

No. 47128-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Parentage of M.R.A.

ARIKA L.R. TONEY,

Appellant,

v.

TIMOTHY J. AHEREN III,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR COWLITZ COUNTY
THE HONORABLE GARY BASHOR

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant raises a hodgepodge of alleged errors to claim that the trial court abused its discretion in modifying child support for the parties' daughter, age 18. But none of these alleged errors have any merit. It was well within the trial court's discretion to maintain the downward deviation that was previously granted to the father, when the mother failed to allege any substantial change in circumstance warranting elimination of the deviation. It was also within the trial court's discretion to terminate the father's transfer payment to the mother once the daughter reached age 18, since he was ordered to provide for the daughter's postsecondary educational support, towards which the trial court properly required the daughter to also contribute.

The mother's remaining arguments challenge the minutiae of the trial court's ruling, which ultimately have no impact on the trial court's final decision. This Court should affirm and award attorney fees to the father.

II. RESTATEMENT OF FACTS

A. The original child support order for the parties' daughter, age 18, was entered in 1998.

Respondent Timothy Aheren and appellant Arika Toney are the parents of a daughter who turns 18 on July 12, 2015. (*See* CP 12, 181; RP 19) Mr. Aheren and Ms. Toney were never married; Mr. Aheren's paternity was established in a parentage action. (*See* CP 1) An order of child support entered July 21, 1998, required Mr. Aheren to pay monthly support of \$256 (the "standard calculation") to Ms. Toney. (CP 4)

This is Ms. Toney's second appeal in this matter. In 2009, Ms. Toney challenged the trial court's entry of a satisfaction of judgment and its clarification of an ambiguous parenting plan provision. This Court affirmed and awarded attorney fees to Mr. Aheren because Ms. Toney's appeal was "frivolous" and "lack[ed] any merit." *Marriage of Toney and Aheren*, 150 Wn. App. 1042, 2009 WL 1610153, *rev. denied*, 167 Wn.2d 1007 (2009).

B. The 1998 order was modified in 2010 granting the father a downward deviation using the "Whole Family" formula. Postsecondary support for the daughter, then age 13, was reserved.

The 1998 child support was modified in December 2010, when the parties' daughter was 13, after a contested hearing before

Cowlitz County Superior Court Judge Stephen Warning. (CP 12-21)
The modified child support order reflected a change in age category, the parties' current incomes, and that Mr. Aheren, who had since married, now had two younger children from that relationship. (CP 13-14, 15)

The trial court ordered a downward deviation from the standard calculation of \$530.22 per month using the "Whole Family" formula to calculate a transfer payment of \$450.22 per month. (CP 13-15; Sub. no. 560, Supp. CP ____) The trial court found that a downward deviation was necessary because Mr. Aheren was responsible for his two younger children from his new marriage. (CP 13-15; Sub. no. 559, Supp. CP ____) Although the 1998 order was silent on income tax exemptions, the 2010 order limited Mr. Aheren to claiming the child as a dependent to every third year. (CP 17)

The trial court also awarded attorney fees of \$4,000 to Mr. Aheren because "the sizeable amounts of motions filed by [Ms. Toney] were largely unnecessary. Ms. Toney created a significant amount of work and employed a strategy to intentionally delay and frustrate the process. The methods imposed by Ms. Toney created

significant attorney's fees and additional costs to Mr. Aheren." (CP 232; Sub. no. 559, Supp. CP ____)

C. The mother sought to modify the 2010 order in November 2013, seeking postsecondary support for the daughter and asking the court to eliminate the downward deviation.

On November 20, 2013, Ms. Toney filed a Petition for Modification of Child Support. (CP 25) The bases for her requested modification were that "more than two years have passed since the last child support was entered," the daughter was graduating high school early, at age 16, postsecondary support was not established in the prior order, and her claim that "Mr. Aheren's income had increased since the last order was entered." (CP 26)

Among other things, Ms. Toney asked the court to eliminate the downward deviation, establish postsecondary support, and grant her all of the future tax exemptions for the daughter. (See CP 27-28, 31) Mr. Aheren responded and supplied documentation of his taxes and his paystubs, refuting Ms. Toney's claims regarding his financial situation. (CP 49, 154, 165, 173) Mr. Aheren asked the court to maintain the downward deviation, agreed that the parties should contribute at some level to the daughter's postsecondary education expenses, and asked that the tax exemptions for the

daughter be allocated to the parties in alternating years. (CP 155-57)

D. The trial court established the parties' postsecondary support obligation, maintained the downward deviation, and ordered a new transfer payment using the "Whole Family" formula that increased the father's support obligation.

On July 17, 2014, Judge Gary Bashor ("the trial court") considered Ms. Toney's petition for modification. (RP 2) Mr. Aheren asked the court to deviate from the standard calculation consistent with the 2010 order and to use the "Whole Family" formula to calculate the deviation. (RP 30-31) Mr. Aheren explained that he and the mother of his two younger children, now ages 6 and 4, were divorcing, and that he anticipated paying monthly child support of \$325¹ for both children given the anticipated equal residential schedule for his younger two children. (CP 155-56)

Ms. Toney urged the court to abandon the deviation, arguing that use of SupportCalctm software to calculate the Whole Family deviation was inappropriate. (RP 5, 46) Ms. Toney objected to the Whole Family deviation, arguing that there was "no math" and that

¹ In fact, the final order of child support in the dissolution action with the younger children's mother requires the father to pay monthly support of \$525 per month.

“[the father] pays no child support for these other children” because he was still married, even though the dissolution action was pending. (RP 101, 103)

Ms. Toney did not assert any change since the 2010 modified order of child support that would warrant eliminating the downward deviation, nor did she claim that any deviation would cause hardship on her household. (See CP 26-28) Nor could she, since even without the receipt of child support, the mother’s net monthly income exceeds her monthly household expenses by more than \$800. (CP 36)

The trial court maintained the downward deviation based on Mr. Aheren’s support of his two younger children (CP 290) and applied the “Whole Family” formula to calculate the deviation using the SupportCalc™ software, noting that the formula is “routinely used,” that SupportCalc™ is an approved vendor for Washington courts, and its forms comply with relevant law. (CP 245) The trial court noted that regardless whether Mr. Aheren was married or

divorced, “he is presumed to be paying for the kids”² and “the deviation...doesn’t appear to be unusual given the numbers.” (RP 106-07)

Because both parties’ incomes had increased since 2010, the monthly transfer payment increased from \$450 to \$559.31³ – a nearly 25% increase, even after the deviation. (CP 14, 289) The trial court ordered Mr. Aheren to make the transfer payment until the daughter reaches age 18, approximately 7 months after the order was entered, so long as the daughter continues to reside with Ms. Toney. (CP 291) In addition to the transfer payment, Mr. Aheren was ordered to pay 55% of the daughter’s total postsecondary educational expenses if she attended college before the age of 18, excluding room and board. (CP 247, 292)

² This is an accurate assessment of the law. As this Court has held “a trial court may deviate from the standard child support schedule based upon one parent’s obligations to children from other relationships who live with them, so long as the parent fulfills the obligation.” *Fernando v. Nieswandt*, 87 Wn. App. 103, 111, 940 P.2d 1380, *rev. denied*, 133 Wn.2d 1014 (1997). In other words, the deviation does not require the parent to be paying “court-ordered child support” for the other children. *Fernando*, 87 Wn. App. at 111.

³ The mother complains that the final order of child support includes inconsistent figures regarding the transfer payment. (*See* Assignment of Error no. 4, App. Br. 2; *compare* CP 289 ¶ 3.5 *with* CP 291 ¶ 3.13) However, there is no dispute that the amount to be paid is as stated in ¶ 3.5 “Transfer Payment,” the higher amount.

Once the daughter reached age 18, the father was no longer required to make the transfer payment. (CP 247, 291-92) Instead, he was ordered to pay 55% of any postsecondary educational expenses, including room and board, after the daughter contributes one-third of the cost. (CP 292) The trial court limited postsecondary support to the in-state cost at the University of Nevada-Reno, where the daughter had applied and been accepted, and in the city where she has resided with Ms. Toney “essentially all her life.” (CP 292, 317) The record does not indicate the daughter applied to any institutions in Washington. (App. Br. 5; CP 180, 240, 317)

Recognizing that the deviation would result in “a drop” from the \$835 monthly transfer payment that Ms. Toney requested, the trial court granted her the tax exemptions for the daughter for tax year 2014 and thereafter. (CP 245) The trial court also ordered the father to pay \$1,109 towards the daughter’s previously incurred medical expenses. (CP 296)

On December 22, 2014, Ms. Toney moved for reconsideration under CR 59, arguing there was insufficient evidence to grant the Whole Family deviation. (CP 298, 301) The trial court denied reconsideration, concluding it had sufficient

information and discretion to determine the deviation in this case.
(CP 317) Ms. Toney appeals.

III. ARGUMENT

A. Trial courts have broad discretion in entering orders modifying child support.

Trial courts have “broad discretion” in deciding whether to modify child support. *Marriage of Dodd*, 120 Wn. App. 638, 644, 86 P.3d 801 (2004). “Under this 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.” *Dodd*, 120 Wn. App. at 644 (*citations omitted*). The “emotional and financial interests affected by [child support] decisions are best served by finality,” and appellate courts should avoid “encourag[ing] appeals by tinkering with [these decisions].” *Marriage of Booth*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990) (*quoting Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985)). Accordingly, a reviewing court “must defer to the sound discretion of the trial court unless that discretion has been exercised in an untenable or manifestly unreasonable way.” *Booth*, 114 Wn.2d at 779.

B. The trial court did not abuse its discretion in ordering a deviation from the standard child support calculation.

The trial court did not abuse its discretion in maintaining the deviation established by the 2010 child support order when the mother proved no substantial change in circumstances to warrant its elimination. It was well within the trial court's discretion to arrive at a transfer payment that takes into account the total circumstances of both households, including the father's children from his later relationship. (CP 290) In any event, the mother's complaint regarding the transfer payment is moot, since the transfer payment terminates under the terms of the order when the daughter turns 18 on July 12, 2015. (CP 181, 291) This court should affirm.

- 1. The mother cannot challenge the downward deviation because she did not allege a substantial change in circumstances warranting its elimination, and the deviation is thus the "law of the case."**

If a court orders a deviation from the standard support calculation, this offset becomes "the law of the case." *Marriage of Trichak*, 72 Wn. App. 21, 24, 863 P.2d 585 (1993). A parent is barred from relitigating whether a deviation is proper if: (a) she had an opportunity to challenge the original child support order when it

was entered, but declined to do so; and (b) the reasons for deviating are still relevant. *Trichak*, 72 Wn. App. at 24, 25.

In *Trichak*, the trial court granted the father a downward deviation by allowing him a pro rata offset in his child support obligation for the child's receipt of Social Security benefits. The mother did not challenge that decision when it was entered. Two years later she sought to modify the child support order, asking the court to eliminate the deviation on the grounds that "the reasons for deviation applicable at the time of entry of the Decree [] are no longer applicable." *Trichak*, 72 Wn. App. at 24. The trial court rejected the mother's request and once again granted the father the deviation.

This Court affirmed, holding that the deviation became the "law of the case" once the mother had the opportunity to challenge the propriety of the deviation in the original child support order and did not do so. *Trichak*, 72 Wn. App. at 24. This Court held that the mother was "barred from relitigating whether the deviation [] was proper" in a later modification action, absent proving a substantial change of circumstances warranting its elimination. *Trichak*, 72 Wn. App. at 24-25. Because the child in *Trichak* was still receiving the social security benefits at the time of the

modification, this Court concluded that maintaining the deviation from the original child support order was proper. *Trichak*, 72 Wn. App. at 25.

Likewise here, the mother asked the trial court to eliminate the previously unchallenged Whole Family deviation granted in the 2010 child support order, in a later modification action. (CP 26-27; Sub. no. 560, Supp. CP ____). But absent a challenge in 2010, the Whole Family deviation became “the law of the case” and could not be relitigated. Further, the original reasons for granting the father a deviation from the standard calculation in 2010 are still relevant today. The trial court previously granted the father a downward deviation because he financially supported his two other children; the father *still* financially supports these two children. (CP 15, 245, RP 30-31) The deviation thus is as warranted today as it was in 2010 when the deviation was originally granted.

- 2. Even if the mother could relitigate the deviation, the trial court properly used the “Whole Family” formula when in doing so it considered the total circumstances of both households.**

Trial courts are authorized to deviate from the standard calculation in establishing child support. RCW 26.19.075(1) contains a non-exhaustive list of reasons a court may deviate from

the standard calculation. Whether a trial court grants a deviation, and the extent of that deviation, is within the trial court's discretion, which may only be overturned for abuse of its discretion. *Marriage of Trichak*, 72 Wn. App. at 23; *Fernando v. Newsandt*, 87 Wn. App. 103, 111, 940 P.2d 1380, *rev. denied*, 133 Wn.2d 1014 (1997) (affirming downward deviation when father also supported a child from another relationship).

Among the reasons the court may deviate from the standard calculation is when either or both parents have children from other relationships. RCW 26.19.075(1)(e); *Fernando*, 87 Wn. App. at 111. In deciding the extent of the deviation, the court must consider "the total circumstances of both households. All child support obligations...for all children shall be disclosed and considered." RCW 26.19.075(1)(e)(iv).

Here, the trial court properly found a basis for deviation when the father proved that he was responsible for the support of his younger two children from his subsequent marriage. (CP 290) As the father explained, as a result of the dissolution of his marriage to the mother of his younger two children, the children will reside half time in his home where he will provide for their support, plus

he anticipated paying monthly child support to their mother of \$325. (CP 155-56)

The trial court also correctly used the Whole Family formula to calculate the deviation. *See Marriage of Bell*, 101 Wn. App. 366, 373, 4 P.3d 849 (2000). In *Bell*, this Court held that the trial court has discretion to calculate a parent's deviation in child support using the Whole Family formula so long as in doing so the trial court "considers factors other than just the number of children." 101 Wn. App. at 375. Although this Court affirmed the trial court's decision to not use the Whole Family formula, it recognized that use of the formula is a "reasonable" approach that "may assist the trial court in resolving the difficult problems these cases present. We encourage them to consider it when exercising their discretion." *Bell*, 101 Wn. App. at 376.

In establishing the amount of the deviation here, the trial court did more than just rely on the Whole Family formula - it considered the total circumstances of both parents' households. For instance, the trial court considered the total income of both parents' households (CP 245, 282; RP 6-8); the daughter's medical bills (CP 246, 287; RP 13-19), advanced learning high school expenses (CP 245-246, RP 11), and projected postsecondary education costs (CP

246-248; RP 19-24); as well as the current living situation of the mother, the father, the daughter, and the father's two younger children. (CP 246-258, 291-292; RP 19-20, 106) The trial court thus properly exercised its discretion by granting the father a deviation due to his support of his younger two children, and by calculating the amount of the deviation after considering both parent's households and the needs of both the daughter and the father's younger two children.

C. It was well within the trial court's discretion to terminate the father's transfer payment once the daughter reached age 18, to require the daughter to contribute one-third towards the cost of her postsecondary expenses, and to cap postsecondary support.

Trial courts have broad discretion in making orders awarding postsecondary support. *Marriage of Kelly*, 85 Wn. App. 785, 792, 934 P.2d 1218, *rev. denied*, 133 Wn.2d 1014 (1997). In this case, the trial court did not abuse its discretion in terminating the transfer payment to the mother once the child reached age 18, in ordering the child to contribute to the cost of her postsecondary education, and in limiting the parents' obligation to the cost of in-state tuition.

- 1. The trial court had discretion to terminate the transfer payment once the daughter reached age 18, since the father would be contributing to the daughter's postsecondary education, including the cost of room and board.**

The mother mistakenly claims that the trial court "terminat[ed] child support at age 18" for the daughter even though she remains dependent. (App. Br. 4) In fact, the parents are still obligated to provide "child support" for the daughter, in the form of their contributions to her postsecondary educational expenses once she reaches age 18. (CP 292) "[P]ostsecondary educational support is money paid to support a dependent child, therefore it is child support." *Marriage of Cota*, 177 Wn. App. 527, 541, ¶ 30, 312 P.3d 695 (2013) (citing *Marriage of Schneider*, 173 Wn.2d 353, 368, 268 P.3d 215 (2011)).

The obligor parent is not required to pay both support under the child support schedule and a percentage of the cost of the child's postsecondary education. "The child support schedule shall be advisory and not mandatory for postsecondary educational support." RCW 26.19.090(1); *Marriage of Daubert & Johnson*, 124 Wn. App. 483, 500, ¶ 41, 99 P.3d 401, 408 (2004), as amended on reconsideration (Dec. 16, 2004) abrogated by *McCausland v. McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007). The court has

“discretion to follow the child support schedule, to ignore the child support schedule, or to pick and choose which provisions to follow.” *Daubert & Johnson*, 124 Wn. App. at 500, ¶ 41. In this case, the trial court did not abuse its discretion by terminating the father’s transfer payment once the daughter reached age 18, when the father’s support obligation will nevertheless continue because he must pay a percentage of the daughter’s postsecondary education expenses, including her tuition, books, and room and board. (CP 292)

2. The trial court had discretion to require the daughter to contribute to her postsecondary support and to limit the parents’ obligation to the cost of a public institution in the state where the daughter lives.

In determining the level of postsecondary support, the trial court must consider, among other things, the parents’ level of education, standard of living, current and future resources, and the “amount and type of support that the child would have been afforded if the parents had stayed together.” RCW 26.19.090(2). In this case, it does not appear that either parent completed college. (*See* CP 181) The parents are of relatively modest means; the father is a laborer and the mother works as an office administrator. (CP 154, 36) In fact, the trial court acknowledged that the parents are

“not extravagantly well off, [but] can afford to assist *at some level.*”
(CP 247, *emphasis added*)

Under these circumstances, it was well within the trial court’s discretion to require the daughter to contribute to the cost of her postsecondary education. *Marriage of Shellenberger*, 80 Wn. App. 71, 84, 906 P.2d 968 (1995) (courts “should consider the adult children’s ability to contribute to their own educations through grants, scholarships, student loans and summer and/or part-time employment during the school term”). Contrary to the mother’s claim on appeal, the trial court did not require the daughter to contribute to the cost of her postsecondary education when she was under 18. (App. Br. 21) The requirement that the daughter contribute to the cost of her education is only triggered *after* she reaches age 18. (CP 247, 292) Before then, the parents share in the total cost of the daughter’s postsecondary expenses.⁴ (CP 247, 291)

Also contrary to the mother’s claim, there was evidence that the daughter could contribute to the cost of her postsecondary

⁴ The father acknowledges that the language in the modified child support order is somewhat ambiguous. (See CP 291) But when read in conjunction with the trial court’s written ruling (CP 247), it is evident that it was anticipated that the parents share in the total cost of the daughters’ postsecondary support, except room and board, until the daughter reaches age 18, at which point she too will be required to contribute. (CP 291-92)

education. (App. Br. 21) For instance, there was evidence that the daughter, who is academically gifted, could receive scholarships, and had in fact already been offered some scholarship funds. (CP 180) There was also evidence that the daughter could apply for and receive federal aid through FAFSA. (CP 234-35) Under the trial court's order, any financial aid or scholarships that the daughter received would be applied first towards her one-third share of the cost of her education. (CP 292)

It was also within the trial court's discretion to limit the amount of postsecondary support to the cost of a public in-state university where the daughter lived. The mother complains that the trial court should have limited postsecondary support to the cost of Washington State University, not the University of Nevada. (App. Br. 5) In making its decision, however, the trial court noted that the daughter has lived in Nevada nearly all of her life. (CP 317) There was no evidence that the daughter had any desire to go to school in Washington State, but there was evidence that the daughter applied and was accepted at University of Nevada in Reno, thus it was obviously a place where she can obtain a degree in her chosen field. (CP 180) *See Shellenberger*, 80 Wn. App. at 85 ("a trial court should not require an objecting parent of modest means to pay for

private college where the child can obtain a degree in his or her chosen field at a publicly subsidized institution”).

In placing a limit on the parents’ postsecondary support, the trial court acknowledged that these types of decision must be made on a “case by case basis.” (CP 317) Its decision to limit the parents’ obligation to a publicly funded university in the state where the daughter lives was reasonable based on the evidence presented and within its discretion.

D. The mother’s remaining hodgepodge of alleged errors is meritless.

Lacking any support for her substantive arguments on appeal, the mother resorts to complaining about minutiae from the trial court’s decision that, even if there were any error, would be ultimately harmless in the grand scheme of the trial court’s decision, since the court concluded that it had all of the relevant information necessary to make an informed decision on the parents’ child support obligations:

Home state.

The mother complains about the “court’s ruling with regard to the child’s home state.” (App. Br. 10-12) But the trial court made no finding regarding the child’s home state, nor would have it been

required to do so to modify child support. “Home state” jurisdiction deals with a court’s authority to address custody, not child support. *See e.g.*, RCW 26.27.201(1)(a). There was no dispute that the trial court had authority to address the mother’s petition for modification, in which she asserted Washington’s jurisdiction because “there is a Washington Order of Child Support.” (CP 25)

Father’s income.

The mother complains that the father’s income was “erroneously set at an artificially low figure.” (App. Br. 12) The mother does not challenge the trial court’s determination of the father’s gross income, or its use of the father’s gross 2013 income to establish child support. (*Compare* CP 43 (mother’s proposed worksheet) with CP 282 (trial court’s worksheet); *see also* CP 268-72) Instead, she complains about the deductions taken from the father’s gross income. Specifically, she complains that the trial court calculated the father’s federal income tax using the 2014 tax table and its deduction of the father’s voluntary retirement contributions from his gross income. (App. Br. 14)

The trial court’s deduction of \$150 for the father’s voluntary retirement contributions is supported both by the evidence and law. RCW 26.19.071(5)(g) provides that up to \$416 per month shall be

deducted from the parents' gross incomes if there is a pattern of contributions. Here, there was evidence that the father contributed \$142.20 per month to his 401k in 2013 (CP 174) and \$150.82 each pay period in 2014. (CP 175)

RCW 26.19.071(5)(a) also requires the trial court to deduct "federal and state income taxes" from the parents' gross incomes. The mother complains that the trial court should have used the 2013 tax table to determine the father's income (App. Br. 14), but the trial court reasonably acknowledged that it used "2014 tax tables as the case was heard in 2014." (CP 317) The trial court rejected the mother's demand to use the tax deductions from the father's 2013 W-2, reasoning that "tax tables were used instead of W-2 deduction, as the deductions do not represent actual tax rates paid when the return is filed." (CP 317) This was a wholly reasonable decision by the trial court.

Financial disclosure.

The mother complains that the trial court did not have "adequate information to complete the worksheets." (App. Br. 13) But that is not true. Cowlitz County Local Rule 97(b) provides that in deciding issues regarding child support, the parties must provide paystubs, tax returns, and proposed worksheets. The trial court

had all of that information before it (CP 154-77, 195-223), and could competently complete the worksheets and determine child support based on that information. (CP 317: “The Court had sufficient information before it and the legal discretion to determine the deviation for whole family on the child support calculation”)

The mother also complains the father failed to provide a “sworn financial declaration.” (App. Br. 13) But as the trial court noted in denying the mother’s motion for reconsideration, she “did not raise any issue of an unsigned financial declaration before or during the course of the trial to this Court’s recollection, or at any point until this motion for reconsideration. Having failed to do so, any objection to that document was waived.” (CP 316) In any event, the mother cannot claim she was prejudiced by the fact that the father failed to provide a signed financial declaration. The father disclosed his income, and explained the current status of his household. No additional information was necessary, since the trial court acknowledged that it had “sufficient information before it” to make its decision. (CP 317)

The mother also complains that the trial court erred by failing to consider the father’s former wife’s income. (App. Br. 14-15) But the trial court did consider the father’s complete household

income, including that of his former wife. (CP 211-21) There was evidence that his former wife was not employed and financially depended on the father during the marriage while she pursued her education. (CP 211) In any event, it was irrelevant since the father and his wife were separated and an action was then pending to dissolve their marriage.

“Math.”

The mother also complains that the father failed to explain his math in support of his child support worksheets. (App. Br. 20) But the father was not required to do any math. The parties' W-2's paystubs, tax returns, and the federal income tax tables speak for themselves - no "math" was required to determine the parties' net incomes for purposes of child support.

SupportCalc™

Finally, the mother claims that it was an abuse of discretion for the trial court to use SupportCalc™ software to calculate the child support payment. (App. Br. 13-14) The trial court explicitly reasoned why using SupportCalc™ was appropriate: it is "an approved vendor for Washington court use and their forms have been certified to comply with the statute." (CP 245)

E. This Court should deny the mother's request for attorney fees and award attorney fees to the father for having to respond to this frivolous appeal.

The mother, who represents herself in this Court, as well as in the trial court, *pro se* is not entitled to attorney fees. *See Price v. Price*, 174 Wn. App. 894, 905, ¶ 23, 301 P.3d 486 (2013) (“because she is appearing *pro se*, she is not entitled to attorney fees”) (citing *Marriage of Brown*, 159 Wn. App. 931, 938-39, 247 P.3d 466 (2011); *see also Kay v. Ehler*, 499 U.S. 432, 435, 111 S.Ct. 1435 (1991) (a *pro se* litigant who is not a lawyer is not entitled to attorney fees). In the unlikely event that the mother prevails in her appeal, she would only be entitled to costs under RAP 14.2.

If any attorney fees are awarded, they should be awarded to the father for having to respond to this frivolous appeal. RAP 18.9(a) (authorizing terms and compensatory damages for a frivolous appeal); RAP 18.1; *Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114 (an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney fees), *rev. denied*, 100 Wn.2d 1023 (1983). The appellant has already been sanctioned in this Court for bringing a frivolous appeal, *Marriage of Toney and Aheren*, 150 Wn. App. 1042, 2009 WL 1610153, *rev. denied*, 167 Wn.2d 1007 (2009), and also has in the past been

sanctioned by the trial court for being intransigent and unnecessarily increasing the father's attorney fees. (CP 274; Sub no. 559, Supp. CP ____) The appellant's actions in bringing this appeal are no different, as it causes the father to unnecessarily increase his attorney fees to respond to a meritless appeal.

An award of attorney fees to the father in this case is particularly appropriate. Because the appellant represents herself, she is not constrained by attorney fees. While most litigants use the potential expense of attorney fees as a constraint before pursuing a frivolous appeal, the appellant has no such "check." Respondent asks the court to order appellant to pay his attorney fees for her intransigence and the lack of merit to this appeal so that in the future she might think twice before pursuing frivolous litigation in court.

IV. CONCLUSION

This Court should affirm the trial court's decision in its entirety and award attorney fees to the father for having to respond to this appeal.

Dated this 10th day of July, 2015.

SMITH GOODFRIEND, P.S.

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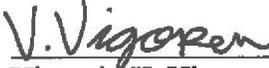
DECLARATION OF SERVICE

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

That on July 10, 2015, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 10th day of July, 2015.



Victoria K. Vigoren

SMITH GOODFRIEND PS

July 10, 2015 - 4:05 PM

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