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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 319202-III

IN THE COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

In the Marriage of:

JENNY M. BUCKLEY

Appellant,

v.

JOHN T. BUCKLEY,

Respondent.

APPELLANT'S REPLY BRIEF

W. SCOTT LOWRY
WSBA 6403
Attorney for Appellant

102 West Main Suite 200
Walla Walla, WA 99362-2856
(509) 529-0261

W. SCOTT LOWRY
Attorney at Law
102 W. Main • Suite 200
Walla Walla, Washington 99362-2856
(509) 529-0261

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III. ARGUMENT

A. **The trial court erred in deducting respondent’s acquisition costs for the Buschini Portfolio from respondent’s 2012 gross income.**

John places singular reliance upon RCW 26.91.071 (5) (h) to support the exclusion from his gross income of his payments to Buschini as “*normal business expenses*”. RB 13-15. John, however, provides no authority that those payments qualify as normal business expenses. Without such authority, John’s argument should not be considered. RAP 10.3 (a) (6); *DC Farms v. Lamb Weston, Inc.*, -- Wn. App. --, 317 P. 3d 543, 553 (2014).

RCW 26.19.071 (5) (h) should be interpreted consistently in the context of the statute as a whole and consistently with the intent of the legislature. *Manna Funding, LLC v. Kitsap County*, 173 Wn. App. 879, 890, 295 P. 3d 1197 (2013).

In this regard, the legislature’s intent is clearly expressed in RCW 26.19.001, which provides, in pertinent part, as follows:

The legislature intends, in establishing a child support schedule, to insure that child support orders are adequate to meet a child’s basic needs and to provide additional child support commensurate with the parents’ income, resources, and standard of living. The legislature also intends that the child support obligation should be equitably apportioned between the parents...

John makes no attempt to address the legislative intent in RCW 26.19.001.

As a deduction from gross monthly income, RCW 26.19.071 (5) (h) should be narrowly construed. *Asfaw v. Woldbehran*, 147 Cal. App. 4th 1407, 1425, 55 Cal. Rptr. 3d 323 (2007) (“[A]lthough “income” is broadly defined in the statutory

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child support scheme ... deduction provisions are specific and narrowly construed.
(Citations omitted”).

Neither the term “*normal*” nor the term “*expenses*” are defined in RCW Chapter 26.19. See RCW 26.19.011. Therefore those terms should be given their ordinary meaning. *In re: Dependency of A. P.*, 177 Wn. App. 871, 877, 312 P. 3d 1013 (2013). The term “*normal*” means usual or customary. *King County Council v. Public Disclosure Commission*, 93 Wn. 2d 559, 561, 611 P. 2d 1227 (1980). The term “*expenses*”, as used in a child support statute, has been defined as ““*an item of outlay incurred in the operation of a business enterprise allocable to and chargeable against revenue for a specific period.*”” *Asfaw v. Woldbehran*, 147 Cal. App. 4th 1420, 55 Cal. Rptr 3d 331 (*Quoting Webster’s 3d New International Dictionary* (1981) p. 800).

Measured against the foregoing definitions, John’s purchase of the Buschini book of business, which required payments 60 percent of the business derived in 2010, 50 percent in 2011 and 40 percent in 2012, defies characterization as a normal business expense. The trial court’s allowance of that expense is therefore based upon an erroneous view of the law and therefore constitutes an abuse of discretion. *In re Jannot*, 110 Wash. App. 16, 22, 37 P.3d 1265 (2002) *aff’d sub nom. In re Parentage of Jannot*, 149 Wash. 2d 123, 65 P.3d 664 (2003).

John argues that the trial court did not violate the matching rule by allowing the deduction for his purchase of the Buschini book of business. RB at 17. John

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fails to cite any authority for his argument, so it should not be considered. RAP 10.3 (a) (6); *DC Farms v. Lamb Weston, Inc.*, 317 P. 3d 553. Moreover, John’s argument that the matching rule was adhered to ignores the fact that he made no payments for the business he received from the Buschini portfolio after 2012. Instead, as stated by Jenny’s CPA, Kristal Hassler, John violated the matching rule by “*front loading*” the expense of acquiring the portfolio into the first three years. In 2013 and thereafter, John will receive income from the portfolio without making any corresponding payment. CP 159.

John argues that Federal tax treatment is irrelevant to the determination of “*normal business expenses*” under RCW 26.19.071 (5) (h). RB 18-19. John fails to acknowledge that his motivation to re-write his agreement to purchase the Buschini book of business was to secure a more favorable tax treatment from the IRS:

... When I understood the error of my ways, I went to David Rose and a new contract was written. That new contract is also filed under seal herein and delineated with number 2 at the top right hand corner and further delineated as a “Consulting Agreement”. As the court can see from the new agreement, it didn’t change the percentages but the IRS now allows the deduction (payment to Buschini) as a business expense and not something that I have to claim as income....CP 104-05.

John misplaces reliance upon *In re Marriage of Mull*, 61 Wash. App. 715, 722, 812 P.2d 125 (1991). RB at 18-19. The child support schedule standard in that case allowed deduction from gross income for mandatory pension plan

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payments. 61 Wn. App. 719 n. 3. The court in *Mull* concluded that the pension plan payments became mandatory upon the husband’s election to participate in the pension. 61 Wn. App. 720. The fact that the payments in *Mull* were mandatory was central to the court’s holding: “*We hold that when a parent is required to make capital contributions in order to maintain his or her source of income, and when such contributions are not made to evade greater support obligations, those contributions qualify as ‘normal business expenses’ under Standard 4.* (Emphasis added)” 61 Wn. App. 722. Here, in contrast, there is nothing to suggest that John’s acquisition of the Buschini book of business was anything other than voluntary on John’s part. *Mull* is therefore distinguishable from the facts of this case.

Nor does *Mull* prohibit the Court from considering the analogous circumstance presented by an election by a taxpayer to deduct under 26 U.S. C. § 179 certain depreciable property which is not chargeable to capital account. Although not controlling, federal law may be considered by a Washington court when texts of state and federal law are similar. *Bravo v. Dolsen Companies*, 125 Wn. 2d 725, 888 P. 2d 147 (1995). When faced with similar an election by a party to a marriage dissolution to claim depreciation on a business asset for federal income tax purposes, other courts routinely refuse to recognize such an election where to do so would impact resources available for child support. *See Asfaw v. Woldberhan*, 55 Cal. Rptr. 3d 323 (Ca. App. 2007); *Reid v. Reid*, 121 Idaho 15, 822 P.2d 534 (1992); *Baker v. Baker*, 183 Ariz. 70, 900 P.2d 764, 767 (Ct. App.

1995); *Matter of Marriage of Perlenfein*, 316 Or. 16, 848 P.2d 604 (1993); *Miller v. Miller*, 610 So. 2d 183, 185 (La. Ct. App. 1992); *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176, 181 (1992); *In re Marriage of Wiese*, 41 Kan. App. 2d 553, 203 P.3d 59 (2009).

John again invokes RCW 26.19.071 (5) (h) in attempting to reconcile that section with RCW 26.19.071 (3) and (4). RB 24-25. John's reliance upon RCW 26.19.071 (5) (h) is once again misplaced, as his decision to front load the expense of purchasing the Buschini book of business fails to qualify as a normal business expense under that statute.

John fails in his attempt to distinguish *Marriage of Bucklin*, 70 Wn. App. 837, 85 P. 2d 1197 (1993). RB 25-26. The failure of the trial court to include in John's gross income the amount paid by John for acquisition of the Buschini book of business presents the same violation of RCW 26.10.071 (3) as did the party's failure to provide documentation of income in *Bucklin*.

B. The trial court erred in finding appellant's monthly net income to be \$7,247.00.

John again invokes RCW 26.19.071 (5) (h) to defend Paragraph 3.2 of the Order of Child Support and the Child Support Worksheets. CP 132, 140-49. RB 19. John's reliance upon RCW 26.19.071 (5) (h) is once again misplaced, as his decision to front load the expense of purchasing the Buschini book of business fails to qualify as a normal business expense under that statute.

C. The trial court erred in finding the transfer payment to be \$1,805.00.

John again invokes RCW 26.19.071 (5) (h) to defend Paragraph 3.5 of the Order of Child Support and the Child Support Worksheets. CP 132, 140-49. RB 19-20. John's reliance upon RCW 26.19.071 (5) (h) is once again misplaced, as his decision to front load the expense of purchasing the Buschini book of business fails to qualify as a normal business expense under that statute.

D. The trial court erred in finding the Standard Calculation to be \$1,805.00.

John again invokes RCW 26.19.071 (5) (h) to defend Paragraph 3.6 of the Order of Child Support and the Child Support Worksheets. CP 132, 140-49. RB 20. John's reliance upon RCW 26.19.071 (5) (h) is once again misplaced, as his decision to front load the expense of purchasing the Buschini book of business fails to qualify as a normal business expense under that statute.

E. The trial court erred in finding the parties' shares of uninsured medical expenses.

John again invokes RCW 26.19.071 (5) (h) to defend Paragraph 3.19 of the Order of Child Support and the Child Support Worksheets. CP 132, 140-49. RB 20-21. John's reliance upon RCW 26.19.071 (5) (h) is once again misplaced, as his decision to front load the expense of purchasing the Buschini book of business fails to qualify as a normal business expense under that statute.

F. The trial court erred in denying appellant's request for attorney and accountant fees.

Contrary to John's argument, the foregoing arguments and authority clearly have merit. Jenny clearly establishes need for an award of attorney fees, as with her monthly net income of \$2,155.00. CP 133

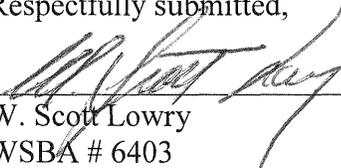
G. Appellant requests an award of attorney fees on appeal.

In the event that she prevails on appeal, Jenny requests an award of reasonable attorney fees on appeal pursuant to RCW 26.09.140 and RAP 18.1 (a). Jenny's need for such an award remains the same as in the trial court. John's net income and assets demonstrate the he is in a much better financial position than Jenny. An award of attorney fees to Jenny is therefore appropriate. *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P. 2d 330, *rev. den.*, 137 Wash.2d 1003 (1999); *Marriage of Kriger and Walker*, 147 Wn. App. 952, 969, 199 P. 3d 450 (2009).

IV. CONCLUSION

In light of the foregoing, the Court should reverse Paragraphs 2.2, 3.2, 3.5, 3.6, 3.19, and 3.23 and the Child Support Worksheets and remand the case to the trial court for entry of accurate findings and accurate worksheets. The Court should further award Jenny reasonable attorney fees on appeal in the event that she prevails on appeal.

Respectfully submitted,



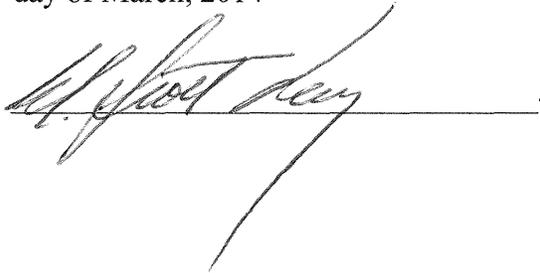
W. Scott Lowry
WSBA # 6403
Attorney for Appellant

V. CERTIFICATE OF MAILING

On this day, the undersigned served the following persons via the United States Mail First Class Postage prepaid with a copy of the foregoing document entitled APPELLANT'S REPLY BRIEF as follows:

William C. Schroeder
Paine Hamblen LLP
717 W. Sprague Suite 1200
Spokane, WA 99201

Dated this 26th day of March, 2014

A handwritten signature in cursive script, appearing to read "W. C. Schroeder", is written over a horizontal line. The signature is written in black ink and is positioned to the left of the line's end.