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No. 51441-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

ROBERT WOOD,

Appellant,

and

ANGELINA WOOD,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE ANNE L. HIRSCH

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

The husband challenges nearly every one of the trial court's fact-based discretionary rulings in this dissolution proceeding following a 16.5-year marriage. For instance, the husband, a retired naval officer capable of earning more than \$100,000 per year, challenges the trial court's award of four years of maintenance and slightly more community property to the wife, who has only a high school diploma, stayed home to care for the parties' three children, and currently earns only \$20,450 as a paraeducator.

To the extent the trial court made any error, it was in refusing to impute income to the husband based on what he is capable and qualified of earning when he quit his job earning \$131,000 annually, shortly before the parties separated, to become a bus driver, earning less than a third of his former income. A parent cannot avoid obligations to his children by voluntarily remaining in a low paying job. If this Court remands to the trial court for any reason, it should reverse the child support order and direct the trial court to impute the husband's income at his historical rate of pay, and recalculate his child support obligation for the parties' children. This Court should also order the husband

to pay the wife's attorney fees on appeal, as he has the ability to pay and she has the need for her fees to be paid.

II. CROSS-APPEAL ASSIGNMENT OF ERROR

The trial court erred in refusing to impute the husband's income at his historical rate of pay in calculating his child support obligations. (4/17 RP 49-50; CP 59-73)

III. CROSS-APPEAL ISSUE STATEMENT

Did the trial court err in refusing to impute income to the husband based on his historical rate of pay when, shortly before the parties separated, the husband quit his job, earning \$131,000 annually, to take a position earning less than a third of his prior income?

IV. RESTATEMENT OF FACTS

A. The parties, who have three children, were married for over 16 years before separating.

Petitioner Robert Wood, age 48, and respondent Angelina Wood, age 44, first met in 1996. (RP 58, 127; CP 6-7)¹ The parties started living together in March 1997, and married a year later on March 8, 1998, when the wife was 8 months pregnant. (RP 57, 127-29, 180-81) The parties have three children: a daughter, born in

¹ Trial occurred on April 12 and 17, 2017. The wife cites to the first day of trial as "RP" and the second day of trial as "4/17 RP."

April 1998; another daughter, born in May 2003; and a son, born in June 2005. (RP 133) The parties separated on July 11, 2014. (CP 42; RP 57, 181)

Following a two-day trial in April 2017, and three post-trial presentation hearings, the trial court entered the decree of dissolution, findings of fact and conclusions of law, final parenting plan, and final order of child support on September 29, 2017. (CP 41-73, 114-60)

B. The wife was a homemaker during the marriage. The husband, a retired naval officer, worked as a systems engineer project manager.

1. The wife had limited work experience, but found employment as a paraeducator after the parties separated.

The wife has only a high school diploma. (RP 128, 181) Prior to marriage, she worked as a waitress. (RP 182) During the marriage, the wife worked at a real estate office for “seven or eight months” in 2001; as a receptionist for “six months, maybe” before getting pregnant with the parties’ second daughter; and then only “once or twice a week for a few hours here and there” at the children’s school. (RP 184) Aside from these three short-lived and sporadic jobs, the wife stayed home caring for the parties’ three children. (RP 129-32, 184-85)

Despite the husband's complaints that the wife could have obtained "stable full time employment" during the marriage (App. Br. 18), the trial court found that the mother's role as a "stay-at-home mother" was "by agreement" of the parties. (4/17 RP 49, 53-54) Further, the court found the parties agreed that rather than the wife pursuing "paid employment during the marriage," she would take care of the children full-time. (4/17 RP 49, 53-54)

By the time the parties separated, the parties' younger children were ages 9 and 11. (RP 133) Despite her limited education and work experience, the wife found employment as a paraeducator, at Nisqually Middle School, where she began working in September 2016. (RP 182, 184; CP 247) By the time of trial, the wife was earning \$1,704 gross per month, or \$1,360 net, working a 32.5-hour week during the school year. (RP 183; CP 247-48; Ex. 59) Although the trial court did not find the wife voluntarily underemployed, it imputed income to her at \$2,099, the equivalent of her working a 40-hour work week during the school year as a paraeducator, for purposes of child support. (CP 69, 141-42, 247-48; Ex. 59)

2. **Six months before separation, the husband quit his job, where he earned \$131,000 annually. After separation, he worked as a bus driver, earning \$42,000 annually.**

The husband, a college graduate, served 20 years as a naval flight officer in the U.S. Navy. (RP 61, 113, 119-120, 125-27) Nearly 14 of those years were during the parties' marriage. (RP 113) Early in the marriage, the parties lived wherever the husband was stationed, including Kansas, California, and Washington. (RP 131-32) After the husband returned from his final deployment, he moved to New Mexico in August 2009 to work as a liaison for a military operations department. (RP 140-41, 199) The wife and children remained in Washington. (RP 135-36, 223)

Upon retiring from the military in late 2011, the husband moved to California to work as a systems engineer project manager, earning \$131,000 annually. (RP 144-45, 199) The husband unilaterally quit this job in 2013 and returned to Washington, but made no effort to pursue employment until after the parties separated in July 2014. (RP 146-47, 155) During this time, the parties' expenses were paid from the husband's military retirement of \$3,386.23, and VA disability of \$1,845.13. (Ex. 21; RP 113, 185-86)

Although the husband earned more than \$100,000 in the final years of the marriage, the husband now works as a coach operator for

Intercity Transit, earning \$20.39 per hour. (RP 116-18; 4/17 RP 13; Ex. 20) Despite accusing the wife of lacking “initiative” to “find stable full-time employment” (App. Br. 18), the husband provides no reason for his own unilateral decision to obtain employment earning less than a third of what he earned prior to separation. In fact, the trial court found that the husband “certainly has the ability to make substantially more income than he is currently making” and “could be making well over a \$100,000 a year.” (CP 132)

C. After the husband filed for dissolution of the marriage, temporary orders were entered ordering him to pay the wife spousal maintenance and child support.

On October 10, 2014, the husband filed a petition for dissolution in Thurston County Superior Court, asking for the trial court to, among other things, divide the parties’ property and enter a child support order for the parties’ three children, who were then ages 16, 11, and 9. (Sub. No. 7, Supp. CP 504-14)

In September 2015, the trial court ordered the husband to pay temporary monthly spousal maintenance of \$2,750 to the wife. (CP 110) Among other things, the trial court ordered the wife to pay any debt incurred on a Discover credit card in her name, and ordered the husband responsible for “[a]ny and all credit cards standing in the Petitioner’ name, Robert W. Wood.” (CP 111)

The trial court ordered the husband to pay monthly temporary undifferentiated child support of \$1,573.15 for the parties' three children, as well as 60% of day care, educational, and extracurricular expenses. (CP 8, 10) The trial court did not provide a termination date for child support, stating it "[d]oes not apply because this is a temporary order." (CP 9) The trial court also reserved the issue of postsecondary support for the older daughter, who was by then age 17. (CP 6, 9)

Without seeking to modify the temporary orders, the husband unilaterally started deducting insurance, car loan, and cell phone payments from his spousal maintenance payment to the wife in January 2017, and between \$700 to \$770 from his \$1,573 monthly child support transfer payments when the older daughter graduated high school in June 2016. (RP 159, 161-63; 4/17 RP 73)

D. The trial court awarded the wife spousal maintenance and a slightly disproportionate share of the community property given the parties' disparate earning capacities. It also entered a child support order for the parties' three children.

The parties appeared for a two-day trial before Thurston County Superior Court Judge Anne Hirsch, starting on April 12, 2017. The parties disputed property division, spousal maintenance, child support, parenting, and attorney fees. (RP 8) The trial court

issued its oral ruling on April 17, 2017, the last day of trial. (4/17 RP 47-76) Final orders were entered on September 29, 2017, after three separate presentation hearings where the trial court addressed many of the complaints that the husband raises in his appeal. (CP 114-60) The husband does not challenge the final parenting plan on appeal.

1. The trial court awarded the wife spousal maintenance for four years.

The wife requested four years of spousal maintenance to allow her to pursue a bachelor's degree that would enable her to become self-supporting. (4/17 RP 12-13) After considering the factors under RCW 26.09.090, the trial court awarded the wife \$2,750 in maintenance for four years, terminating in October 2021. (4/17 RP 52-54; CP 49) The trial court also directed the husband to obtain a life insurance policy to sufficiently cover any outstanding maintenance, allowing the policy to "be reduced annually as maintenance reduces." (CP 51)

In making its award, the trial court "continue[d] the currently ordered amount for a period of four years from the time final orders are entered." (4/17 RP 54) Thus, contrary to the husband's claim on appeal, the trial court did not increase the temporary spousal maintenance award by \$1,200 in its final order.

(App. Br. 12, 21) The wife received \$2,750 under the temporary orders (CP 110) *and* in the final decree. (CP 49)

The husband's complaint appears to be premised on the fact that the trial court also awarded the wife half of the marital portion of the husband's monthly military retirement, approximately \$1,200. (CP 55, 69, 72, 133) But this was part of the wife's *property* award, not spousal maintenance, and was an asset that the husband proposed she receive. (4/12 RP 113-14, 117)

2. Pursuant to both parties' proposals, the trial court awarded the wife a disproportionate share of the community property.

Both parties proposed that the wife be awarded a disproportionate share of the community property. (See Ex. 27; CP 268) The trial court agreed, finding that a "disproportionate share of property being awarded to the wife" was "fair and equitable" under these circumstances. (4/17 RP 57; CP 43) In addition to her share of the community property, both parties agreed that the wife receive a \$20,440 inheritance from her brother as her separate property. (RP 96-97, 192; 4/17 RP 56; Ex. 27)

Contrary to the husband's repeated claims on appeal that the wife was awarded 58% of the community property (App. Br. 7, 11,

15, 42)², the trial court in fact awarded approximately 54.4% of the community property to the wife, and 45.6% of the community property to the husband:

COMMUNITY ASSET	WIFE	HUSBAND
Oak Harbor Rental	\$65,000	
TSP Account	\$50,000	\$50,000
Husband's IRA		\$39,604
Wife's IRA	\$39,604	
Military pension (community portion)	1/2	1/2
Janus Account		\$7,935
Capital One (Joint Account)	\$14,161.52	
Vehicles ³	(\$2,425)	\$41,955
Total	\$166,340.52	\$139,494
	54.39%	45.61%

² The husband's claim appears to be premised on the assumption that the trial court adopted his proposed property distribution (Ex. 27), which it did not. Instead, in contrast to his proposed property distribution, the trial court: (1) valued the 1949 Cadillac awarded to the husband at \$16,600, which he conceded was a "fair representation" of its value (RP 101); (2) ordered the wife responsible for the \$10,000-\$11,000 debt on the Jeep awarded to her; (3) awarded the Ford Explorer to the husband; (4) assessed the debt for the repossessed Cadillac to the husband; and (5) excluded the children's Capital One accounts, with a total value of \$2,709.65, from the property distributions "because those are to be used for the benefit of the children." (See Ex. 27; RP 101-02, 194; 4/17 RP 55-56; CP 53, 55, 132)

³ The total value of vehicles includes the debts owed on each vehicle. For instance, the wife was awarded a Jeep, valued at \$8,075, with a debt of \$10,500. (CP 268; RP 194; Ex. 27; 4/17 RP 55) Meanwhile, the husband was awarded multiple vehicles, including the debt of \$11,495 on the Cadillac that was repossessed during the parties' separation. (CP 132, 299)

Among the community debts that the trial court considered in its property distribution was the debt on a Cadillac that the husband purchased right before the parties separated, which had been repossessed during separation. (RP 156-57; CP 299) Although the wife had been using this vehicle, it was titled in the husband's name and she believed that the husband would receive the car in the dissolution proceeding. (RP 196: "it's only in his name; I can't even go sell it") After the wife was in a minor accident with the Cadillac during separation, the parties "e-mailed and it was apparent that [the husband] was going to take the car." (RP 196) Because "it needed to be fixed first," the wife dropped the vehicle off at an auto repair shop "under the impression [the husband] would take it and sell it." (RP 196) The parties later learned that the Cadillac was repossessed while at the repair shop, with a remaining deficiency of \$11,495. (4/17 RP 44; CP 299) The trial court allocated the Cadillac deficiency to the husband given his "ability to make substantially more income than he is currently making." (CP 132)

With regard to their separate debts, the trial court ordered each party to pay any debt they each incurred since separation, including any debts in their name. (CP 57-58) The trial court also ordered the wife to pay the \$17,000 balance associated with the

Discover credit card that the wife acknowledged she and a friend had used since separation. (CP 58; 4/17 RP 11-12, 56) The husband also asked the trial court to order the wife to pay a Chase credit card that was in his name only. Although the husband testified to the existence of the Chase credit card at trial, he presented no other evidence, claiming he did not “have access” to it – despite the account being in his name. (RP 116; CP 234) After trial, the husband presented statements for this card, but no evidence as to who incurred the debt or made payments on it since separation. (CP 234-42) Under the temporary order, the husband was responsible for any credit cards in his name. (CP 111) The trial court declined to designate this debt to the wife “on the basis of something that is put in [] argument after trial.” (CP 57, 133)

3. The trial court entered a child support order and awarded postsecondary support for the parties’ older daughter.

The final child support order requires the husband to pay \$1,071.08 per month for the two younger children, and his proportionate share of uninsured medical expenses and extracurricular activities. (CP 61, 65-66) The trial court also ordered postsecondary support for all three children based on “unrefuted evidence that the history of this family was that the

parents would pay for college for their children.” (4/17 RP 11, 50-51; CP 63, 134) The trial court ordered the husband to pay \$700 per month in postsecondary support for the older daughter while she attends school (CP 63; 4/17 RP 73), but waived the payment if the husband “continues to allow [the daughter] to use his GI Bill.” (CP 63) The trial court reserved the issue of the parties’ proportionate share of postsecondary support for the younger children if no GI Bill remains for their use. (4/17 RP 51; CP 63)

4. The trial court awarded the wife a portion of her attorney fees based on her need and the husband’s ability to pay.

The trial court awarded the wife \$10,000 toward her attorney fees, based on her need and the husband’s ability to pay. (4/17 RP 67) In entering its final orders, the trial court entered judgments against the husband, taking into account the attorney fee award to the wife, back support owed by the husband under the trial court’s temporary orders, and payments made by the husband toward these obligations during the five months between the trial court’s oral ruling and entry of final orders. (CP 50, 59, 159-60) Those judgments are more fully addressed in the argument below. (Arg. § B.3, *infra*)

V. ARGUMENT

A. **The trial court did not abuse its discretion in awarding the wife, the economically disadvantaged spouse, spousal maintenance and a disproportionate award of community property.**

It was well within the trial court's discretion to find that "the fair and equitable approach in this case" was to award monthly spousal maintenance of \$2,750 to the wife, the economically disadvantaged spouse, for four years, plus a greater share of community property. (4/17 RP 57) "A trial court in dissolution proceedings has broad discretion to make a just and equitable distribution of property based on the factors enumerated in RCW 26.09.080." *Marriage of Wright*, 179 Wn. App. 257, 261, ¶ 5, 319 P.3d 45 (2013), *rev. denied*, 186 Wn.2d 1017 (2014). A trial court's decision to award spousal maintenance is also discretionary: the "only limitation on the amount and duration of maintenance under RCW 26.09.090 is that the award must be 'just.'" *Wright*, 179 Wn. App. at 269, ¶ 23. Reviewing courts are "reluctant to encroach upon this discretion by providing a precise formula prescribing the amount of property to be distributed or maintenance to be awarded to the supporting spouse." *Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). The burden is on the appellant to

demonstrate that the trial court manifestly abused its discretion. *Wright*, 179 Wn. App. at 261, ¶ 5.

The husband here does not seriously challenge the disproportionate award of community property to the wife. Nor could he, since he himself proposed a disproportionate award in favor of the wife. (Ex. 27) Instead, the husband challenges the wife's spousal maintenance award, claiming that a disproportionate property award to the wife alleviates the need for spousal maintenance. (App. Br. 14-16) However, Division One rejected a similar argument in *Wright*, recognizing that "financial need is not a prerequisite to a maintenance award"; "[m]aintenance is 'a flexible tool' for equalizing the parties' standard of living for an 'appropriate period of time.'" 179 Wn. App. at 269, ¶¶ 22-23.

In this case, the trial court properly exercised its discretion by awarding the wife, whose earning capacity is significantly less than the husband, more community property plus spousal maintenance for four years to prepare herself to be self-supporting, after having stayed home to care for the family during the parties' more than 16-year marriage. This Court should affirm.

1. The trial court’s spousal maintenance award was based on a proper consideration of RCW 26.09.090. (Response to App. Br. 11-24)

The trial court properly considered the factors under RCW 26.09.090 in making a “just” spousal maintenance award to the wife. For instance, the trial court acknowledged the “duration of the marriage,” RCW 26.09.090(1)(d), noting the “parties were married for a little over 16 years” – “a length of marriage that the case law would refer to as mid-length.” (4/17 RP 48, 54) The trial court also considered the “age, physical and emotional condition of the parties” at the end of their marriage, RCW 26.09.090(1)(e), noting that the husband and wife, 47 and 42 at trial, respectively, were “pretty young and healthy” and “have quite a number of years ahead of them, sadly or not, that they have to work.” (4/17 RP 47-48, 54, 60-61)

In awarding the wife monthly maintenance of \$2,750, the trial court considered the wife’s “financial resources,” and her ability to “meet [] her needs independently.” RCW 26.09.090(1)(a). The trial court recognized that notwithstanding the community property awarded to the wife, her monthly net income of \$1,360 was inadequate for her to “meet the financial needs of [her] family without maintenance.” (4/17 RP 12, 54; *see also* Ex. 60) The

husband concedes this point by noting that even with the wife's award of temporary spousal maintenance, she was still forced to incur credit card debt during separation to meet her expenses. (App. Br. 13-14)

In awarding the wife spousal maintenance for four years, the trial court considered the "time necessary [for the wife] to acquire sufficient education" to find better employment. RCW 26.09.090(1)(b). Despite the husband's efforts to denigrate the wife's efforts to find work after the parties separated (*see* App. Br. 16-19), the wife indeed secured gainful employment. (RP 182-84) Nevertheless, the trial court recognized that the wife needed to secure higher paying employment if she wished to become self-supporting. (4/17 RP 54) Given the wife's education and work history, the trial court found it would likely take the wife "four years" or "maybe longer" to be able to earn a higher income. (4/17 RP 12-13, 54)

Meanwhile, the husband does not need to wait to earn higher income. Although the husband complains that he is purportedly ordered to pay 44% of his net income each month to the wife for spousal maintenance (App. Br. 12, 21-22), RCW 26.09.090 "places emphasis on the justness of an award, not its method of

calculation.” *Washburn*, 101 Wn.2d at 182. In this instance, the trial court acknowledged that despite the husband’s complaints, the amount of income available to the husband each month is entirely up to him. Indeed, “the evidence showed and proved that the father had significantly more resources available to him, including his ability, if he chooses, to earn a significant income.” (4/17 RP 53) The trial court recognized that while the husband *chooses* to earn \$20 per hour as a bus driver, he is “*able* to earn approximately \$120,000 per year” “in addition to retirement and disability.” (4/17 RP 13, 49, 53; RP 125-26, 145) (emphasis added) Thus, in awarding the wife spousal maintenance, the trial court took into account the husband’s ability to meet his own needs while paying maintenance, including his ability to earn greater income. RCW 26.09.090(1)(f).

Finally, the trial court considered “the family’s standard of living during the marriage,” which it found was “quite good, even though there was only one wage earner in the family during their time together.” (4/17 RP 54) RCW 26.09.090(1)(c). The husband acknowledges that the parties “were able to maintain monthly expenses, purchase a home, and acquire a modest retirement.” (App. Br. 19-20) They also did not have any significant debt (App. Br. 20) and owned eight vehicles. (Ex. 27) While the parties did

not lead a “lavish” lifestyle (App. Br. 20), it was well within the trial court’s discretion to find that the parties lived a comfortable lifestyle, warranting an award of spousal maintenance to the wife.

The trial court’s decision awarding monthly maintenance of \$2,750 to the wife for four years was based on a proper consideration of the statutory factors under RCW 26.09.090. The trial court’s decision was well within its discretion and supported by substantial evidence. This Court should affirm.

2. The trial court did not abuse its discretion by requiring the husband to obtain life insurance to secure the maintenance award. (Response to App. Br. 42)

After awarding the wife spousal maintenance, the trial court did not abuse its discretion in ordering the husband to obtain life insurance to secure his obligation. (CP 51) *See Riser v. Riser*, 7 Wn. App. 647, 650, 501 P.2d 1069 (1972) (“support and maintenance obligation may [] be secured by a life insurance policy on the life of the father”); *Marriage of Morrow*, 53 Wn. App. 579, 589-90, 770 P.2d 197 (1989) (trial court did not abuse its discretion “by requiring [husband] to insure his maintenance obligation [even] without first finding that term insurance was available to him and that it was affordable”). The trial court clearly recognized that maintenance constitutes “a substantial portion” of the wife’s

income for the next four years, and the life insurance “policy may be reduced annually as maintenance reduces.” (CP 51, 451)

The husband does not challenge the merits of this decision. Instead, the husband argues that the provision requiring him to obtain life insurance should not have been included in the decree because it “was not ordered by the court.” (App. Br. 42) This argument is premised entirely on the fact that the trial court did not mention life insurance in its oral ruling at the conclusion of trial. However, any inconsistency in the trial court’s oral statements does not, and cannot, demonstrate error in the court’s final written decree. *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963) (“[A] trial judge’s oral decision is no more than a verbal expression of his informal opinion at that time,” “necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.”).

Here, in the five months between the trial court’s oral ruling and entry of the final orders, the trial court properly recognized the wife’s need to have her maintenance award secured. Therefore, to the extent it had not required the husband to obtain life insurance when it made its oral ruling, it was within its discretion to include such provision in its final written order. *Fogelquist v. Meyer*, 142

Wash. 478, 481, 253 P. 794 (1927) (until final orders are entered, the trial court may “change its ruling if it saw fit to do so”).

3. The trial court did not abuse its discretion in refusing to characterize the husband’s unilateral post-separation payments as maintenance. (Response to App. Br. 39-40)

The trial court was not required to “characterize” payments the husband made on behalf of the wife post-separation as “maintenance.” (App. Br. 39) As the trial court noted, these payments were made by the husband only after he “unilaterally withheld payments from the mother that the Court had previously ordered him to make.” (CP 132) The trial court recognized that the husband deprived the wife of the opportunity to pay the debts assigned to her under the temporary order, including the mortgage and car payment, by making those payments himself and then deducting it from his court-ordered spousal maintenance obligation. (CP 132: “[T]he father’s declaration that he – I think his term was ‘made certain that the payments were made’ is a little bit disingenuous to the Court.”) In fact, the husband acknowledged at trial that he deducted certain bills from the maintenance he paid, despite not knowing whether the wife was able to make those payments on her own. (RP 159-60, 195; 4/17 RP 45) The trial court

thus properly refused to credit the husband for these post-separation payments that he unilaterally chose to pay.

The trial court was also not required to make the wife liable for the debt associated with the repossessed Cadillac. Only the husband, as the sole owner on the vehicle's title, received notices regarding deficient payments or the risk of repossession. (CP 293-94, 299) In light of the husband's admission that he took it upon himself to make the Cadillac payments, it is unclear how it could be the wife's fault that the Cadillac was repossessed. In any event, the trial court found the husband had a greater ability to pay this debt than the wife (CP 132), and thus properly exercised its discretion by ordering the husband responsible for the debt. There is nothing "inequitable and unfair" (App. Br. 40) about the trial court's decision.

B. The trial court did not abuse its discretion in making its individual decisions allocating the parties' property and debts, or in awarding attorney fees.

As earlier stated, the husband does not seriously challenge the trial court's property division. Instead, the husband's approach to challenging the trial court's decree of dissolution is to throw in every challenge "but the kitchen sink." Fortunately, the "kitchen sink" has a garbage disposal. This Court should affirm each of the

decisions made by the trial court in entering its decree because they were each well within its discretion to make and supported by substantial evidence:

1. **The trial court did not abuse its discretion in ordering the husband to pay the Chase credit card debt incurred in his name.** (Response to App. Br. 40-41)

The trial court properly ordered the husband to pay the Chase credit card – “a credit card opened in Robert’s name after separation” – and did not “refuse[] to assign either party the debt.” (App. Br. 40) While the trial court did not specifically identify the Chase credit card in the decree, it plainly required the husband to “pay all debts that he has incurred (made) since the date of separation,” and to “pay the debts that are now in his name.” (CP 57)

There is zero support for the husband’s claim that “[i]t was not disputed” that the wife or her friend incurred the debt on the Chase credit card. (App. Br. 40-41) There was never any “agreement” that the wife would pay the Chase credit card, nor did the wife concede that she ever used this card after separation. (App. Br. 40) In fact, under the temporary orders, the husband was responsible for the payments on “[a]ny and all credit cards standing

in the Petitioner's name, Robert W. Wood" (CP 111), which presumably included the Chase credit card in his name.

Given the dearth of evidence regarding the Chase credit card debt, including how it was incurred and by whom, and the fact that the wife assumed the Discover credit card debt in her name, it was entirely within the trial court's discretion to order the husband responsible for the debt on this credit, which had been incurred in his name post-separation. (CP 133)

- 2. The trial court properly awarded the wife 50% of the marital portion of the husband's military retirement, just as the husband proposed at trial. (Response to App. Br. 41-42)**

The trial court properly divided the marital portion of the husband's military retirement equally between the parties. Contrary to the husband's claim that the wife "failed to request a division of the military retirement" (App. Br. 41), both parties asked the trial court to divide the community portion of the husband's retirement. (CP 267; *see also* 4/17 RP 31; RP 113-14) The husband therefore cannot complain about a decision that he in fact requested. *Marriage of Morris*, 176 Wn. App. 893, 900-01, ¶ 15, 309 P.3d 767 (2013) (party invites error if it requests a ruling that the trial court grants, and then challenges that ruling on review).

It was also well within the trial court's discretion to award the survivor benefit associated with the husband's military pension to the wife. The trial court recognized the detrimental impact on the wife were she to lose the benefit of the husband's military pension if he died. (CP 51, 451)⁴ That the survivor benefit may not have been addressed at trial does not preclude the trial court from distributing the omitted asset once it was called to its attention post-trial. (CP 451, 481) *See e.g. Marriage of Buchanan*, 150 Wn. App. 730, 735-37, ¶¶ 6-12, 207 P.3d 478, 481 (2009), *as amended on reconsideration in part* (July 21, 2009) (trial court could designate former wife as military Survivor Benefit Plan beneficiary *after* decree entered when wife had not known of the SBP designation when decree was entered).

3. The trial court did not abuse its discretion in entering judgments in the decree of dissolution and child support order. (Response to App. Br. 35-40)

The trial court did not abuse its discretion in entering the judgments against the husband in its final orders. These judgments were not for "unpaid out of pocket expenses," as the husband

⁴ On September 13, 2017, the wife submitted a declaration in response to the husband's motion for presentation of final orders. That declaration (CP 382-478) is out of order in the copy of clerk's papers transmitted to this Court. The first page is found at CP 382 and continues at CP 450-52. The correct order of the exhibits to the declaration is CP 453-78, 383-449.

claims. (App. Br. 35, 37) Instead, these judgments, totaling \$4,934.51,⁵ were to address the husband's outstanding obligation under the temporary orders and the trial court's award of attorney fees to the wife. To the extent there was any error in calculating the outstanding amounts still owed by the husband, the error was in the husband's favor, as it understates the amounts he still owed.

It is undisputed that the husband was ordered to pay monthly spousal maintenance of \$2,750, plus \$1,573.15 in undifferentiated child support for all three children, pursuant to the temporary orders. (CP 8, 110) It is also undisputed that the temporary order of child support did not include a termination date, and reserved the issue of postsecondary educational support for trial. (CP 9) Neither party sought to revoke or modify the temporary orders before final orders were entered. While the trial court ruled in its *final* order of child support that the husband did not have to provide monthly support for the older daughter if she is receiving benefits from his GI Bill (CP 63),⁶ this did not impact the

⁵ The trial court entered a judgment in the final dissolution decree for \$2,534.51 (CP 50) and a judgment in the final child support order for \$2,400. (CP 59)

⁶ The father voluntarily allowed the older daughter to use his GI Bill benefits while the dissolution action was pending, but it is undisputed that he never sought to modify the temporary order of child support when she graduated from high school.

temporary order of child support that remained in effect until final orders were entered. RCW 26.09.060(10)(c) (temporary orders terminate when the final decree is entered); *see also* (4/17 RP 52: “When the court makes an order about payments, the parties have to comply with that order unless and until the court changes it. The court didn’t change the child support amount here, and it’s incumbent upon the parties to comply with it.”). Therefore, the husband’s monthly obligation of \$4,323.15 under these temporary orders continued until final orders were entered.

At the conclusion of trial in April 2017, the trial court awarded the mother \$10,000 towards her attorney fees. (4/17 RP 67) The trial court also ordered the husband to pay \$2,100 to the mother for child support he still owed after he had unilaterally deducted \$700 from his temporary support obligation for the months of June, July, and August 2016, after the older daughter graduated high school. (4/17 RP 51-52; RP 162-63)

During the five months between the conclusion of trial and entry of final orders, the husband made several payments to the wife, ostensibly towards the back child support owed, attorney fees awarded, and his monthly obligation under the temporary orders. The trial court properly considered these payments, as well as the

husband's still outstanding obligations, in determining the amount of the judgment to be entered:

Payments by husband:	\$28,840.49 ⁷
Back child support owed:	(\$2,100)
Interest on back child support:	(\$303.55) ⁸
Attorney fees ordered:	(\$10,000)
May-September support owed under temporary orders:	<u>(\$21,615.75)⁹</u>
Total amount still owed:	(\$5,178.81)

(See CP 496-99)

Despite the fact that the husband still owed the wife \$5,178.81, the total judgment entered by the trial court was only \$4,934.15 – \$244.66 less than the amount the husband actually owed. While respondent acknowledges that the judgments entered do not accurately reflect the correct amount still owed by the husband, the error is harmless, as it favors appellant.

⁷ The payments the husband made to satisfy his proportional share of the children's extracurricular and uninsured medical and dental expenses are not reflected in this total. (CP 496-99)

⁸ "Temporary support installments become judgments as they fall due." *Marriage of Lindsey*, 54 Wn. App. 834, 835, 776 P.2d 172 (1989). "[E]ach installment of alimony or child support, when unpaid, becomes a separate judgment and bears interest from the due date." *Parentage of Fairbanks*, 142 Wn. App. 950, 959, ¶ 32, 176 P.3d 611 (2008) (quoted source omitted).

⁹ The wife's declaration misstated the total amount owed under temporary orders. The amount is \$4,323.15, not \$4,275. (CP 496-99)

4. The trial court did not abuse its discretion in awarding attorney fees to the wife. (Response to App. Br. 42-44)

The trial court did not abuse its discretion in awarding the wife \$10,000 in attorney fees. The husband complains that the wife did not file an “affidavit” to support her request. (App. Br. 43) But the wife testified that she had incurred at least \$23,000 in attorney fees. (4/17 RP 14) The husband provides no authority for his claim that the wife’s testimony is inadequate to support her request for attorney fees, particularly when he does not dispute the reasonableness of the amount she states she incurred.

In any event, “the trial court has broad discretion in determining whether to award attorney’s fees and costs under RCW 26.09.140.” *Marriage of Fernau*, 39 Wn. App. 695, 708, 694 P.2d 1092 (1984). The party challenging the award of attorney fees has a “high burden of showing abuse of trial court discretion in its attorney fee award.” *Walsh v. Reynolds*, 183 Wn. App. 830, 857, ¶ 57, 335 P.3d 984 (2014), *rev. denied*, 182 Wn.2d 1017 (2015).

Here, after going over the “income disparities and earning disparities” of the parties (4/17 RP 67), the trial court properly awarded the wife a portion of the attorney fees that she incurred based on her need and the husband’s ability to pay. RCW

26.09.140. The husband fails to meet his “high burden” of showing the trial court abused its discretion in making its award, as the record wholly supports the trial court’s finding that the wife had the need for her attorney fees to be paid, and the husband had the ability to pay. (4/17 RP 67; *see, e.g.*, RP 145, 183, 185; 4/17 RP 13)

The trial court properly awarded spousal maintenance to the wife, properly distributed the parties’ assets and debts, and properly awarded the wife attorney fees. The trial court’s decisions were all well within its discretion to make. Therefore, this Court should affirm the trial court’s Decree of Dissolution in its entirety.

C. The only error by the trial court in entering its child support order was in failing to impute income to the husband when he is voluntarily underemployed.

Like spousal maintenance and property awards, this Court “reviews a trial court’s order of child support for abuse of discretion.” *Marriage of Schnurman*, 178 Wn. App. 634, 638, ¶ 8, 316 P.3d 514 (2013), *rev. denied*, 180 Wn.2d 1010 (2014). “[T]rial court decisions in dissolution proceedings will seldom be changed on appeal.” *Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). With the exception of the trial court’s refusal to impute income to the husband, which the wife raises in her cross-appeal, the trial court did not abuse its discretion in calculating either

party's incomes for child support purposes, and awarding postsecondary support for the parties' older child.

1. **The trial court erred in refusing to impute a higher income to the husband, despite finding him voluntarily underemployed.** (Cross-Appeal and Response to App. Br. 24-25)

The trial court erred in calculating the husband's income for purposes of calculating his child support obligation, but not for the reasons he states. (App. Br. 24-25) The husband complains that the trial court failed to consider his taxes in calculating his income. But the wife acknowledged that her worksheet "did not take taxes out of Mr. Wood's retirement . . . or his disability and his retirement should have been taxed." (CP 142) In entering the final child support worksheets, the trial court believed the parties "agreed" that "Mr. Wood has income accurately reflected including the taxes."¹⁰ (CP 142) The husband did not disagree or object, instead seeking clarification only of the wife's salary.¹¹ (CP 142)

¹⁰ The worksheet itself states that "Father's taxes are calculated based upon single with 2 exemptions." (CP 72)

¹¹ Appealing the trial court's orders was not "Robert's only remedy . . . to address these issues." (App. Br. 24, 45) The trial court's refusal at a *third* presentation hearing to relitigate issues that could, and should, have been addressed during trial did not prevent or otherwise preclude the husband from properly bringing these issues to the trial court's attention through a motion for reconsideration. (See App. Br. 21-24) Nor did the trial court's comment that the husband has a right to appeal (App. Br. 45) foreclose his similar right to seek reconsideration.

In any event, the *real* error in the trial court's calculation of the husband's income was in failing to impute income when he is indisputably voluntarily underemployed as he is working well below the level that he is capable and qualified. *Marriage of Schumacher*, 100 Wn. App. 208, 215, 997 P.2d 399 (2000) (in imputing income, the court must determine whether the parent is working at a level at which "the parent is capable and qualified"). "A parent cannot avoid obligations to his or her children by voluntarily remaining in a low paying job or by refusing to work at all." *Marriage of Brockopp*, 78 Wn. App. 441, 445, 898 P.2d 849 (1995). RCW 26.19.071(6) requires the trial court to impute income to a parent who is voluntarily underemployed. "The court first determines whether or not a parent is voluntarily underemployed based upon the parent's work history, education, health, age, and other relevant factors." *Marriage of DewBerry*, 115 Wn. App. 351, 367, 62 P.3d 525, *rev. denied*, 150 Wn.2d 1006 (2003); RCW 26.19.071(6). Where a parent is underemployed but "gainfully employed on a full-time basis," the trial court must impute income if "the parent is purposely underemployed to reduce the parent's child support obligation." RCW 26.19.071(6); *DewBerry*, 115 Wn. App. at 367.

In *DewBerry*, the trial court found the father, “a healthy, 47-year-old college graduate with a history of executive-type sales and marketing jobs,” voluntarily underemployed and imputed income to him. 115 Wn. App. at 367-68. The father had previously earned \$55,000 in an earlier position, but was earning significantly less at the time of trial, as he “work[ed] toward the requirements for a new career as a longshoreman.” *DewBerry*, 115 Wn. App. at 366-67. In light of these “pertinent” facts, Division One held that it “was reasonable and appropriate” for the trial court to impute income to the father based on the “salary levels” that he had previously maintained. *DewBerry*, 115 Wn. App. at 367-68.

Like *DewBerry*, the trial court here properly found the husband was voluntarily underemployed because he “certainly has the ability to make substantially more income than he is currently making.” (4/17 RP 49; CP 132) However, it erred in refusing to impute income to the husband based on its finding that there was “no evidence presented at trial that he’s voluntarily underemployed for purposes of not paying an appropriate amount of support.” (4/17 RP 49-50) The same was true in *DewBerry*, as “there was no suggestion that [the father was] trying to lower his income to avoid child support.” 115 Wn. App. at 368. Nevertheless, Division One

found it was still “reasonable and appropriate” for the trial court to impute income to the father, who was indisputably underemployed based on his work history. *DewBerry*, 115 Wn. App. at 368. The trial court in this case should have done the same.

It is unrefuted that the husband sought lower-paying employment only *after* the parties separated in July 2014. Like the father in *DewBerry*, the husband here “does not argue that he is unemployable, and all of the evidence indicates that his underemployment has been brought about by his own free choice.” *DewBerry*, 115 Wn. App. at 367. Indeed, the husband has a history of high-paying military and engineering jobs. (RP 145) In the husband’s last employment before the parties separated, he was earning \$131,000 as a systems engineer project manager. (RP 145-46) Yet, when he returned to work after the parties’ separation, the husband voluntarily and purposely sought lower paying positions – first as a substitute school bus driver and now as a coach operator with Intercity Transit. (RP 72, 116-18, 155) The trial court abused its discretion in disregarding this “pertinent” evidence and refusing to impute the husband’s income at his historical income.

It was particularly egregious for the trial court to refuse to impute income to the husband while imputing income to the wife,

who worked 32.5 hours per week as a paraeducator. Unlike the husband, who the trial court found *was* voluntarily underemployed, it did not find the wife voluntarily underemployed, nor could it. In light of the wife’s work history and education, her employment as a paraeducator was within her capabilities, and arguably above her qualifications. See RCW 28A.413.040 (minimum employment requirements for paraeducators). Nor does the fact that the wife works less than 40 hours a week make her “underemployed.” *Schumacher*, 100 Wn. App. at 215 (“full-time does not necessarily mean 40 hours a week”). Nevertheless, the trial court imputed income to the wife, but not the husband. This was error. The trial court should have imputed income to the husband to reflect the income that he is capable and qualified of earning.

2. The trial court properly imputed income to wife based on the full-time earnings of a paraeducator. (Response to App. Br. 25-27)

To the extent the trial court should have imputed income to the wife, it did not abuse its discretion in determining the amount to impute. At the time of trial, the wife earned \$1,704.55 gross per month as a paraeducator,¹² working 6.5 hours per day (32.5 hours per week), 189 days per year (a school year), at an hourly rate of

¹² The wife’s monthly income is fixed year-round. (See Ex. 59; CP 247)

\$16.65. (CP 72, 247; 4/17 RP 18) Because the wife works 189 days, and a full-time paraeducator works “not less than 180 full work days,” WAC 392-121-215, to the extent she works less than full-time it is because she works a 6.5-hour day, rather than an 8-hour day.

As required by the statute, the trial court properly imputed gross monthly income to the wife of \$2,099, based on her “[f]ull-time earnings at the current rate of pay” as a paraeducator. RCW 26.19.071(6)(a). If the mother worked 8 hours per day (40 hours per week), 189 days per year (a school year), her “full-time earnings” as paraeducator “at her current rate of pay” of \$16.65 per hour would be approximately \$2,099 gross per month.¹³

The trial court properly recognized that imputing income to the mother based on a 40-hour week year-round at her hourly rate of \$16.65, as the husband urges on appeal, would artificially inflate the income that she could earn as a full-time paraeducator. Instead, the trial court acknowledged that if you were to calculate the wife’s income based on year-round employment, rather than just the school year, her extrapolated hourly rate would be approximately \$12.11, which is calculated by dividing her actual

¹³ 8 hours x 189 days x \$16.65 = \$25,174.80 annual income.

annual income of \$20,454.60 by 1,690 hours.¹⁴ Therefore, if the wife worked a 40-hour work week year-round (2,080 hours) at an hourly rate of \$12.11, her gross monthly income would be \$2,099,¹⁵ which is roughly the same gross monthly income the wife would earn working a 40-hour week during the school year at her actual hourly rate of \$16.65. In either event, the trial court properly calculated the wife's salary by imputing to her an income equivalent to the full-time income of a paraeducator.

3. The trial court did not abuse its discretion in ordering the parties to pay their proportional share of the children's extraordinary expenses. (Response to App. Br. 27-28)

The trial court properly ordered the husband to pay his proportionate share of the children's extracurricular, uninsured medical, and education expenses. These are "special child rearing expenses" that are not included in the husband's transfer payment, and by statute "shall be shared by the parents in the same proportion as the basic child support obligation." RCW 26.19.080(2), (3).

Further, with regard to the children's extracurricular activities, it was entirely appropriate for the trial court to order the

¹⁴ 32.5 hours x 52 weeks.

¹⁵ 40 hours x 52 weeks x \$12.11 = \$25,188.80 annual income.

parties to share the cost of “the many activities that the children historically had participated in,” based on its finding that the children “need to be able to stay involved in their activities,” which “have been a constant for them.” (CP 148; *see, e.g.*, RP 64, 153, 206; 4/17 RP 15-18) Nevertheless, the husband challenges the trial court’s decision by claiming that the “testimony and evidence was very clear that Robert does not have the ability to pay” such additional expenses. (App. Br. 27-28) But he cites to no such evidence, because there is none, as the trial court recognized the husband’s “ability” to pay his obligations for the children is substantially greater than the income he earns at a job for which he is overqualified. (*See* 4/17 RP 49; CP 132)

4. The trial court properly considered the factors set forth in RCW 26.19.090 in awarding postsecondary support for the older daughter.
(Response to App. Br. 28-33)

The trial court did not lose jurisdiction to order postsecondary support for the older daughter just because she turned 18 while the dissolution action was pending. (App. Br. 28-31) Nor did the trial court “retroactively” order postsecondary support by enforcing the husband’s obligation under the temporary child support order that he never sought to modify. (App. Br. 30, 33; *see* Arg. § B.3, *supra*)

Where “the support-paying parent has notice that the support obligation will extend past the age of majority,” the trial court has discretion to award postsecondary educational support. *Marriage of Cota*, 177 Wn. App. 527, 534, ¶ 13, 312 P.3d 695 (2013) (quoted source omitted); RCW 26.09.170(3). Here, in the petition for dissolution filed by the husband, he specifically requested that the parties’ older daughter, who was then age 16, be included in any child support order. (Sub No. 7, Supp. CP 504-14) Further, the temporary child support order put the husband on notice that his support obligations could continue after the daughter turned 18 by stating that “termination of support” “[d]oes not apply because this is a temporary order,” and “specifically reserved” the issue of postsecondary support. (CP 9) *Cota*, 177 Wn. App. at 535, ¶ 16 (“by referencing postsecondary educational support and reserving ruling for a future date, [an] order put[s] the parents on notice that their support obligations could continue past the age of majority”).

The trial court was thus well within its discretion to order postsecondary support after considering the evidence related to RCW 26.19.090.¹⁶ (App. Br. 28) The only mandatory factor the

¹⁶ Although the trial court ordered postsecondary support for all three children (CP 63), the husband contests on appeal only the postsecondary support awarded to the older daughter. Accordingly, the wife addresses only the propriety of that award.

trial court must consider when ordering postsecondary support is “whether the child is in fact dependent and is relying upon the parents for the reasonable necessities of life.” RCW 26.19.090(2) (“the court *shall* determine . . .”) (emphasis added). Otherwise, the trial court “shall *exercise its discretion* when determining whether and for how long to award postsecondary educational support.” RCW 26.19.090(2) (emphasis added). Relevant factors the trial court *may* consider include the child’s age and needs, the “expectations of the parties for their children when the parents were together,” “the nature of the postsecondary education sought,” the parents’ standard of living and “current and future resources,” as well as “the amount and type of support that the child would have been afforded if the parents had stayed together.” RCW 26.19.090(2).

Here, the wife testified that the daughter, who is pursuing a bachelor’s degree in athletic training, is not working while in school and that the wife “continu[es] to help her financially.” (4/17 RP 10-11) The wife also testified that the parties would have “[w]ithout a doubt” continued to support the daughter through college had they stayed married. (4/17 RP 11) The parties “always planned” that their children would go to college, opening up a college fund for the

older daughter when she “wasn’t even one year old.” (4/17 RP 11) In addition to the parties’ supplemental briefing on postsecondary support (CP 272-76, 287-91), the record here also contains evidence of the parties’ educational levels, standard of living, and financial resources. (*See* Arg. § A.1, *supra*) It is “presumed” that the trial court considered this evidence for purposes of ordering postsecondary support. *See Marriage of Kelly*, 85 Wn. App. 785, 793, 934 P.2d 1218, *rev. denied*, 133 Wn.2d 1014 (1997).

This “unrefuted evidence” supports the trial court’s findings that the older daughter “is still dependent on her mother,” “that she is attending college full time,” “that the history of this family was that the parents would pay for college for their children,” and that, “in fact, the parties saved by agreement . . . for many years for that purpose” until the husband “unilaterally stopped making that payment” without informing the wife. (4/17 RP 50-51) That the husband failed to provide contradictory evidence does not render the wife’s evidence “self-serving testimony.” (App. Br. 43) While the trial court “acknowledge[d] that there was not a whole lot of testimony about it,” the evidence that *was* before the court is indisputable, as it remains – even on appeal – “unrefuted by Robert.” (4/17 RP 51) Even if, “[i]deally, the court should have

been more explicit in its consideration of RCW 26.19.090's factors," the husband here "has not shown that the trial court failed to consider them." *Kelly*, 85 Wn. App. at 793-94.

Finally, the purported lack of specific evidence "regarding [the daughter's] education costs, receipt of financial aid/scholarships, whether she was in good standing" (App. Br. 29, 32) is not fatal to the postsecondary support order. The "trial court has broad discretion to order support for postsecondary education." *Cota*, 177 Wn. App. at 536, ¶ 19; *Kelly*, 85 Wn. App. at 792. The trial court's award of postsecondary support for the older daughter was well within its discretion, and this Court should affirm.

5. **The trial court did not abuse its discretion in setting the older daughter's postsecondary support at \$700 per month and declining to include her on the child support worksheet for the younger children.** (Response to App. Br. 32-35)

The trial court did not abuse its discretion in ordering the father to pay monthly postsecondary support of \$700 for the older daughter if she does not use his GI Bill benefits. (CP 63) In calculating its award, the "child support schedule shall be advisory and not mandatory for postsecondary educational support." RCW 26.19.090(1). "After the court accurately determines each parent's income and proportional share, the court has discretion to

equitably apportion education expenses and may order ‘either or both parents’ to pay for a child’s postsecondary education support.” *Marriage of Newell*, 117 Wn. App. 711, 720, 72 P.3d 1130 (2003) (quoting RCW 26.19.090(6)).

The trial court here properly calculated both parties’ incomes and their proportional shares of the combined net income. (CP 69) After doing so, the trial court had “discretion to equitably apportion education expenses.” *Newell*, 117 Wn. App. at 720. The trial court based its \$700 per month postsecondary support award on the very amount that the *husband* calculated and withheld as the older daughter’s portion of his basic child support obligation. (4/17 RP 73: “the child support amount of 770, whatever it was that was *deducted by the father* will be paid to the mother” (emphasis added); *see also* RP 162-63; CP 232)

Further, that the trial court stated prior to entry of the final orders that it was “going to reserve post-secondary support, the specific amounts to be determined on the family court” (CP 134), is not a basis for overturning the final order awarding the older daughter a specific amount in postsecondary support. (App. Br. 32) The husband yet again disregards not only the trial court’s broad discretion in fashioning a postsecondary support award, but that,

“[u]ntil final judgment is entered, the trial judge is not bound by a prior expressed intention to rule in a certain manner.” *DGHI, Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 944, 977 P.2d 1231 (1999). In any event, the trial court was likely referring to the parties’ two minor children, as the final child support order also ordered postsecondary support for the younger children but reserved the “issue of the proportionate shares of post-secondary support” if the husband’s GI Bill could not “pay for their post-secondary education.” (CP 63)

Finally, the trial court did not abuse its discretion by establishing child support for the younger two children based on a two-child household. (App. Br. 33) When the Uniform Child Support Guidelines were first considered, the committee acknowledged that “[f]amily size is a variable known to effect cost of raising a child, just as is total income. It will ‘cost’ less to raise each child in a three child family than it will to raise each child in a two child family.” Washington State Superior Court Judges Uniform Child Support Guidelines at 13 (1982). The committee noted that “items like per person housing and transportation costs are more influenced by family size than by age and sex of family member.” Washington State Superior Court Judges Uniform Child Support

Guidelines at 14 (1982). “The additional percentage of income spent on each additional child decreases with the number of children at all income levels.” Washington State Child Support Schedule Commission, Final Report at 11-12 (November 1987).

Under the circumstances, the trial court did not abuse its discretion in ordering child support for the younger two children based on a two-child household. However, to the extent the trial court remands on any issue related to the child support order, it should direct the trial court to impute income to the father based on the level of income that he is capable and qualified of earning based on his age, work history, and education.

D. This Court should deny the husband’s request for attorney fees and award the wife her fees on appeal.
(Response to App. Br. 44-46)

This Court should reject the husband’s request for attorney fees on appeal. (App. Br. 44-46) Considering the financial circumstances of each party, the husband is clearly in a better position to bear the cost of his own appeal. Additionally, RAP 14.2 provides no basis for awarding attorney fees for a party’s “abusive litigation” – nor does the record provide *any* support for the husband’s contentions that the wife engaged in any such “abusive” or “bad faith” litigation tactics. (App. Br. 44-45) Indeed, the

husband concedes that the wife should not be required to pay his attorney fees by asserting that “the *trial court* bears responsibility for the cost of this appeal.” (App. Br. 45) (emphasis added)

To the extent that any fees are awarded, the Court should award fees to the wife based on her need and the husband’s ability to pay. RCW 26.09.140; RAP 18.1(a); *Marriage of Leslie*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), (awarding attorney 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). On appeal, the husband challenges only discretionary, fact-based decisions supported by substantial evidence. That the husband believed the trial court was “inclin[ed] to deny” a motion for reconsideration (App. Br. 45) does not justify requiring the wife to use her maintenance and property awards to defend on appeal trial court decisions that were wholly within its discretion. Because the wife has the need and the husband has the ability to pay, this Court should award the wife her attorney fees on appeal.

VI. CONCLUSION

This Court should affirm the trial court in its entirety, but if this Court remands for any reason, it should direct the trial court to impute the husband’s income at his historical rate of pay and

recalculate the parties' child support obligations accordingly. This Court should also deny the husband's request for attorney fees on appeal and award the mother her attorney fees incurred on appeal.

Dated this 27th day of March, 2018.

SMITH GOODFRIEND, P.S.

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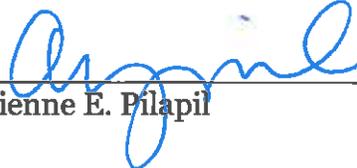
DECLARATION OF SERVICE

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

That on March 27, 2018, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 27th day of March, 2018.



Andrienne E. Pilapil

SMITH GOODFRIEND, PS

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