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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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**REPLY BRIEF OF APPELLANT**

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## REPLY STATEMENT OF THE CASE

**A. Prior to and during the marriage, Daniel owned and operated up to four commercial diving boats, and during the marriage, worked several jobs.**

Daniel explained that prior to the marriage, he started a commercial geoduck harvest diving operation in October 2004. BA 3 (citing CP 377). He owned and maintained up to four commercial diving boats, ran the businesses, and was employed as a diver/captain on his boats. *Id.* He typically worked more than 80 hours a week, including 12-hours-a-day on the water, and additional time running the businesses. *Id.* (citing CP 378). He could earn over \$150,000 a year working those many jobs. *Id.* (citing CP 380-81).

Kathryn claims that Daniel “does not, and did not, work multiple jobs as he describes himself in his brief.” BR 2 (citing CP 658). That citation is to one of Daniel’s declarations, which says this:

I built my business well while married to Katie, but now that she has moved out my income is dramatically lower than in the past. 2014 was a shockingly good year. I will never make anywhere near that amount again, partly because I will not be diving in addition to being the captain. I do not make \$15,000.00/month. I make \$4,000.00/month.

Katie has never had any involvement in our family finances or my business finances. Her implications that I make or that we have “tons of money” are simply wishful thinking. . . .

In November 2015, to work on our marriage I cut back on work to be at home with Katie and the kids. Katie agreed to this. I made myself the “on-call guy” rather than lay off one or two workers and work full-time myself.

In January, I stopped diving all together to be home even more because our marriage didn’t seem to be improving. Katie agreed to this, too, or I wouldn’t have done it. My “diving captain” salary accounted for \$100,000.00/year. . . .

My income consists of my business, World Harvest LLC. In the past I have been the captain and diver on the F/V Equalizer. I have income from my ownership in the F/V Silverhawk and F/V Sea Wolf. I remain committed to seeing that our kids don’t grow up away from home in daycare.

Since Katie left us, I am in a situation where I can’t be with my kids if I’m diving because of the long hours and commuting time. Katie knows I have decided to stay home and one of her first comments was, “I’ve been asking for you to do that for years.” Katie says in her declaration that she, “. . . actually would be thrilled if [I] would spend more time with the children on a consistent basis.” . . . That’s exactly what I am doing now. The kids don’t need to go to daycare with me at home. It will be too expensive to afford, anyway.

CP 657-58. Kathryn’s own citation directly supports Daniel’s assertion, and is directly contrary the assertions in her brief. BR 2.

Indeed, Kathryn concedes that Daniel’s adjusted gross income went from a historical high of \$157,900 in 2014, to \$93,094 in 2016. BR 4. This occurred because he worked only full time. BA 6. Kathryn’s assertions are unsupported.

**B. After a 5.8-year marriage, the parties dissolved their marriage by agreement, dividing their property, agreeing to roughly 50/50 custody of their two children, and leaving only child support for judicial resolution.**

Daniel explained that the parties entered into CR 2(A) Agreements in December 2016, dividing their property, and providing essentially 50/50 custody for their two children. BA 4 (citing CP 298-314). The court incorporated the terms of their Agreements into its final orders in February 2017. *Id.* (citing CP 348-76). The parties left child support for judicial resolution. *Id.*

Kathryn fails to respond, tacitly conceding these points.

**C. Kathryn misled the trial court.**

Daniel noted that Kathryn failed to disclose the operative portion of RCW 26.19.071(6). BA 4-5. She does not deny it. Nor does she challenge the substantial evidence regarding his work. BA 6.

**D. Kathryn's vituperations are irrelevant.**

Repeatedly claiming that Daniel engaged in "scorched-earth" litigation and sought "revenge" against her, Kathryn asserts that the court did not find Daniel's statements credible. *See, e.g.*, BR 1-2, 6-7. The Court will note that Kathryn cites no credibility finding by the trial court. None exists.

Kathryn's vituperations are as false as they are irrelevant.

## REPLY ARGUMENT

**A. Interpreting statutes and court orders is a question of law, reviewed *de novo*.**

As Daniel pointed out, interpreting the child support statute, or a child support order, are questions of law, reviewed *de novo*. BA 7. Kathryn admits this. BR 7 (“*interpreting* an order of child support” is reviewed *de novo*). She also claims that Daniel misinterprets the trial court’s rulings. BR 8-9. This dispute is reviewed *de novo*.

**B. The trial court erred as a matter of law in imputing income to a fully-employed parent who is not seeking to evade his child-support obligations, but rather to spend time with his children under a 50/50 parenting plan.**

Daniel explained that the trial court erred as a matter of law in imputing income to a fully-employed parent who is not seeking to evade his child-support obligations, but rather to spend time with his children under a 50/50 parenting plan. BA 8-11. Kathryn omitted the key statutory language, leading the trial court into legal error. *Id.* The statute, RCW 26.19.071(6) unambiguously requires a finding that even though Daniel is employed full time, he was purposely underemployed to reduce his child support obligation. *Id.* The trial court did not so find. CP 412-13. *In re Peterson*, 80 Wn. App. 148, 906 P.2d 1009 (1995) is dispositive. This Court should reverse.

Kathryn argues that the trial court's oral statement that she was not "persuaded by Mr. McRae's argument in regards to his employment situation" (RP 25-26) somehow amounts to a credibility finding against him. BR 8, *see also* BR 10. Not only is Kathryn facially incorrect – rejecting an "argument" is not a credibility finding – but the court did not enter any credibility finding. CP 411-19. Kathryn's other vituperations are irrelevant to child support.

Kathryn attempts to distinguish ***Peterson*** on the basis that the lawyer in that case undisputedly worked full-time, but here that assertion was disputed. BR 8-9. She misses the point. Under ***Peterson***, the required finding is that Daniel is purposely underemployed *to reduce his child support obligation*. BA 8-11. The trial court could have – but refused to – check that box. CP 412-13. ***Peterson*** requires reversal here.

**C. The trial court also erred in finding Daniel voluntarily underemployed.**

Daniel explained that the trial court also erred in finding Daniel voluntarily underemployed. BA 11-12. This Court held that part-time work is insufficient, whatever the reason. ***Marriage of Wright***, 78 Wn. App. 230, 896 P.2d 735 (1995) ("***Wright 1995***"). But ***Wright 1995*** does not apply where, as here, Daniel works 40-50 hours a

week (or more) and makes over \$90,000 a year. *Id.* Kathryn cites no finding to the contrary.

Kathryn infers from a day-care schedule that Daniel is not working every other week. See BA 5-6, 12. The record does not support her supposition. Daniel's work now is running his companies. He can do that from home. He no longer goes out to captain or dive, specifically so that he can work from home and be with his kids. Many people work from home. That does not mean that they do not work, or even that they are "voluntarily underemployed." Daniel makes his money the old-fashioned way: he *earns* it.

Similarly, Kathryn implausibly claims that it would have been "impossible" for the trial court to determine Daniel's current rate of pay because he is self-employed. BR 13-14. Many people are self-employed, yet no one has any trouble determining their current rate of pay. Kathryn is incorrect.

**D. The trial court erred in finding that the children spend most of their time with Kathryn under the parties' agreed 50/50 parenting plan.**

Daniel explained that the trial court erred in finding that the children spend most of their time with Kathryn under the parties' agreed 50/50 parenting plan (CP 413). BA 12-13. No substantial evidence supports this finding. *Id.* (citing *Marriage of Katare*, 175

Wn.2d 23, 283 P.3d 546 (2012)). On the contrary, Kathryn admitted that she “agreed to a 50/50 parenting plan because our children were doing well.” *Id.* (citing CP 328). She admitted that her “rent and daycare for the children is nearly 65% of my earnings,” working full time at \$56,500 per year – in other words, she, like Daniel, works full time. *Id.* She presented no evidence that 50/50 parenting is anything less than equal time with the children. *Id.* (citing CP 327-29).

Kathryn falsely claims that her designation as “primary parent” proves that the children actually do reside with her “most of the time.” BR 14 (citing CP 671). That citation has nothing to do with her “primary parent” designation. And such a designation proves nothing about with whom the children reside “most of the time.” Nor can (or does) Kathryn cite any evidence that this finding is true. It is false.

Without expressly conceding the court’s obvious error, Kathryn suggests that this court should “disregard any error or defect . . . which shall not affect the substantial rights of the adverse party” – in short, an error must cause prejudice. BR 15 (citing RCW 4.36.240; ***Saleemi v. Doctor’s Assocs.***, 176 Wn.2d 368, 292 P.3d 108 (2013)). Daniel is prejudiced by a false finding that his children reside “most of the time” with their mother – this is a public document to which his children may be exposed. And absent justification for the

trial court's other rulings challenged here, it is difficult to know whether this false finding was – or might be on remand – used against Daniel. It is unsupported. The Court should strike it.

**E. The trial court erred in refusing to grant a residential credit without the necessary findings that a deviation would result in insufficient funds in Kathryn's household to meet the basic needs of the children.**

Daniel explained that the trial court erred in refusing to grant him a residential credit without the required findings supporting a conclusion that deviation will result in insufficient funds to meet the children's basic needs. BA 13-16 (citing RCW 26.19.075(1)(d); ***Marriage of Schnurman***, 178 Wn. App. 634, 640, 316 P.3d 514 (2013) (citing RCW 26.19.075(3); ***State ex rel. M.M.G. v. Graham***, 159 Wn.2d 623, 152 P.2d 1005 (2007))). The Court should reverse and remand for reconsideration of the order. *Id.*

Kathryn misrepresents Daniel's argument as being that the trial court did not find that a deviation would result in insufficient funds in Kathryn's home. BR 16. Daniel obviously did not argue that. BA 13-16. Rather, he noted that the trial court failed to enter the statutorily required findings *justifying* that conclusion. *Id.*

Kathryn does respond to Daniel's actual argument, claiming that in general, appellate courts may look to an oral *opinion* to fill-in

missing findings. BR 17 (citing **Marriage of Crosseto**, 82 Wn. App. 545, 918 P.2d 954 (1996) (citation omitted)). While calling **Crosseto** “dispositive” – even though **Crosseto** has nothing to do with this issue and states only general propositions – she fails to even mention, much less distinguish, the directly on-point, controlling authority Daniel cited, **Schnurman**. This Court should reverse and remand for reconsideration of a residential credit.

### CONCLUSION

*“Truth is a good dog;  
but beware of barking too close  
to the heels of an error,  
lest you get your brains kicked out.”*

– Samuel Taylor Coleridge, *Table Talk*

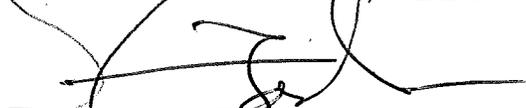
*“Truth is a cow which will yield such people no milk,  
and so they have gone to milk the bull.”*

– Samuel Johnson, *Boswell’s Life of Johnson*

This Court should reverse and remand.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of January 2018.

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**CERTIFICATE OF SERVICE**

I certify that I caused to be filed and served, a copy of the foregoing, **REPLY BRIEF OF APPELLANT**, on the 29<sup>th</sup> day of January 2018, as follows:

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## Transmittal Information

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