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Division II  
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No. 50178-3

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION II

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**In re the Marriage of:**

KATHRYN MCRAE,

Respondent,

and

DANIEL MCRAE,

Appellant.

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

Daniel<sup>1</sup> challenges the trial court's decision regarding child support for the two minor children in this case. Specifically, he claims that the court erred in determining he was voluntarily underemployed and imputing his income based on his historical earnings. Daniel states that the court found him voluntarily underemployed despite the fact that he was working 40 hours per week for his business. Daniel grossly misstates the trial court's findings and the record. In actuality, the trial court did not believe Daniel's self-serving statements regarding his work hours, and the record supported the finding that Daniel misrepresented his work schedule. Quite simply, the court found that Daniel was not credible. Daniel fails to acknowledge the specific evidence before the trial court that he was voluntarily underemployed and not working full-time. This included Daniel's own earlier statements, signed under penalty of perjury, that he was reducing his work to less than full-time because he wanted to stay home with the children. Kathryn also produced daycare records showing that Daniel did not utilize daycare when the children were in his care. Additionally, Daniel's scorched-earth approach to this dissolution from the beginning focused on hurting Kathryn in any way possible, especially

financially, which further undermined his credibility with the court.

Daniel also claims the trial court erred in denying his request for a deviation of child support due to the shared residential schedule. The parties agreed to a week-on, week-off parenting plan with the children residing in both homes for equal amounts of time. The trial court, in its discretion, correctly denied the request for a deviation given the large disparity in income between Kathryn and Daniel's households, and the need for funds in Kathryn's household.

The trial court correctly imputed Daniel's income and denied his request for a deviation. The trial court's order ensures that the children will be financially supported. This Court should affirm the trial court's order and award Kathryn her attorney fees on appeal.

## II. RESTATEMENT OF FACTS

Kathryn (32) and Daniel (38) were married in July 2010. CP 360. The parties have two children: Aubrey, who was 4-years-old at the time of dissolution, and Charlie, who was 2-years-old. CP 641. Kathryn worked as a medical coder prior to the birth of their first child. *Id.* Daniel is a commercial fisherman who owns his own fishing business. *Id.* He does not, and did not, work multiple jobs as he describes in his brief. He simply had ownership interest in more than one company. CP 658.

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<sup>1</sup> First names are used for ease of the reader. No disrespect is intended.

The parties separated in February 2016 after 6 years of marriage. CP 642. As soon as Kathryn told Daniel that she wanted a divorce, Daniel took revenge in every way he could. He closed all of their joint accounts, and removed over \$200,000 in community funds. CP 642-43; 673-74. He took Kathryn's car and locked her out of the family home. CP 643. Daniel obtained a frivolous ex-parte domestic violence protection order against Kathryn in a neighboring county, which was dismissed when Daniel failed to appear at the return hearing. CP 671-72. Daniel also attempted to solicit Kathryn's friends and family to go against her. CP 632.

Several months after temporary orders were entered, the parties entered agreed final orders regarding all aspects of their dissolution, except for child support. CP 298-314. The trial court noted a motion for a decision regarding child support based on the record and affidavits of the parties. It was agreed by the parties that child support would be presented to the court in this way. CP 341-47.

**A. Daniel was self-employed with historical earnings that were almost double his alleged income at the time of trial.**

Daniel owns World Harvest, LLC, and Wolf Pack LLC which is a commercial geoduck business operating under two names for business reasons, as is commonly done. CP 377. Prior to the dissolution

proceedings, Daniel was a diver/captain for the business. CP 658. He operated the business as an owner. *Id.* Essentially, he was an “owner-operator.” *Id.* He also indicated in the early proceedings that he had income from his ownership interest in the F/V Silverhawk and F/V SeaWolf. CP 658.

Historically Daniel’s income was substantial. In 2014, Daniel earned \$171,725 with an Adjusted Gross Income of \$157,900. CP 381. His 2015 schedule K1 showed his income as \$247,976. CP 473-82. This included an 100% deduction of the two boats that were purchased for the business, making his Adjusted Gross Income \$146,884. *Id.* In 2016, Daniel earned \$93,094. CP 132-60.

**B. Daniel’s earlier statements about his work schedule contradicted his later statements to the trial court.**

Daniel’s own conflicting statements support the trial court’s finding that Daniel misrepresented his current work schedule. By his own account, Daniel made himself the “on-call guy” in January 2016 and “stopped diving all together to be home even more” with the children. CP 658. He claimed that his significant reduction in working hours was due to his commitment “to seeing the kids did not grow up in daycare.” *Id.* Daniel’s early statements to the court acknowledge that he was choosing to stay home instead of working full-time. CP 658-59.

Initially, Daniel insisted he would only gross \$4,000 per month due to his admittedly voluntary reduction in working hours. CP 657. In fact, he made \$93,094 despite his part-time schedule. CP 132-60. In another declaration to the trial court, and in response to Kathryn insisting that he worked 60-80 hours per week due to travel and prior to the dissolution, Daniel responded by stating he “did not work close to that amount” of time. CP 658-59. He then contradicted himself later in the proceedings (and in this appeal) by insisting her worked over 80 hours per week during the marriage. (App. Br.); CP 699-700.

**C. The daycare records, signed by Daniel, proved he was not working full-time.**

The evidence indicated that Daniel was not being honest with the court about working full-time. Not only do his own statements contradict this assertion, but the daycare records also show that Daniel was not working full-time. CP 574-631. The parties have two young children. It is practically impossible to be parenting even one of them and working at the same time. Yet, during his weeks with the children, Daniel would routinely keep the children home with him instead of utilizing daycare. *Id.* When he did use daycare, he would often drop them off late in the day or pick them up early. *Id.* For example, in January 2017 alone, he picked the children up at 1:15 pm, 2:25 pm, and 4:00 pm. CP 575-99. In this same

month, he consistently dropped them off after 9:00 am—sometimes at 10:00 am, 11:30 am, 2:30 pm, and even 4:30 pm. *Id.*

Similarly, in February 2017, he consistently kept the children home in lieu of working, according to the records. On his days, he would drop the children off at 10:00 am, 11:00 am, 1:30 pm, 2:30 pm, sometimes after 3:00 pm. CP 600-31. He would often pick them up early as well—on two occasions he picked them up at 10:00 am and 11:20 pm after Kathryn had dropped off the children in the morning, only hours earlier. *Id.*

**D. Daniel's repeated attempts to hurt Kathryn for initiating the dissolution undermine his credibility when evaluating his self-serving statements related to his work schedule.**

Throughout the dissolution proceedings, Daniel initiated a scorched-earth approach with the intent of depriving Kathryn money. This case began with Daniel removing hundreds of thousands of dollars from the parties joint account, refusing to allow Kathryn access to her car, and locking her out of the family home. CP 642-43, 673. He routinely refused to make payments to Kathryn pursuant to the temporary family law order. On one occasion, when he finally made a payment, he addressed the envelope to “Crazy Katie.” CP 407-409.

The trial court properly considered not only Daniel's conflicting statements in the record, but also his history of depriving Kathryn money with the intent of hurting her, to determine that Daniel lacked credibility

regarding his self-reported hours.

### III. ARGUMENT

#### A. Standard of review.

A trial court's child support order will only be overturned if the challenging party can show the court abused its discretion. *In re Marriage of Peterson*, 80 Wn. App. 148, 152, 906 P.2d 1009 (1995). The court abuses its discretion if the result is manifestly unreasonable or based on untenable grounds. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

Daniel asserts that "interpreting a child support order is also a legal question reviewed *de novo*," implying that the standard of review here is *de novo* as opposed to abuse of discretion. (App. Br. 7). Daniel cites *In re Marriage of Sprute* to support this assertion. 186 Wn. App. 342, 349, 344 P.3d 730 (2015). In *Sprute*, this Court reaffirmed that when the trial court is charged with *interpreting* an order of child support, on appeal the standard of review will be *de novo*. (emphasis added) *Id.* In that case, the appellate court reviewed *de novo* the trial court's interpretation of the previous order related to post-secondary support. *Id.* This is inapplicable here, as Daniel is asking that this Court review the trial court's discretionary findings and rulings involving the credibility of the parties and a requested deviation. The appropriate standard is abuse of discretion.

**B. The trial court properly concluded Daniel was underemployed.**

***1. Daniel misstates the trial court's holding.***

Daniel's appeal of the trial court's order is largely premised on the inaccurate assertion that Daniel was working 40-hours per week, and thus working full-time. Therefore, according to Daniel, the trial court erred as a matter of law because it imputed income to Daniel without finding that he was voluntarily underemployed for the purpose of evading child support. This misstates the finding of the court.

The record indicates that the court did *not* find Daniel's self-serving statements that he worked full-time credible. Therefore, the court found that he was voluntarily underemployed. In the oral decision, the trial court states that "[she was] not persuaded by Mr. McRae's argument in regards to his employment situation." RP 25-26.

Daniel's reliance on *Peterson* to support his assertion that the trial court erred in finding Daniel was voluntarily underemployed is misplaced. 80 Wn. App. 148. In that case, Division I reversed the trial court's imputation of the father's income by finding that the father was not gainfully employed despite his full-time employment. *Id.* The father had a law degree, but never practiced law. *Id.* at 151. He spent twelve years working for a union as a contract negotiator, and his income steadily increased during that time. *Id.* He then lost his job due to no fault of his own. Thereafter, he struggled for years, even

attempting to open his own law practice which generated little income. *Id.* At the time of trial, it was undisputed that the father was working full time for a bail bond company as their in-house legal counsel. *Id.* Despite acknowledging that he was employed full-time, the trial court still determined he was voluntarily underemployed and imputed his income based on the father's age and education level. *Id.* at 153-54. The ruling was reversed, and the Court held that under the statute the trial court may only impute income to a full time working obligor if the court finds they are underemployed to evade child support. *Id.* at 153-55.

Unlike *Peterson*, in this case it *was* disputed that Daniel was working full-time. The trial court *did not* agree that Daniel was underemployed yet working on a full-time basis—the trial court found that Daniel was not working full time and this finding is supported in the record. CP 412; RP 25-26.

2. ***The trial court correctly determined that Daniel was underemployed because the evidence suggested he was not working full-time.***

The trial court properly imputed Daniel's income in accordance with applicable statute, which states:

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.** A court shall not impute income to a parent who is gainfully employed on a full-time

basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation. Income shall not be imputed for an unemployable parent. Income shall not be imputed to a parent to the extent the parent is unemployed or significantly underemployed due to the parent's efforts to comply with court-ordered reunification efforts under chapter 13 RCW or under a voluntary placement agreement with an agency supervising the child.

(emphasis added) RCW 26.19.071(6). The statute requires consideration of the following factors in determining if a parent is voluntarily underemployed: (1) the parent's work history; (2) education; (3) health; (4) age; or (5) any other relevant factors. *Id.* The trial court properly analyzed the specific facts of this case in accordance with the statute to determine Daniel was voluntarily underemployed. Daniel was self-employed, and the court acknowledged the ease of business owners to manipulate their own schedule, earnings, and working hours. RP 16. Daniel is also young and healthy, and had established his business in the fishing industry for quite some time. CP 377-38. His earning history indicated he made substantially more money prior to his admitted voluntary reduction in hours. CP 657-658.

The trial court correctly considered Daniel's own conflicting statements in the record, the daycare records, and his previous attempts to deprive Kathryn of money, as "other relevant factors" under RCW 26.19.071(6). The court noted in its oral decision that it did not find Daniel's testimony about his working hours credible. RP 25-26.

Daniel asserts that the *In re Marriage of Wright* case is inapplicable here, because Daniel worked full-time and made \$90,000 a year. 78 Wn. App. 230, 896 P.2d 735 (1995). In so asserting, Daniel claims that the trial court was not legally permitted to find Daniel underemployed. (App. Br. 8-11). This assertion ignores the evidence in the record, and the applicable caselaw. In *Wright*, a mother was the primary caretaker of her five children in addition to working part-time as a nurse and part-time in the National Guard. 78 Wn. App. at 234. Despite her two part-time jobs and obligations to their children, the trial court found she was underemployed and imputed her income based on evidence that she could obtain employment as a full-time nurse. *Id.* The *Wright* Court upheld the trial court's order "[b]ecause the record discloses that Lynette Wright could have obtained full-time employment as a nurse, we cannot say that the trial court erred in imputing additional income. . . ." *Id.* Here, as in *Wright*, the record supports the finding that Daniel was underemployed because Daniel was not working full-time despite his self-serving statements to the contrary. A parent's voluntary reduction in working hours to stay home with children still requires that parent's income be imputed as a full-time earner. *Id.* While Daniel did make over \$90,000 a year in 2016, this was substantially less than the preceding years when he was working full-time and the court properly considered his significant decline in income. As in *Wright*, the court here did not abuse its discretion in imputing income to Daniel. *Id.*

Daniel's own statements about his work schedule indicate that he was voluntarily choosing to drastically reduce his working hours because he did not want the children to grow up in daycare. CP 658-59. The daycare records support Daniel's statements about staying home with the children. CP 575-631. When the children are in his care, which is every other week, he would often not utilize daycare. *Id.* Daniel offered no explanation for this, other than that the children were home with him during these times. On at least one occasion, he brought the children to daycare an hour before Kathryn was due to pick them up. *Id.* The children in this case were young—two and four—and the trial court properly inferred that Daniel was not working while also caring for two young children that require almost constant attention. While Kathryn agrees staying home with children is a noble goal and difficult job, the law still requires Daniel's income be imputed to reflect full-time earnings. *See Wright*, 78 Wn. App. 230.

Daniel only claimed to work full-time when it suited him to do so. When it did not, he claimed to work part-time. The objective evidence before the trial court shows that Daniel was working less than full-time. The trial court's finding that Daniel was voluntarily under-employed is supported by substantial evidence.

**C. The trial court correctly imputed Daniel's income using his historical earnings in accordance with the priority schedule in RCW 26.19.071(6).**

After finding Daniel was underemployed and not working full-time, the trial court imputed Daniel's income under the priority schedule in RCW 26.19.071(6) which states:

In the absence of records of a parent's actual earnings, the court shall impute a parent's income in the following order of priority:

- (a) Full-time earnings at the current rate of pay;
- (b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;
- (c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;
- (d) Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is recently coming off public assistance, aged, blind, or disabled assistance benefits, pregnant women assistance benefits, essential needs and housing support, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;
- (e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.

Because Daniel is self-employed, it would be impossible for the court to impute his income based on his current rate of pay as Daniel was not an hourly or salaried employee. RCW 26.19.071(6) required the court to move down the priority list and determine his income based on his historical rate of pay. To

determine Daniel's income, the court averaged his earnings for the preceding three years. The trial court correctly averaged Daniel's historical earnings from 2014-2016 under the statute in imputing his income.

**D. The trial court did not err by finding that the children spend most of their time with Kathryn, and even if it did the error was harmless.**

Daniel appeals the form language found in the Order of Child Support, which states that the children reside with Kathryn "most of the time." The evidence supported the finding that Kathryn was the "primary parent" for the children despite the residential schedule. *See, e.g.*, CP 671. Regardless, even if the trial court erred in finding that the children lived with Kathryn "most of the time" under the joint residential schedule the error is harmless.

In Washington, parties are required to use the mandatory state forms for child support. RCW 26.19.220. Appropriately, the trial court used the standard Order of Child Support form. Daniel appeals the language in section 8, entitled "Standard Calculation," which is the section in the form order which lists the obligor parent, and the standard calculation under the worksheets regardless of any ordered deviation. Daniel makes significantly more money than Kathryn; therefore, he is the obligor parent regardless of any shared residential schedule because the child support obligation is allocated "between parents based on each parent's share of the combined monthly income." RCW 26.19.080(1); *In re Marriage of Schnurman*, 178 Wn. App. 634, 639, 316 P.3d 514 (2013). As

the higher earner, his obligation under the worksheets would be greater than Kathryn's. *Id.*

RCW 4.36.240 states that “[t]he court shall, in every stage of an action, disregard any error or defect. . . which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.” To disrupt the trial court’s ruling, an alleged error must have prejudiced the appealing party: “[i]t is well established that errors in civil cases are rarely grounds for relief without a showing of prejudice to the losing party.” *Saleemi v. Doctor’s Assocs.*, 176 Wn.2d 368, 380, 292 P.3d 108 (2013). Here, the form language at issue had no bearing on the trial court’s decision whatsoever. Daniel does not even allege or argue that he was prejudiced by the trial court’s inclusion of this form language.

The trial court did not err by including the standard form language. The finding is supported in the record. Even if it was included in error, the error is harmless.

**E. The trial court properly denied Daniel’s request for a deviation of child support.**

A deviation from the standard support obligation is the exception to the rule. *Burch v. Burch*, 81 Wn. App. 756, 761, 916 P.2d 443 (1996). The law affords the trial court great discretion in evaluating a requested deviation, and generally trial courts are not reversed on such decisions. *Goodell v. Goodell*,

130 Wn. App. 381, 391-92, 122 P.3d 929 (2005). A trial court's decision regarding child support will only be overturned for manifest abuse of discretion. *In re Marriage of Booth*, 114 Wn.2d 777, 776, 791 P.2d 519 (1990).

Due to the disparity of incomes between Daniel and Kathryn, the court properly denied Daniel's requested deviation of child support under RCW 26.19.075. Daniel contends that the trial court erred in denying his request because the court did not find that a deviation would result in insufficient funds in Kathryn's home. (App. Br. 13-16). This argument is without merit as the trial court did find, in both its oral and written findings, that a deviation would result in insufficient funds in Kathryn's home. In its oral ruling, the trial court states:

In looking at the factors under RCW 26.19.075, I don't believe a deviation is needed or appropriate in this case and will not be ordered. There is a large disparity in income and would result—a deviation would result in leaving Ms. McRae, the petitioner, with insufficient funds.

RP 26. The Court also listed in the Order of Child Support that the reason for denying the requested deviation was “. . . a deviation would leave insufficient funds in the mother's household.” CP 414. Additionally, Kathryn's financial declaration filed in this matter and part of the record before the trial court showed a deficit of over \$2,000 per month in Kathryn's home. CP 315.

Daniel further contends that the trial court erred by not making a written finding that the court considered Daniel's increased expenses for the children

due to the residential schedule. (App. Br. 13-16). The plain language of the statute states the court need only *consider* the increased expenses and not that the court need to enter written findings regarding such a consideration. RCW 26.19.075(1)(d). Additionally, the “lack of a trial court’s specific findings is not fatal, and in the absence of a finding on a particular issue, an appellate court may look to the oral opinion to determine the trial court’s basis for the deviation.” *Matter of Marriage of Crosseto*, 82 Wn. App. 545, 560, 918 P.2d 954 (1996) (citing *In re Marriage of Booth*, 114 Wash 2d 772, 791 P.2d 519 (1990)). *Crosseto* is dispositive. Here, the trial court did make the required findings both in its oral ruling and written order. RP 26, CP 414. In addition, the record before the court indicates that Daniel’s requested deviation was inappropriate. Even with his part-time earnings of over \$90,000 per year, he made almost double what Kathryn made. Yet, the parties both had almost the exact same expense for the children—in fact, Kathryn spent more on the children per month than Daniel. CP 319; 401. Daniel declares under penalty of perjury that he spends \$800 a month in clothing and childcare, and \$550 per month in food for 3 people, for a total of \$1350. CP 401. Kathryn declares that she spends closer to \$1,000 per month in clothing and childcare, and \$600 per month in food for 3 people, for a total of \$1600. CP 319.

RCW 26.19.075(1)(d) permits a deviation from the standard calculation based on a shared residential schedule. Any deviation, however, is still within

the trial court's discretion. *State ex rel. M.M.G. v. Graham*, 159 Wn.2d 623, 627, 152 P.3d 1005 (2007). The plain language of the statute grants this discretion.

RCW 26.19.075(3) and the case law directs a process for consideration of a requested deviation. *Graham*, 159 Wn.2d at 627-28. The trial court properly followed the mandated process. It first determined the income of the parties, and calculated the standard obligation. RP 25-27. The court identified Daniel as the obligor parent due to his significantly higher income. *Id.* At Daniel's request, the court considered a downward deviation due to the shared schedule. *Id.* The court, in its discretion, correctly denied his request after determining a deviation would result in insufficient funds in Kathryn's household due to the disparity in incomes. *Id.* This is the correct process under both the statute and the holding in *Graham*. 159 Wn.2d at 627-28.

**F. This Court should award Kathryn her reasonable attorney fees.**

This Court should award Kathryn her attorney fees on appeal. RCW 26.09.140; RAP 18.1(a); *Marriage of Leslie*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998) (awarding fees to the wife “[g]iven the disparity in income and assets between the two parties” and the husband's ability to pay), *rev. denied*, 137 Wn.2d 1003 (1999).

Despite the fact that Daniel makes significantly more money than Kathryn, Kathryn has not received any award of attorney fees either by

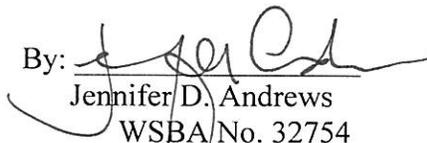
agreement or from the trial court. Kathryn now has to defend the trial court's ruling against Daniel's appeal of the trial court's discretionary, fact-based decisions clearly supported by substantial evidence. This Court should award Kathryn her fees based on her need, and Daniel's ability to pay.

#### IV. CONCLUSION

This Court should affirm the trial court's ruling regarding child support and award Respondent her attorney fees on appeal.

Dated this 28<sup>th</sup> day of November, 2017.

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