

No. 38778-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

FREDERICK SKUSEK,

Respondent,

v.

SHEILA M. SKUSEK n/k/a HERMAN,

Appellant.

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II
JUN 15 2015
CLERK OF COURT

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A. INTRODUCTION

The present case involves an entirely unremarkable action to modify a child support order. The only distinguishing feature is Sheila Herman's strenuous effort to convince this Court that it should review the trial court's decision de novo. Br. of Appellant at 19-22, 40. But it is well established that an appellate court will not reverse the trial court's decision to modify child support absent a manifest abuse of discretion, and cannot substitute its judgment for that of the trial court unless the trial court's decision rests on unreasonable or untenable grounds.

Frederick Skusek (Skusek) and Sheila Herman (Herman) were divorced when their twin sons were five years old. Ten years later, Herman filed a motion to modify the child support order. By that time, Skusek, who had long worked as a union brick layer, had been forced to retire due to increasing pain in his thumbs. His income was thus significantly less than it had been in previous years. A commissioner entered a new child support order which required Skusek to pay \$998 per month in child support. Skusek moved to revise the new order.

After reviewing the record before the commissioner and hearing oral argument, the trial court granted Skusek's motion for revision, and lowered the amount of Skusek's child support payment to better reflect his decreased earnings. Herman appeals, arguing this Court should review the

trial court's decision de novo. This Court, however, reviews child support modifications for abuse of discretion.

The trial court did not abuse its discretion, and its findings of fact were supported by substantial evidence. This Court should affirm.

B. COUNTERSTATEMENT OF THE ISSUES

Skusek acknowledges Herman's assignments of error, but believes the issue in this case is more appropriately and simply expressed as follows:

Did the trial court appropriately exercise its discretion when it entered the order on motion for revision and the amended order of child support where substantial evidence supported the court's findings of fact?

C. COUNTERSTATEMENT OF THE CASE

As a preliminary matter, Herman's brief fails to comply with RAP 10.3, which requires an appellant to provide a fair statement of the facts and procedure relevant to the issues presented for review, without argument. RAP 10.3(a)(5). Reference to the record must be included for each factual statement. RAP 10.3(a)(5). This Court, on its own motion or the motion of a party, may strike portions of a brief and sanction a party for failing to comply with the Rules of Appellate Procedure. RAP 10.7; *Sheikh v. Choe*, 156 Wn.2d 441, 446-47, 128 P.3d 574 (2006). Skusek does not move to strike Herman's brief in whole or in part, but feels it is

important for the Court to recognize Herman's repeated violations of the rule.¹

Frederick Skusek was a brick layer by trade. CP 368. He is a member of a bricklayers' union and worked in the trade for more than 38 years. CP 368. The heavy, physical exertion required in his job took a toll on his body. CP 368-69. Ultimately, the pain he experienced handling bricks became so great due to the deterioration of the joints in his thumbs that he was forced to retire in 2007. CP 369. His doctor advised that he not continue to work as a bricklayer. CP 396. Skusek had also worked for a short time as an estimator for his older son's masonry company. CP 368-69. After he retired, his son hired him part-time, paying him \$40 an hour. CP 370. Skusek used the part-time wages to supplement his union pensions. CP 54, 368, 370.

Skusek and Herman were divorced in 1998 when their twin sons were five years old. CP 12. Under the terms of the order of child support, Skusek paid \$540.78 per month in child support. CP 14. In January 2008, Herman requested the State of Washington (the "State") petition for

¹ See, e.g., Br. of Appellant at 6 ("He tried to claim that he was retired as a way to avoid his full obligation to his two teenage sons."), ("...his responses were incomplete and sloppy"); *id.* at 7 ("...this would ... show that he is voluntarily underemployed..."); *id.* at 8 ("dilatatory," "suspect"); *id.* at 10 ("The trial court adopted this incorrect number."); *id.* at 11 ("The correct number should have been..."), ("...he was not forthcoming"), ("He disregarded his obligation..."); *id.* at 13 ("...he was elusive at best."); *id.* at 16 ("...the mother refuted this..."), ("...he never had an explanation for his income shortages."); *id.* at 17 ("These fees and costs were necessary and reasonable to represent Ms. Herman..."); *id.* at 18 ("Mr. Skusek did not want to pay...").

modification of the child support agreement pursuant to RCW 74.20.220 because the boys had moved to a new age category for support purposes.² CP 29, 32. In the child support worksheet submitted with the petition, the State calculated Skusek's income as \$1,733 in wages and salaries, \$115 in interest and dividend income, and \$1,282 in other income for a gross monthly income of \$3,130, and a net income of \$2,677. CP 34, 35. The State listed Herman's income as "unknown," but imputed a monthly net income of \$2,051 to her by age. CP 34, 35, 37. Herman's current husband's monthly income was listed as \$10,032. CP 37. The State calculated the new monthly child support payment for both boys to be \$1,346. CP 35.

Skusek and Herman also submitted child support worksheets. Both Skusek and Herman listed Skusek's gross monthly income as \$3,174.05. CP 54, 110. Skusek listed his net monthly income as \$2,709.16, while Herman listed his net income as slightly less, at \$2,627.05. CP 55, 111. Like the State, both imputed Herman's income at \$2,051. CP 55, 111.

² In her request for review of child support, Herman checked box 2a on the standard form, stating that the boys were less than 12 years old when the support order was entered, and were now 12 years old or more. CP 32. The boys were 14 at the time. CP 12, 32.

A commissioner did not hear the State's petition until December 8, 2008.³ 1 RP 1-31. By the time of the hearing, the State had modified the amount of Skusek's new child support payment by reducing it from \$1,346 to \$998 per month. CP 442, 445. The State revised its calculation of Skusek's income, imputing a gross income of \$2,511.26 per month, \$97 interest income per month, \$500 per month for side jobs, and \$1,615 per month in pension payments for a gross monthly income of \$4,723. CP 441-43. The State continued to impute Herman's income at \$2,051 and to list her husband's income as \$10,032. CP 444, 446.

Skusek filed an amended child support worksheet. CP 380-85. Skusek's worksheet included a lower figure for wages, listed no interest or side job income, and had a slightly lower pension payment. CP 380. Skusek proposed a child support payment of \$760.89. CP 380, 385.

Herman asserted that Skusek was "voluntarily underemployed," and insisted Skusek's monthly income was \$6,579.88 - dramatically higher than either the State or Skusek determined it to be. CP 428, 436. She also indicated a significantly lower monthly income of \$7,550 for her husband. CP 439.

³ There are two reports of proceedings, one for the commissioner's hearing on 12-8-2008 (1 RP), and the other for the superior court hearing on 1-9-2009 (2 RP).

At the outset of the proceedings before the commissioner, the State acknowledged the limitations imposed on Skusek's ability to work full-time by his medical condition. 1 RP at 2. Asserting that Skusek could still work part-time, the State imputed \$500 a month for side jobs, and assigned \$97 a month in interest income based on a three-year average of his tax returns. *Id.* at 2-3. The State requested a child support payment of \$998 per month beginning January 16, 2008, the date the petition was filed. 1 RP at 3.

Herman defended the income figure she assigned to Skusek on her worksheet as reflecting Skusek's higher income in the years before he retired. *Id.* at 3. She also took exception to the manner in which Skusek had filled out his worksheet, asserting that he had mixed gross and net amounts in his calculation of his retirement benefits. *Id.* at 5.

Skusek disputed Herman's averaging of his income, pointing out that he had retired for medical reasons, was incapable of working full-time, and that the construction trade was in bad shape because of the economy. *Id.* at 11-15. Citing his declaration, Skusek stated that his expenses were outpacing his income, and that he had been forced to supplement his income by selling numerous items, including real property and an all terrain vehicle. *Id.* at 15; CP 294-96, 426. He also had to cash in his certificates of deposit ("CDs"). *Id.* at 15; CP 294. Skusek asserted

that the State erred in including the side jobs, arguing that those jobs were “few and far between,” and that he no longer pursued them due to the deteriorating condition of his hands and the poor economy. 1 RP at 25-26. Skusek also disputed the addition of interest income because he had cashed in the CDs and was consequently no longer receiving interest payments on them. *Id.* at 15.

The commissioner adopted the State’s figures, and ordered child support payments in the amount of \$998, dating back to January 16, 2008. *Id.* at 29; CP 472-73. Skusek moved for revision, arguing *inter alia*, that the commissioner erred in including interest income and an additional \$500 a month in imputed business income. CP 467. He also assigned error to the new start date, arguing that he was prejudiced by the eleven month delay between the date the motion was filed and the date the State finally scheduled the hearing. *Id.*

The motion was argued before the Honorable Katherine M. Stolz in Pierce County on January 9, 2009. 2 RP 3-14. Skusek again argued that he had no interest income because he had cashed in his interest-bearing CDs. *Id.* at 4. He argued that it was error to impute \$500 in income from side jobs because his health and the poor state of the economy prevented him from pursuing them. *Id.* at 5. He also requested that the start date be changed, noting again the delay between the time he

was served by the State and the actual hearing date eleven months later.

Id. at 5.

The court granted Skusek's motion to revise, noting his medical condition and the "substantially altered conditions" in the economy. *Id.* at 11-12; CP 497-504. The court also revised the start date to July, 2008. 2 RP at 12; CP 502. Under the court's revised order, Skusek's new child support payments have been set at \$760.98 per month. CP 501, 507. Back child support payments are to be paid at \$50 per month for the first twelve months, and then at \$100 per month until the arrearage is paid in full. CP 504.

Herman appealed. The State has taken no position on appeal and is not a party to it.

D. SUMMARY OF ARGUMENT

Herman misstates the standard of review applicable to this child support modification case. It is well established that an appellate court will not reverse the trial court's decision to modify child support absent a manifest abuse of discretion, and cannot substitute its judgment for that of the trial court unless the trial court's decision rests on unreasonable or untenable grounds. The very nature of a trial court makes it better suited than an appellate court to weigh the various factors involved in a parenting plan on a case-by-case basis, and the trial judge is in the best position to

assess a particular case. This Court should grant the trial court the proper deference it is due in resolving domestic disputes and affirm.

The Court should deny Herman's request for attorney fees where they were denied below and she cannot demonstrate her financial need and Skusek's ability to pay.

The Court should award Skusek his attorney fees and costs on appeal.

E. ARGUMENT IN RESPONSE

(1) Standard of Review

In the area of domestic relations, the appellate courts have historically been loath to overturn trial court decisions. *In re Parentage of Jannot*, 149 Wn.2d 123, 126-28, 65 P.3d 664 (2003). Trial court decisions in a domestic action will seldom be changed upon appeal. *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214, 215 (1985). Appellate courts should not encourage appeals by tinkering with them. *Id.* Consequently, the party challenging such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. *Id.* The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion. *Id.*

Herman insists that because the commissioner and the trial court considered only documentary evidence and took no testimony, the proper

standard of review is de novo. Br. of Appellant at 20. This is a significant misstatement of the law, and her reliance on that erroneous standard is fatal to her case. In 40 pages of briefing she cites 19 cases; ten of those cases are used to buttress her argument that this Court should review her appeal de novo. Unfortunately, none of the cases she cites support her contention and her mischaracterization of those cases is highly misleading. Most of the cases she cites regarding the standard of review are not domestic relations cases, and those she does cite have either been superseded by *Jannot* or hold contrary to her assertion that this Court must review de novo.

Herman cites first to *In re Marriage of Flynn*, 94 Wn. App. 185, 972 P.2d 500 (1999), for the proposition that this Court is in as good a position as the trial court to review written submissions de novo. Br. of Appellant at 20. The *Flynn* court held that while trial court decisions relating to custody changes are reviewed for abuse of discretion, the appeals court reviews as a matter of law when a trial court bases its decision on affidavits of the parties. *Flynn*, 94 Wn. App. at 189-90. *Flynn* was an outlier in our case law, was decided four years before *Jannot*, and is directly contrary to the Supreme Court's holding that abuse of discretion is the proper standard of review even when the trial court relies solely on

documentary evidence in reaching its decision. *Jannot*, 149 Wn.2d at 126-28.

She also cites *In re Marriage of Rideout*, 150 Wn.2d 337, 350-51, 77 P.3d 1174 (2003), asserting that it holds this Court is in the same position as the trial court and may review cases based on written submissions by the parties de novo. Br. of Appellant at 20-21. *Rideout* made no such holding. On the contrary, the Supreme Court explicitly rejected de novo review and the argument that the appellate court is in as good a position as the trial court to judge the credibility of witnesses when the record is entirely documentary and competing documentary evidence has to be weighed and conflicts resolved. *Id.* at 351-52. The Court distinguished its holding from that in *Flynn*, noting that no appellate court reviewing documentary records de novo has weighed credibility. *Id.* at 374. “[D]e novo review of the entire record on appeal is not feasible.” *Id.* at 376. Trial judges and court commissioners, the Court noted, routinely hear family law matters. *Id.* at 352 (citing *Jannot*, 149 Wn.2d at 123). Local trial judges decide factual domestic relations questions on a regular basis and consequently stand in a better position than an appellate judge to decide domestic cases. *Id.* at 351 (internal quotes omitted). Where competing documentary evidence is to be weighed and conflicts resolved, the *findings of fact* the court enters in reaching its decision are reviewed

for substantial evidence. *Id.* at 351-52. “Notwithstanding the fact that the record was entirely documentary, the superior court’s findings should be given deference...” *Id.* at 359-60.

Herman’s reliance on *In re Marriage of Dodd*, 120 Wn. App. 638, 86 P.3d 801 (2004), is likewise misleading and mistaken. Herman avers that under *Dodd*, this Court reviews the documentary evidence de novo and is authorized to determine its own facts based on the record before the trial court. Br. of Appellant at 21. Again, Herman significantly mischaracterizes the holding of the case. After noting that a trial court exercises broad discretion in its decision to modify the child support provisions of a divorce decree, the *Dodd* court held that under the abuse of discretion standard, the reviewing court cannot substitute its judgment for that of the trial court unless the trial court’s decision rests on unreasonable or untenable grounds. *Id.* at 644. In revision cases where the evidence before a commissioner did not include live testimony, the trial court reviews the record de novo, but this Court must defer to the discretion of the trial court. *Dodd*, 120 Wn. App. at 643-45.

The *Dodd* court could not have been clearer in holding that the proper standard of review of trial court decisions in these cases is abuse of discretion and not de novo. To cite *Dodd* and *Rideout* for the proposition

that this Court reviews a trial court's amendment of child care orders de novo is a serious misstatement of the law.

In *Jannot*, our Supreme Court went to great lengths to explain why de novo review is not appropriate in such cases. Parenting plans are individualized decisions that depend upon a wide variety of factors, including culture, family history, the emotional stability of the parents and children, finances, and any of the other factors that could bear upon the best interests of the children. *Jannot*, 149 Wn.2d at 127 (internal quotes omitted). The very nature of a trial court makes it better suited than this Court to weigh these varied factors on a case-by-case basis. *Id.* at 127. A trial judge is in the best position to assign the proper weight to each of the varied factors raised by the affidavits submitted in a particular case. *Id.* at 127.

Most importantly, in the area of domestic relations, this Court grants deference to the trial courts because the emotional and financial interests affected by such decisions are best served by finality, whereas de novo review encourages appeals. *Id.* at 127 (internal quotes and citations omitted). Like Herman, the petitioner in *Jannot* cited to a long list of unrelated cases in which appellate courts have applied de novo review; however, the Supreme Court held those dissimilar questions simply did not involve the child's weighty interest in finality. *Jannot*, 149 Wn.2d at

127-28. The *Jannot* court affirmed that Washington courts apply the abuse of discretion standard when reviewing child support modifications and temporary parenting plans, even those based on affidavits alone. *Id.* at 128.

This Court has explicitly followed *Jannot* in holding that abuse of discretion is the proper standard of review when the trial court relies solely on documentary evidence in reaching its decision. *Choate v. Choate*, 143 Wn. App. 235, 240-41, 177 P.3d 175 (2008). This Court must review the present case under the abuse of discretion standard, a standard Herman cannot meet.

(2) The Trial Court Did Not Abuse Its Discretion in Modifying the Child Support Order

Herman argues that the trial court erred in adopting Skusek's child support worksheets by excluding interest and "recurring income," by granting an incremental increase, and in not awarding her attorney fees.⁴ Br. of Appellant at 22, 29, 33, 36. All of the decisions to which Herman assigns error were within the court's discretion and were supported by substantial evidence. In revision cases, where the commissioner did not hear live testimony, the trial court reviews the record de novo. *In re*

⁴ Herman appears to argue that Skusek violated a Pierce County local rule and implies that the trial court erred in adopting Skusek's worksheet despite that violation. Br. of Appellant at 18-19. However, Herman assigns no error to that decision by the trial court, and places the argument improperly in her statement of the case in violation of RAP 10.3.

Marriage of Moody, 137 Wn.2d 979, 993, 976 P.2d 1240 (1999). The entire record was before the trial court, which stated clearly that it had reviewed all the materials submitted by the parties. 2 RP at 4.

In setting child support, the trial court must (1) compute the total income of the parents, (2) determine the child support level from the economic table, (3) decide whether to deviate from the standard calculation based on specific statutory factors, and (4) allocate the child support obligation to each parent based on his or her share of the combined net income. *In re Marriage of Maples*, 78 Wn. App. 696, 700, 899 P.2d 1 (1995). The findings must be supported by substantial evidence and justify the court's conclusions. *State ex rel. Stout v. Stout*, 89 Wn. App. 118, 124, 948 P.2d 851 (1997).

As discussed above, this Court will overturn an award of child support only when the party challenging the award demonstrates that the award is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons. *In re Marriage of Peterson*, 80 Wn. App. 148, 152, 906 P.2d 1009 (1995), *review denied*, 129 Wn.2d 1014 (1996). An abuse of discretion is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the

facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Id.* The trial court here did not abuse its discretion.

(a) The Trial Court Did Not Abuse Its Discretion in Adopting Skusek's Worksheet

Herman baldly asserts that the income entries on Skusek's child support worksheets were erroneous and that the trial court should not have adopted them. Br. of Appellant. at 26-27. She also insists that the trial court should instead have adopted either her proposed worksheets or those of the State. *Id.* But the figures entered on the State's and Herman's worksheets were substantially different. Where Skusek listed his monthly income as \$3,196.04, the State listed it as \$4,723.00. Herman claimed his income to be a significantly higher \$6,579.88 – more than double what Skusek claimed. Herman does not offer any reason to choose between the State's figure and her own, much less any reason to pick either over Skusek's.

Herman appears to contend that the court's decision to adopt Skusek's child support worksheet violated RCW 26.19.071(2). The statute requires only that the parties provide tax returns and pay stubs so

that the court may verify the amounts contained in the child support worksheets. *In re Marriage of Payne*, 82 Wn. App. 147, 152, 916 P.2d 968 (1996). Skusek did so. CP 43-46, 49, 388-89, 402-08. When calculating a support obligation, a court may consider *all* relevant factors, including current and future income. *Payne*, 82 Wn. App. at 152. Because Skusek's income dropped due to his health and the health of the economy, his past earnings were no longer of primary relevance and the court's decision to reduce his payment was not an abuse of discretion. *Id.*

Notably, Herman makes no mention of Skusek's health issues in her brief. Indeed, she insists that Skusek was fully employed, or could have been, but chose to retire before retirement age. Br. of Appellant at 27. The trial court, however, was presented with substantial evidence that Skusek was unable to work full time due to the deterioration of his thumbs. CP 369, 396; 2 RP at 5. RCW 26.19.071(6) requires the court to impute income when the parent is voluntarily unemployed or voluntarily underemployed. Skusek was not voluntarily unemployed or underemployed. He had retired because he was no longer physically able to work full-time due to the increasing pain in his thumbs. The trial court did not abuse its discretion in adopting Skusek's worksheet, which did not list side-job income. Under *Payne*, the court properly exercised its

discretion in considering *all* relevant factors, including Skusek's past, current, and future income. 82 Wn. App. at 152.

Herman asserts that Skusek wrongly listed net income instead of gross income on his worksheet. Br. of Appellant at 24. Even if this were true, the difference in the amount of the monthly child support payment under RCW 26.19.020 would be a mere \$18, an amount surely within the discretion of the court to adjust. That minor difference pales in comparison to the figure of \$1,441.70 that Herman claimed Skusek owed in monthly support. CP 437.

Herman also objects to the trial court's oral decision to strike the side jobs and interest income and adopt Skusek's worksheet. Br. of Appellant at 25; 2 RP at 13. Her objection is groundless. A trial court's oral opinion will suffice, even where the order deviates from the standard child support calculation, which was not the case here. *In re Marriage of Crosetto*, 82 Wn. App. 545, 560, 918 P.2d 954 (1996).

As with her analysis of the standard of review, Herman cites to cases which actually undermine her argument. She cites first to *In re Marriage of Peterson*, 80 Wn. App. 148, 152-55, 906 P.2d 1009 (1995), *review denied*, 129 Wn.2d 1014 (1996), where the court held that it will overturn an award of child support only when the party challenging the award demonstrates that the trial court's decision is manifestly

unreasonable, based on untenable grounds, or granted for untenable reasons. Br. of Appellant at 25. This is directly contrary to her insistence that this Court should consider her case de novo. Aside from undercutting Herman's argument regarding the standard of review, *Peterson* has no relevance to the present case. The *Peterson* court held that the father was gainfully employed, not voluntarily underemployed, and could thus not have income imputed to him. *Id.* at 154-55. Here, the court imputed no income to Skusek, and made no finding that he was voluntarily underemployed. On the contrary, the court directly addressed the issues leading to Skusek's involuntary retirement from full-time employment. 2 RP at 12.

Herman's citation to *In re Marriage of Shellenberger*, 80 Wn. App. 71, 906 P.2d 968 (1995) is even more surprising. Br. of Appellant at 26. *Shellenberger* was a trial by affidavit, and the Court reviewed the trial court's order for abuse of discretion. *Id.* at 970, 972. Herman actually summarizes the *Shellenberger* holding correctly. Br. of Appellant at 26. The Court reversed the trial court's imputation of income to the father and the order of child support where the trial court made no findings regarding Shellenberger's age, health, training, skills, or work experience to support the conclusion that he was voluntarily underemployed due to his "unrecoverable" disability. Br. of Appellant at 26; *Shellenberger*, 80 Wn.

App. at 80-83. The trial court in the present case made precisely such findings, and its findings were supported by substantial evidence. *See* 2 RP 4-6, 10-11; CP 368-71, 396.

Herman also takes exception to Skusek's submission of his 2007 tax returns shortly before the first hearing. Br. of Appellant at 26. Herman never filed a motion to compel. She cites no authority for the proposition that the trial court erred in considering the tax return, and case law holds otherwise. A trial court may exercise its discretion in modifying a child support order, even where a party files the necessary paperwork late or not at all. *In re Marriage of Pollard*, 99 Wn. App. 48, 55-56, 991 P.2d 1201 (2000).

Findings of fact made by the trial court upon conflicting evidence will not be disturbed on appeal. *State ex rel. Carroll v. Seattle Hotel Bldg. Corp.*, 41 Wn.2d 595, 597, 250 P.2d 982, 983 (1952). When there is substantial evidence to support the trial court's findings of fact, the reviewing court will not disturb them on appeal, and even when the evidence conflicts, the reviewing court must determine only whether the evidence most favorable to the prevailing party supports the challenged findings. *State v. Black*, 100 Wn.2d 793, 802, 676 P.2d 963 (1984). Furthermore, this Court need not work through the specific figures in dispute in a domestic order. *See Landry*, 103 Wn.2d at 810. Where the

trial court analyzed the respective positions of the parties, exercised its discretion and rendered a thoughtful decision, the distribution that this Court might have made collectively or individually is not relevant. *Id.* This Court should hold that the trial court did not abuse its discretion in adopting Skusek's worksheet.

(b) The Trial Court Did Not Abuse Its Discretion in Excluding Interest and Side Job Income

Herman states that the trial court struck Skusek's purported side job income "without reviewing the past 2 years, let alone any review of the record." Br. of Appellant at 30. That assertion is flatly contradicted by the record. As noted above, the court clearly stated that it had reviewed the record. 2 RP at 4. Without any citation to authority beyond general reference to the statutes, Herman argues that the trial court somehow failed to properly consider the two previous years of Skusek's income, and essentially argues that Skusek was required to prove a negative – namely to substantiate work he did not perform. Br. of Appellant at 32. But Skusek complied with RCW 26.19.071(2), which required him to provide tax returns and pay stubs so that the court could verify the amounts contained in the child support worksheets. CP 43-46, 49, 388-89, 402-08. *See Payne*, 82 Wn. App. at 152. As stated above, the trial court properly

exercised its discretion in considering all relevant factors, including Skusek's current and future income. *Id.*

Again without any citation to authority, Herman argues that Skusek actually received a "windfall" by virtue of the fact that child support was still set at a rate from 1998 when the children were age 5..." Br. of Appellant at 32. This is an astonishingly cynical argument. Far from receiving a "windfall," Skusek was paying the amount set by the original child support order that remained in effect until the modified order was entered. It was Herman who slept on her rights and Herman who did not seek a modification until the boys were nearly 15 years old. CP 31. Indeed, Herman acknowledges in her brief that her failure to seek modification or adjustment was "her fault." Br. of Appellant at 36.

Herman then proceeds to declare – again without citing any authority – that a "recent downswing in the economy...does not permit the court to deviate in the worksheets..." Br. of Appellant at 32. Under *Payne*, the court has precisely the discretion to make such determinations.

Finally, Herman asserts without any legal argument whatsoever that the court erred in excluding interest income and including a "long distance transportation expense" in Skusek's worksheet. *Id.* at 33. An argumentative assertion with a lack of reasoned argument does not merit judicial consideration. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538,

954 P.2d 290, *review denied*, 136 Wn.2d 1015 (1998). There is, in any event, substantial evidence to support the trial court's action. Skusek cashed in his interest-bearing CDs and consequently had no continuing interest income. CP 330-52, 371. Consequently, the trial court did not abuse its discretion in excluding Skusek's side job and interest income.

(c) The Trial Court Did Not Abuse Its Discretion in Changing the Start Date of the Order

Continuing to assign error without citing to any case law, Herman argues that the trial court erred in granting an incremental increase. Br. of Appellant at 33. Herman appears to confuse an incremental increase with a change in the date the modified order was to take effect. *Id.* at 33-34. Paragraph 3.10 of the amended order, headed Incremental Payments, reads "Does not apply." CP 502. The thrust of Herman's argument appears to be that the court erred in changing the date the amended order would take effect. Her claim of error is entirely without merit. The trial court has discretion to make the modification effective upon the filing of the petition, upon the date of the order of modification, or *any time in between*. *Pollard*, 99 Wn. App. at 55-56. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *Broadaway*, 133 Wn.2d at 131. Skusek requested the court make the start date December, 2008 because of

the delay between the filing of the motion to modify and the hearing date. 2 RP at 5. The court exercised its proper discretion under *Pollard* and set the start date at July, 2008.

(d) The Trial Court Did Not Err in Denying Herman's Request For Attorney Fees

Under RCW 26.09.140, the trial court may award attorney fees to either party. *Spreen v. Spreen*, 107 Wn. App. 341, 351, 28 P.3d 769 (2001). In determining whether it should award fees, the trial court considers the parties' relative need versus ability to pay. *Shellenberger*, 80 Wn. App. at 87. This Court reviews the trial court's decision for abuse of discretion and will reverse an attorney fee award only if the decision is untenable or manifestly unreasonable. *Spreen*, 107 Wn. App. at 351.

After considering the financial resources of both parties, the trial court has discretion under RCW 26.09.140 to award attorney fees. *In re Marriage of Stenshoel*, 72 Wn. App. 800, 813, 866 P.2d 635 (1993). The trial court must balance the needs of the spouse requesting them with the ability of the other spouse to pay. *Id.* Where the trial court concluded the parties should bear their own attorney fees, and the party requesting fees on appeal fails to allege her financial circumstances have changed since trial, such party is not entitled to an award of attorney fees on appeal under

RCW 26.09.140. *In re Combs*, 105 Wn. App. 168, 177, 19 P.3d 469, review denied, 144 Wn.2d 1013 (2001).

Herman sought attorney fees below and seeks them on appeal based principally on her allegations of intransigence on Skusek's part over his purported delay in delivering some of his tax records. Br. of Appellant at 38-39. A trial court may consider whether legal fees were caused by one party's intransigence and award attorney fees on that basis. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, review denied, 120 Wn.2d 1002 (1992). However, in order to do so, the court must find facts sufficient to support the conclusion. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). The court here made no finding that Skusek had been intransigent, nor did Herman seek any motion to compel.

The court reduced the child support payment due to Skusek's reduced earnings. Herman's own financial declaration, tax records, and her worksheets showed significantly greater assets and income than Skusek's did. CP 67, 79-85, 113. Herman listed her husband's monthly income as \$7,550 while the State listed it as \$10,032. CP 113, 446. Given that disparity of assets, it cannot be said the trial court abused its discretion in declining to award Herman her attorney fees.

In deciding attorney fees on appeal under RCW 26.09.140, this Court examines the arguable merit of the issues on appeal and the financial resources of the respective parties. *In re Marriage of Booth*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990). Given the thinness of the merits of Herman's appeal, and the continuing disparity of income between the parties, this Court should likewise not award Herman fees.

(3) This Court Should Award Attorney Fees to Skusek

Skusek sought revision of the child support payment because his income has been greatly reduced by his physical inability to work full time. An award of attorney's fees and costs may be granted in an appellate court's discretion under RCW 26.09.140. Upon a request for fees and costs, this court will consider the parties' relative ability to pay and the arguable merit of the issues raised on appeal. *In re Marriage of Leslie*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998). Herman has a greater household income than Skusek. Responding to this appeal has imposed costs on Skusek that he can ill afford. Given Skusek's significantly reduced income and the questionable merits of Herman's appeal, this Court should award attorney fees to Skusek pursuant to RCW 26.09.140 and RAP 18.1.

F. CONCLUSION

Herman has attempted to avail herself of appellate review by grossly mischaracterizing the standard of review applicable to her claim.

The trial court did not abuse its discretion in entering its revision order and its amended order of child support. It cannot be said that the court's decision rests on unreasonable or untenable grounds, or that no reasonable judge would have reached the same conclusion. Herman has not met the heavy burden of showing a manifest abuse of discretion on the part of the trial court. This Court should affirm the trial court and award Skusek fees and costs on appeal.

DATED this 25 day of June, 2009.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the following document: Brief of Respondent in Court of Appeals Cause No. 38778-6-II, to the following:

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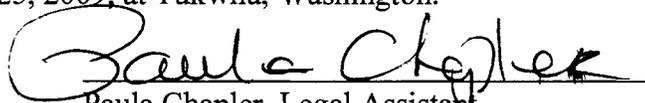
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 25, 2009, at Tukwila, Washington.


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