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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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IN RE: THE MARRIAGE OF:

WYATT POWELL,

Respondent,

v.

MONIQUE POWELL,

Respondent.

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**BRIEF OF RESPONDENT**

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**A. RESPONDENT'S STATEMENT OF ISSUES**

1. Whether the Court should decline to review the issues raised by Appellant where she failed to provide a sufficient record for review.
2. Whether the Court has discretion to omit nonrecurring overtime from Mr. Powell's income for purposes of calculating child support.
3. Alternatively, whether the Court should reserve ruling and remand to the trial court for entry of a written finding of fact regarding nonrecurring overtime earned by Mr. Powell.

**B. RESPONDENT'S STATEMENT OF THE CASE**

Wyatt and Monique Powell are the parents of one son, R.P., age four.<sup>1</sup> On July 28th, 2015, Mr. Powell filed a Petition for divorce with joinder, signed by Ms. Powell.<sup>2</sup>

A trial was held on August 2nd, 2017.<sup>3</sup> Judge Serko adopted the Guardian Ad Litem's proposed residential schedule and calculated Mr. Powell's income at a rate of \$42.79 per hour, ruling that overtime would not be included.<sup>4</sup> A final decree, findings of fact, and final parenting plan were entered on August 18th, 2017, but the issue of child support was reserved for August 28th, 2017.<sup>5</sup> Mr. Powell asked for a deviation because "his overtime is non-recurring income based on his previous two years of

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<sup>1</sup> CP 135.

<sup>2</sup> CP 135.

<sup>3</sup> CP 113.

<sup>4</sup> CP 113.

<sup>5</sup> CP 113.

income.”<sup>6</sup>

On September 15, 2017, the trial court entered a final child support order that did not include Mr. Powell’s recent overtime as part of his standard income.<sup>7</sup>

Ms. Powell filed a Notice of Appeal on October 10, 2017, seeking review of the Final Child Support Order and the Order Denying Motion/Granting Attorney Fees.<sup>8</sup>

### C. ARGUMENT

Ms. Powell alleges two errors on appeal: first, Ms. Powell asserts that the trial court abused its discretion by not including Mr. Powell’s overtime pay in determining Mr. Powell’s income; second, that the trial court’s award of attorney’s fees to Ms. Powell was not large enough because it was predicated on the trial court’s calculation of Mr. Powell’s income.<sup>9</sup>

The crux of Ms. Powell’s appeal is that the trial court abused its discretion by ruling that Mr. Powell’s nonrecurring overtime would not be included in calculating his income.

1. **This court should decline to address Ms. Powell’s appeal where she has failed to provide this court with a sufficient record to review the alleged errors she identifies.**

Generally, an insufficient record on appeal precludes appellate

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<sup>6</sup> CP 113.

<sup>7</sup> CP 142-154.

<sup>8</sup> CP 161-162.

<sup>9</sup> Appellant’s Opening Brief, p. 2-5.

review of alleged errors.<sup>10</sup> Ms. Powell alleges that the trial court's decision to exclude Mr. Powell's overtime as part of his income was erroneous, as was the amount of attorney's fees awarded, but failed to provide this Court with a transcript of the trial and the hearing where the trial court stated its findings and conclusions supporting its ruling regarding overtime pay and its determination to award attorney's fees.<sup>11</sup> The Court should decline to review these issues for lack of a sufficient record, and dismiss this appeal.

**2. The trial court did not abuse its discretion in refusing to consider Mr. Powell's overtime in calculating his income for child support purposes.**

In the event this Court decides to review the alleged errors, Mr. Powell submits the following argument.

*a. Standard of Review.*

"[A] trial court's order of child support [is reviewed] for abuse of discretion. A trial court abuses its discretion if its decision rests on unreasonable or untenable grounds, or if it bases its ruling on an erroneous view of the law or employs an incorrect legal analysis."<sup>12</sup>

*b. The trial court's decision to exclude Mr. Powell's nonrecurring overtime from the calculation of his income was not an abuse of discretion.*

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<sup>10</sup> *Cuesta v. Emp't Sec. Dep't*, 200 Wn. App. 560, 568, 402 P.3d 898 (2017).

<sup>11</sup> CP 113.

<sup>12</sup> *In re A.L.*, 185 Wn. App. 225, 238-39, 340 P.3d 260, 266-67 (2014).

Chapter 26.19 RCW sets forth the child support schedule. In determining the amount of child support owed, the trial court begins by setting the basic support obligation.<sup>13</sup> This is based on the statute's economic table based on the parents' combined monthly net income considering the number and age of the children.<sup>14</sup> The economic table is presumptive for combined monthly net incomes of \$12,000 or less, the case here.<sup>15</sup> The court next allocates the child support obligation between the parents based on each parent's share of the combined monthly income.<sup>16</sup> The court then determines the standard calculation, the presumptive amount of child support owed by the obligor parent to the obligee parent.<sup>17</sup> The obligor is the parent with the greater theoretical support obligation.<sup>18</sup>

The next step is consideration of any deviations from the support obligation.<sup>19</sup> RCW 26.19.075 provides, in pertinent part,

(1) Reasons for deviation from the standard calculation include but are not limited to the following:

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<sup>13</sup> RCW 26.19.011(1).

<sup>14</sup> RCW 26.19.011(1).

<sup>15</sup> RCW 26.19.065.

<sup>16</sup> RCW 26.19.080(1).

<sup>17</sup> RCW 26.19.011(8).

<sup>18</sup> *In re Marriage of Schnurman*, 316 P.3d 514, 178 Wn.App. 634 (Wash.App. Div. 1 2013)

<sup>19</sup> RCW 26.19.011(4), (8).

(b) **Nonrecurring income.** The court may deviate from the standard calculation based on a finding that a particular source of income included in the calculation of the basic support obligation is not a recurring source of income. Depending on the circumstances, nonrecurring income may include overtime...Deviations for nonrecurring income shall be based on a review of the nonrecurring income received in the previous two calendar years.

Mr. Powell filed his previous two years of income.<sup>20</sup> In 2015, Mr. Powell made \$75,000 and in 2016 he made \$85,000.<sup>21</sup> Mr. Powell never made anywhere near a gross amount of a \$134,000.00 per year as argued by Ms. Powell below.<sup>22</sup> Examining his last two years of pay, it is clear that his overtime is a source of **nonrecurring** income for Mr. Powell.<sup>23</sup> Mr. Powell can and most likely will be laid off again when his company has a downturn in business.<sup>24</sup> Looking at Mr. Powell's paystubs, his hours vary from twenty hours to sixty hours in some weeks.<sup>25</sup> There is no guarantee that Mr. Powell will continue to work the same number of hours.<sup>26</sup>

Here, the trial court deviated from the child support calculation schedule because it found, after reviewing Mr. Powell's pay stubs and tax information for the two years prior to trial, that Mr. Powell's overtime

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<sup>20</sup> CP 117; CP 98; CP 176-179.

<sup>21</sup> CP 117; CP 176-179.

<sup>22</sup> CP 117.

<sup>23</sup> CP 117.

<sup>24</sup> CP 117.

<sup>25</sup> CP 117.

<sup>26</sup> CP 117.

income was nonrecurring income. The trial court did not abuse its discretion in ruling that Mr. Powell's income would not include Mr. Powell's nonrecurring overtime because RCW 26.19.075 permits the trial court to do exactly what it did.

3. **Alternatively, this court should remand this case for a hearing to permit the trial court to make a record as to why it excluded Mr. Powell's overtime pay.**

Deviations from the standard calculation of child support are within the superior court's discretion.<sup>27</sup> Overtime income is presumptively included for determining child support, but the court may exclude overtime income if it finds that it is a nonrecurring source of income.<sup>28</sup> The superior court must base this determination on a review of the income received in the previous two calendar years.<sup>29</sup> Additionally, "[w]ritten findings of fact must support the court's order or any deviation from the uniform support schedule and be supported by the evidence."<sup>30</sup>

If this court is inclined to consider Ms. Powell's arguments on appeal, it is critical that it have a complete record of the trial court's findings and conclusions supporting its ruling that Mr. Powell's overtime would not be considered as part of his income for purposes of child

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<sup>27</sup> *In re Marriage of Newell*, 117 Wash.App. 711, 719 n. 18, 72 P.3d 1130 (2003).

<sup>28</sup> RCW 26.19.075(1)(b); *Newell*, 117 Wash.App. at 719 n. 18, 72 P.3d 1130.

<sup>29</sup> *Id.*

<sup>30</sup> *In re Marriage of Wayt*, 63 Wash.App. 510, 512, 820 P.2d 519 (1991)(citing former RCW 26.19.020(2), (5) (1989)).

support calculation. The trial court's findings of fact and conclusions of law were entered orally following the trial.<sup>31</sup> As noted above, Ms. Powell has failed to provide this court with a transcript of the trial or any other hearing below.

While it is true that the trial court failed to enter written findings of fact and conclusions of law regarding its decision to exclude Mr. Powell's overtime from the calculation of his income, those findings are contained in the court's oral record. If this Court considers Ms. Powell's appeal, before it makes any rulings on the appeal, it should remand the case to the trial court for entry of the trial court's written findings of fact and conclusions of law regarding the overtime. Alternatively, this court should order Ms. Powell to provide a transcript of the hearing where the trial court made its oral findings and conclusions.

- 4. This Court should decline Ms. Powell's request for attorney's fees on appeal because there are no findings of fact and conclusions to support the award in the trial court.**

"[A] fee award must be accompanied by findings of fact and conclusions of law to establish a record adequate for review."<sup>32</sup> Appellate courts exercise a supervisory role to ensure that a trial court's discretion in making an attorney fee award is properly exercised on articulable

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<sup>31</sup> CP 172-174.

<sup>32</sup> *Matter of Marriage of Laidlaw*, 409 P.3d 1184, 1190 (2018) (quoting *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wash. App. 697, 715, 9 P.3d 898 (2000)).

grounds.<sup>33</sup> Therefore, such an award must be supported by findings of fact and conclusions of law sufficient to establish an adequate record for review.<sup>34</sup> “[T]he absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record.”<sup>35</sup>

The Court should remand this case to the trial court to enter findings of fact and conclusions of law regarding the award of attorney’s fees to Ms. Powell. Alternatively, the Court should enter an order requiring Ms. Powell to provide transcript[s] in which the trial court’s decision to award attorney’s fees is recorded.

#### **D. CONCLUSION**

Ms. Powell failed to produce an adequate record to allow review of the issues raised in this appeal. The Court should decline to consider and dismiss the appeal or, alternatively, remand for findings of fact and conclusions of law regarding deviation of child support based on nonrecurring overtime and the award of attorney’s fees to Ms. Powell.

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<sup>33</sup> *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

<sup>34</sup> *Mahler*, 135 Wn.2d at 435, 957 P.3d 898.

<sup>35</sup> *Id.*

Respectfully submitted this 31 day of May, 2018.



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**May 30, 2018 - 5:29 PM**

**Transmittal Information**

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