25 hours per week, her salary equates to \$58.46 per hour. Applying this wage to a 40-hour work week resulted in a \$10,133.06 gross monthly income. This imputed income also approximated Aleen's \$9,600.42 gross monthly wage for 2010.

Doug's monthly net monthly income was found to be \$3,780.⁸⁸ Doug has not assigned error to this finding. Aleen has not cross-appealed. This finding is a verity on appeal.⁸⁹

V. ARGUMENT

A. Standard of Review

Statutory construction and interpretation is a legal matter reviewed *de novo* by this Court.⁹⁰ Moreover, a trial court abuses its discretion when it misapplies the law when rendering a decision.⁹¹ Here, the trial court erred when it refused to apply the mandatory travel apportionment statute (RCW 26.19.080(3)) and the income imputation statute (RCW 26.19.071(6)). As such, this Court must reverse the trial court's decision.

⁸⁶ CP 207.

⁸⁷ RP 34:7-10 (Nov. 14, 2011).

⁸⁸ CP 283.

⁸⁹ *Fuller v. Employment Sec. Dept. of State of Wash.*, 52 Wn. App. 603,605, 762 P.2d 367 (1988) (“unchallenged findings of the trial court will be treated by this court as verities on appeal”)

⁹⁰ *Christenson v. McDuffy*, 93 Wn. App. 117,179, 968 P.2d 18 (1998).

⁹¹ *State v. Neal*, 144 Wn.2d 600,609, 30 P.3d 1255 (2001).

B. All Long Distance Transportation Costs, Including The Parent's Travel Costs, Should Be Apportioned Between The Parents In Accordance With Their Respective Net Income Because The Child Is Too Young To Fly Unaccompanied.

This court must allocate all extraordinary child expenses, including long distance transportation expenses to and from the parents for visitation purposes, in proportion to these parents' respective income earning capacity. RCW 26.19.080(3) requires, by using the word "shall," courts to apportion "long-distance transportation costs to and from the parents for visitation purposes... in the same proportion as the basic child support obligation."⁹² The phrase "long distance transportation costs to and from the parents for visitation purposes" is not defined. Despite the phrase not being defined, it has been interpreted as including all "reasonable and necessary" long distance transportation costs to accomplish visitation between the parent and child.⁹³ Once this court determines the long distance transportation costs that are reasonable and necessary, it is "required to allocate them in proportion with the parents' income."⁹⁴ This principle applies with equal force when a parent has to

⁹² *In re Marriage of Katare*, 125 Wn. App. 813,833, 105 P.3d 44 (2005) ("this statutory language is mandatory"); *Murphy v. Miller*, 85 Wn. App. 345, 349, 932 P.2d 722 (1997)

⁹³ *Katare*, 125 Wn. App. At 833-34; *Murphy*, 85 Wn. App. At 349; and *In re Parentage of Hewitt*, 98 Wn. App. 85, 89, 988 P.2d 196 (2000).

⁹⁴ *Katare* at 834, *Murphy* at 349-50, *Hewitt* at 89

travel with a child or travel to see the child because the child is too young to travel.⁹⁵

Doug's travel per the parenting plan is necessary. Long distance transportation is necessary. The trial court adopted the parents' agreed parenting plan. By doing so, the trial court found the residential arrangements in the parenting plan were in the child's best interests.⁹⁶ In *Coy*, the court approvingly cited Judge Madsen's dissent stating that "a court must agree that a parenting plan jointly agreed by the parents is in the best interest of the child."⁹⁷ Therefore, the trial judge implicitly found the residential provisions in the agreed parenting plan was in the child's best interests. This implicit determination is consistent with the parenting evaluator's, Jude McNeil's, report that the residential provisions in the agreed parenting plan were in the child's best interests, and that the father's visits are necessary to maintain their relationship.⁹⁸ McNeil specifically noted that the child "appears to have an intact bond with both of her parents which needs to be enhanced by frequent contact with each parent.... [and] It has been an advantage for J. to have had as much residential time as she has had with her father given the long distance

⁹⁵ *Hewitt*, 98 Wn. App. at 90.

⁹⁶ RCW 26.09.071(a)

⁹⁷ *In re Marriage of Coy*, 160 Wn. App. 797,805, 248 P.3d 1101 (2011) (citing Madsen's dissent in *In re Marriage of King*, 162 Wn.2d. 378,416, 174 P.3d 659 (2007).

⁹⁸ CP 182-188; Consultation report

between them.”⁹⁹ Once the trial court made this determination, then the reasonable long distance transportation costs necessary to accomplish this residential time were required to be apportioned between the parents based on their respective earning abilities. Stated another way, once a court approves and adopts residential provisions in a parenting plan, thereby determining the residential provisions are in the child's best interests, and then the court must apportion the reasonable costs necessary to accomplish the residential time set forth in the parenting plan.

Here, the trial court was led into error when Aleen and her counsel tried to indirectly do what the trial court could not do directly. Specifically, Aleen and her counsel and the trial court disproportionately allocated the long distance transportation costs necessary for the child to have residential time with both parents, as contemplated by the parenting plan. It did so by allocating only those transportation expenses it found minimally adequate for the child to maintain a bond with the child and her father Doug.¹⁰⁰ There is no authority for a trial court to find and adopt residential provisions in a parenting plan that are in the child's best interests on one hand and then on the other hand allocate only those expenses that are only adequate for the child's relationship with a parent.

⁹⁹ CP 183-84; Consultation report

¹⁰⁰ CP 297-98; Referencing the parenting plan 3.11

The *Hewitt* case is virtually identical, both procedurally and substantively, to this case. In *Hewitt* the parents mediated an agreed permanent parenting plan.¹⁰¹ The mother planned on moving to Boston and the parenting plan provided the father would then travel to Boston every six weeks to visit with their 1-year old child.¹⁰² A child support trial was held and the trial court required the father to pay all “his travel expenses he incurs traveling to Boston to visit [his son].”¹⁰³ The father then appealed the child support order.¹⁰⁴ The appellate court, Division One, reversed.¹⁰⁵ First, the *Hewitt* court properly found the son was “too young to travel alone.”¹⁰⁶ It then held that if the son “travels with a companion, under RCW 26.19.080(3), the costs of both the child and companion will be apportioned.”¹⁰⁷ Finally, it also saw no distinction between a parent traveling with the child and a parent who travels to see the child.¹⁰⁸ As a result, it reversed the trial court with directions to apportion, in accordance with the parents’ net incomes for child support purposes, the father’s long distance travel costs he incurred to visit his son in Boston.

¹⁰¹ *Hewitt* at 86

¹⁰² *Id.*

¹⁰³ *Hewitt* at 87

¹⁰⁴ *Id.*

¹⁰⁵ *Hewitt* at 86

¹⁰⁶ *Hewitt* at 89

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

The situation here is virtually identical. The parties worked with a parenting evaluator to devise a residential arrangement that was in the child's best interests.¹⁰⁹ They did not agree on child support issues and they were tried to the trial court.¹¹⁰ The child is 3 and too young to travel unaccompanied.¹¹¹ The father lives in N.Y. and the Mother and child live in Seattle.¹¹² The parents' agreed permanent parenting plan requires the father to travel to Seattle to visit the child for one week every month and allows the child to travel to New York to visit Father and his family and friends several times per year.¹¹³ Pursuant to *Hewitt*, all Father's long distance transportation expenses to accomplish the time sharing in the agreed parenting plan are necessary to effectuate the time sharing arrangement and all reasonable costs must be apportioned between the parents. Here, this should include father's reasonable coach air fare, lodging (\$350 per month), and rental car expenses. It should also include both parents' air fare when they accompany the child to New York for residential time with father.

C. Income Should Be Imputed To The Mother For Full Time Work At Her Current Wage Because She Was Voluntarily Underemployed.

¹⁰⁹ CP 185; Consultation report

¹¹⁰ CP 297-298, Finding of Facts 2.6

¹¹¹ CP 104

¹¹² RP 21:14-22:24 (Nov. 14, 2011).

¹¹³ CP 302-303 , Agreed Parenting Plan 3.1

The lower court was required to impute income to Aleen because she was voluntarily underemployed. RCW 26.19.071(6) provides, “The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors...” By using the word “shall” the legislature intended to require income be imputed to voluntarily underemployed parents.¹¹⁴ When determining child support the court must consider each parent’s earning capacity.¹¹⁵ “A parent may not avoid a child support obligation by voluntarily remaining unemployed or underemployed.”¹¹⁶ It is irrelevant whether the parent intends to avoid her or his child support payment; they are still accountable for earnings foregone in making an employment choice.¹¹⁷ This policy is gender neutral and applies with equal force to women as it does to men.¹¹⁸ A parent is voluntarily underemployed if he or she decides to reduce their employment in order to care for their children.¹¹⁹

¹¹⁴ *In Re Marriage of Pollard*, 99 Wn. App. 48, 52-53, 991 P.2d 1201 (2000).

¹¹⁵ *In Re Marriage of Jonas*, 57 Wn. App. 339, 340-41, 788 P.2d 12 (1990).

¹¹⁶ *Pollard*, 99 Wn. App. at 50 and 52.

¹¹⁷ *Jonas*, 57 Wn. App. at 340.

¹¹⁸ *Id.*

¹¹⁹ *Pollard*, 99 Wn. App. at 54.

Aleen is voluntarily underemployed and full time income must be imputed to her. As stated in *Schumacher*,¹²⁰ the Washington Supreme Court espoused criteria to determine whether a parent is voluntarily underemployed: “a court should look at the level of employment at which the parent is capable and qualified.”¹²¹ Using this first criteria, it is clear Aleen is voluntarily underemployed. Her employment history shows that she is capable and qualified to work more than the 25 hours a week and she is capable and qualified to earn over \$115,000 per year.¹²² Despite the advantages of her EMP part time position, Aleen voluntarily chose this position with less pay and hours. Furthermore, Aleen’s part time employment does not limit her from seeking freelance positions to maintain fulltime hours. While working as an independent contractor for EMP, Aleen stated that she worked freelance jobs other than her jobs with EMP to earn \$115,000.¹²³ Because she has not pursued more work she is voluntarily underemployed. Second, *Schumacher* adds an additional criterion by advising courts to look to how many hours per week are customary in a particular occupation.¹²⁴ There was no evidence that Aleen's position is customarily limited to 25 hours per week. To the

¹²⁰ *In re Marriage of Schumacher*, 100 Wn. App. 208,214, 997 P.2d 399 (2000).

¹²¹ *Id* at 214.(internal quotations omitted)

¹²² CP 494-506.

¹²³ RP 42:25- 43:1 (Nov. 14, 2011).

¹²⁴ *Schumacher*, 100 Wn. App. at 214.

contrary, Aleen admitted that she was reducing her hours and pay by accepting a part time position because of the stability and certainty it created.¹²⁵ Aleen took hours below the customary amount freely and voluntarily. Aleen is, thus, voluntarily underemployed and full-time income at her wage should be imputed to her.

This remains true even when this Court considers the statutory factors. RCW 26.19.071(6) states, “the court determines whether to impute income by evaluating the parent’s work history, education, health, age and any other relevant factor.”¹²⁶ According to Aleen’s 2010 tax return she was a self employed producer and editor and earned \$115,000 in gross earnings – \$9,600 per month in gross income.¹²⁷ In 2011 she became engaged with the Experience Music Project (EMP) and worked as an independent contractor earning \$75 per hour – \$156,000 gross if full time or \$13,000 per month.¹²⁸ Now, right before trial, she has accepted part-time employment with EMP as a non-exempt W-2 wage earner employee earning just over \$2,923 bi-weekly or \$76,000 per year – or \$6,333 per month.¹²⁹ This is a 1/3 reduction in earning capacity. Aleen’s choice to be employed part-time, no matter how legitimate the

¹²⁵ RP,34:84-10 and 42:20-24 (Nov. 14, 2011).

¹²⁶ *Pollard*, 88 Wn. App. at 53.

¹²⁷ CP 619-626.

¹²⁸ CP 494-506.

¹²⁹ RP, 35:8-10 (Nov. 14, 2011).

reason might be, and the precipitous drop in earnings immediately prior to this child support trial, show Aleen is voluntarily underemployed.

Aleen's imputed income for child support purposes should be based on her current wage rate, but imputed to full-time employment. RCW 26.09.071(6) prioritizes the legally correct way to establish imputed income. The preferred method is set forth in RCW 26.09.071(6)(a), which states "Full time earnings at the current rate of pay."¹³⁰ According to Aleen's employment letter with EMP her part-time salaried employment began November 1, 2011, she continues to work 25 hours per week, and she earns a bi-weekly salary just over \$2,900.¹³¹ Her Salary equates to \$58.46 per hour. Assuming a standard 2080 hour work year, her annual earning ability is therefore \$121,500 per year or \$10,133 per month. This is only \$500 more per month than her gross earnings were on her 2010 income tax return. \$10,133 per month is therefore, the correct imputed amount for Aleen's current earning capacity.

D. The Award of Fees and Costs in the Judgment Summary is unsupported by the findings of facts and conclusions of law and is error.

The judge wrote into the findings of facts and conclusions of law that "each party will pay their own attorney fees."¹³² The Judgment

¹³⁰ RCW 26.09.071(a)

¹³¹ CP 207.

¹³² CP 300.

Summary, ostensibly making such an award, was left unchanged¹³³ and should also have been amended. This was clearly a clerical error. Any such award is unsupported by any findings or conclusions. The judge clearly intended that each party bear their own attorney fees.

E. Mr. MacKenzie is Entitled to Attorney Fees and Costs

If Mr. MacKenzie prevails in this appeal, under RCW 26.26.140 and RAP 18.1, he is entitled to an award of attorneys fees and costs on appeal. He is a prevailing party and has the financial need and Aleen has the ability to pay. Pursuant to RCW 26.26.140 he is entitled to attorney fees on appeal.

DATED this 29th day of May, 2012.

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¹³³ CP 324.

CERTIFICATE OF SERVICE

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

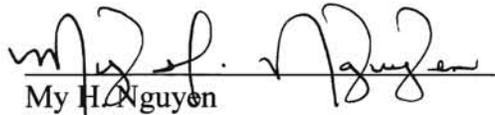
On the below written date, I caused delivery of a true copy of Douglas Mackenzie's Opening Brief to the following individuals via U.S. Mail:

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My H. Nguyen
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