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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

CASE NO. 319202

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

In re the Marriage of,

JENNY M. BUCKLEY

Appellant,

v.

JOHN T. BUCKLEY,

Respondent.

AMENDED BRIEF OF RESPONDENT

PAINE HAMBLÉN, LLP
William C. Schroeder, WSBA #41986
Jane E. Brown, WSBA #25093
717 W. Sprague Avenue, Suite 1200
Spokane, WA 99201-3505
(509) 455-6000
Attorneys for Respondent

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I. INTRODUCTION AND SUMMARY

This is an appeal of the trial court's entry of an Order of Child Support and Child Support Worksheets. At the trial court, Appellant Jenny M. Buckley ("Jenny") argued that Respondent John T. Buckley ("John")'s 'monthly net income' should be, alternatively, \$8,387 or \$9,773, and that his 'monthly net income' for the purposes of child support should not be calculated by allowing various deductions: health insurance; depreciation; capital losses; business investment losses; charitable contributions; and monthly fees paid under a consulting agreement.

John argued that he should be allowed the aforementioned deductions from his monthly net income. The total value of the last deduction on the above list (monthly fees paid under a consulting agreement) was \$1,140 per month. The total value of the remainder of the requested deductions was \$2,241 per month. John proposed that his 'monthly net income' be \$5,120, which reflected his proposed deductions.

Both parties requested costs, attorney's fees, and expert (accountant) fees.

The trial court permitted the deduction of the \$1,140 in business fees from John's monthly net income pursuant to RCW 26.19.071(5)(h). The trial court disallowed the other requested deductions, and set John's monthly net income at \$7,247 – which is the subtraction of \$1,140 from

Jenny's (initial) proposed gross monthly income for John of \$8,387. The trial court denied both parties' request for costs and fees.

John does not appeal.

Jenny assigns error to the trial court's allowance of the \$1,140 deduction from John's monthly gross income, and to the trial court's denial of costs and attorney's fees to her.

Jenny argues that the trial court lacked statutory authority, and that the trial court abused its discretion.

As to the first argument, the trial court had specific authority under RCW 26.19.071(5)(h) to determine whether to deduct particular claimed 'normal business expenses' from monthly net income.

As to the second argument, Jenny has made no showing that the trial court abused its discretion under RCW 26.19.071. Under these facts, it was within the trial court's discretion to accept portions of each of the parties' positions on the issue of John's monthly net income, as well as to decline to award costs or attorney's fees to either party.

John therefore requests that this Court affirm the trial court's decision.

II. SYNOPSIS OF ASSIGNMENTS OF ERROR

Jenny's 22 assignments of error actually describe the cumulative effect of one alleged error. Jenny contends the trial court erred in its determination of John's monthly net income, for the purposes of calculating child support. (See assignment of error 3). Each other assignment of error, save the two concerning attorney's fees, is a description of how the alleged error affects the remaining pertinent sections of the Child Support Worksheet.¹ Assignments of error 1 through 19, and 21, are all premised upon a single assignment of error concerning the trial court's determination that that monthly fees paid by John in 2011 and 2012 constitute a 'normal business expense' under RCW 26.19.071(5)(h).

Second, Jenny contends the trial court erred in denying her request for costs and attorney's fees. (See assignments of error 20, 22). However, the only basis for her allegation that the trial court erred vis-à-vis attorney's fees is, again, that the trial court allegedly erred in calculating John's monthly net income. (See Appellant' Brief, p. 20).

¹ Jenny does not allege a mathematical error. Normally, mathematical or clerical error in a child support worksheet is not an appealable issue; such errors should be addressed to the trial court via a CR 60 motion. *Marriage of King*, 66 Wn. App. 134, 137-39, 831 P.2d 1094 (1992).

III. STATEMENT OF THE CASE

A. Marriage, Dissolution, and the 2010 Child Support Order

The marriage between Jenny and John was dissolved in 2004; two minor children were the result of that marriage. (CP 1-2).

An Order of Child Support was entered by the Walla Walla County Superior Court on October 5, 2010, (CP 1-13), which set John's monthly net income at \$6,198. (CP 10). The trial court determined Jenny's monthly net income to be \$2,197. (CP 10). The monthly transfer payment was \$1,807. (CP 4).²

B. John Enters Into a Consulting Agreement with a Retiring Investment Manager to Obtain New Clients.

John is the owner of Buckley Investment Group LLC. (CP 23) In 2010, Buckley Investment Group LLC entered into a consulting agreement to obtain a book of business from a retiring investment manager, Delphine Buschini. (CP 65; 221-226)

Under the agreement, in consideration for Buschini introducing her present customers to Buckley Investment Group, Buckley Investment Group would pay a specified percentage of any fees earned from those clients for a specified period of time. (CP 221-226) The Buschini consulting agreement was initially entered in October, 2010. (CP 221) The

² Under the 2010 Child Support Order, Jenny was to provide health insurance coverage for the children. (CP 6). However, John began providing health insurance to the children in November, 2011. (CP 62-63; 116).

consulting agreement was later reformed with the aid of a licensed attorney, though the relevant terms remained the same. (CP 65-66; 223-226). Buckley Investment Group obtained contacts for 38 clients through the consulting agreement. (CP 123) About half of those clients have since left. (CP 123).

For October 1, 2010 through September 30, 2011, Buckley Investment Group paid 60% of the fees earned from Buschini clients to Buschini. From October 1, 2011 through September 30, 2012, Buckley Investment Group paid 50% of fees earned from Buschini clients to Buschini. From October 1, 2012 through September 30, 2013, Buckley Investment Group paid 40% of fees earned from Buschini clients to Buschini. (CP 221, 224).

John's proportional share of the monthly fees Buckley Investment Group paid to Buschini was \$27,363.50, or an average of approximately \$1,140 per month. (*See* CP 20, 65-66, 213, 219).

C. John's Accountant Prepares an Opinion of John's 2011 and 2012 Income.

In late 2012, Jenny communicated her intention to seek biennial modification of the child support order. (CP 62-63) In preparation, John directed his Certified Public Accountant David C. Hale ("Hale") to provide an analysis and opinion of John's income in 2011 and 2012. (CP

62-63; 23-50). Hale's opinion was based upon various of John's sealed financial documents. (CP 24-50).

D. Jenny Initiates Modification Proceedings, and Proposes John's Monthly Net Income to be \$8,387.

Jenny moved to modify the 2010 Order of Child Support, and sought costs and attorney's fees, on February 27, 2013. (CP 14-15) Jenny's Motion was supported by sealed source financial documents, (CP 21-60), as well as a declaration of her Certified Public Accountant, Ms. Kristal A. Hassler ("Hassler"). (CP 16-20). Hassler opined that John's 2011 net income was \$8,747.90; and John's 2012 net income was \$8,026.40. (CP 16-20) Jenny therefore proposed that John's average monthly net income in 2011 and 2012 was \$8,387, and that her own monthly net income was \$2,154.52. (CP 52-54).

Hassler opined that the following should not be deducted from John's monthly net income: medical insurance; capital losses and business losses; depreciation of assets; charitable contributions; and business asset acquisition costs. (CP 18-20). Hassler opined that the total value of these deductions in 2011 was \$24,402.53, and the total value of the deductions in 2012 was \$29,383.52, or an average of approximately \$2,241 per month. (*See* CP 20).³

³ For claimed deductions in 2011, the amounts were: \$7,651.52 in medical insurance; \$3,000 in capital losses; \$2,103 in charitable deductions; \$1,853 in non-deductible

Hassler also disallowed the deduction of the fees paid by John's business under the consulting agreement for the Buschini clients. (CP 18-20). John's claimed deduction for the Buschini fees was \$27,363.50, or an average of \$1,140 per month. (CP 20, 213, 219).⁴

E. John Proposes his Monthly Net Income to be \$5,120, After Allowable Deductions.

Jenny's Motion was opposed by two declarations of John T. Buckley, as well as a sealed financial declaration. (CP 61-89).

Jenny's Motion was also opposed by a declaration of Hale, who argued that the analysis of Ms. Hassler is methodologically inconsistent; and he also provided calculations and analysis as to the issues of deductions for capital losses, Section 179 depreciation, charitable contributions, and the other claimed deductible expenses. (CP 202-204)

John's Memorandum of Authorities argued, in pertinent part, that the \$1,140 per month in Buschini consulting agreement fees are an allowable deduction from John's monthly net income under RCW 26.19.071(5)(h). (CP 228).

expenses; and \$5,377 and \$4,418 in separate business losses, for a total of \$24,402.53. In 2012, the amounts were: \$12,778.52 in medical insurance; \$3,000 in capital losses; \$1,118 in Section 179 deductions; \$2,957 in charitable deductions; \$1,566 in non-deductible expenses; and \$4,500 and \$3,464 in separate business losses, for a total of \$29,383.55. (See CP 20 for itemized list).

The 2011 and 2012 figures, divided over the 24-month period, equal \$2,241 per month.

⁴ In the chart prepared by Hassler (CP 20), the \$27,363.50 Buschini fees deduction is listed as a lump sum in 2011. That figure divided into the 24-month period of 2011 and 2012 under consideration equals a deduction of \$1,140 per month.

John proposed that his net monthly income was \$5,120, which reflected deductions for both the Buschini contract fees (\$27,363.50, or \$1,140 per month), and medical insurance, expenses, and losses (\$24,402.53 in 2011 and \$29,383.52 in 2012, or a combined total of \$2,241 per month). (*See* CP 208-09). John therefore proposed a monthly transfer payment of \$1,534. (CP 208-09).

F. Jenny Argues John is Not Entitled to Any Deductions, and Proposes John's Monthly Net Income was \$9,773.31

In reply, Jenny supplied two additional declarations of Hassler, as well as her own reply declaration. (CP 90-110). Hassler's additional declarations analogize Buckley Investment Group's consulting agreement with Buschini with the purchase of "very expensive business related company hardware and software;" opined that the consulting fees paid to Buschini should not be deducted from John's net income; and opined that John's monthly net income in 2012 was \$9,773.31. (*Id.*).

Jenny submitted an additional set of Child Support Worksheets, proposing that John's monthly net income for both 2011 and 2012 be averaged to \$9,773.31, with a transfer payment of \$2,523.96. (CP 126-27).

G. John's Sur-Reply

John submitted a reply declaration which concerned Hale's fees, and noted that Hale's fees were largely incurred in responding to requests made by Jenny, her attorney, and her accountant. (CP 111-113).

John also supplied a Supplemental Declaration of himself, (CP 114-121), as well as a Supplemental Declaration of Melissa Buckley re Buschini Investments. (CP 122-123). John notes that he has been paying the cost of the children's health care since 2010, notwithstanding the October 2010 child support order, and John also requests that the trial court award him costs and attorney's fees. (CP 114-121).

The Melissa Buckley declaration notes that Buckley Investment Group obtained contacts for 38 clients in its Consulting Agreement with Delphine Buschini in October of 2010. (CP 123). About half of those clients had since left. (CP 123).

H. The Trial Court Deducted the Consulting Agreement Fees from John's Gross Income in Calculating his Monthly Net Income Pursuant to RCW 26.19.071(5)(h); Disallowed the Other Requested Deductions; and Denied Both Parties' Requests for Costs and Fees.

The trial court ruled on May 31, 2013 by written opinion, as follows:

The primary issues presented are: first, whether the up-front payments made by the Respondent for the purchase of Delphine Buschini's portfolio of clients can be deducted from the amount of his gross income from the same, or whether the cost thereof should be amortized over a longer term as is generally done in a business acquisition; and second, whether certain other deductions claimed by the Respondent can properly be allowed in calculating his net income for child support purposes.

The applicable statute is RCW 26.19.071. Subsection (2) thereof indicates that the court is to consider tax returns for the preceding two years, and that "Other sufficient verification shall be required for income and deductions

which do not appear on tax returns or pay stubs.” Subsection (5)(h) allows “Normal business expenses,” provided that “Justification shall be required for any business expense deduction about which there is disagreement.” The Petitioner rightly cites *In Re Marriage of Mull*, 61 Wn. App. 715, 721-22 (1991), for the proposition that whether or not expenditures may be deducted for federal income tax purposes does not control whether they are deductible for child support purposes. The deductions that the Petitioner questions here include payments made by the Respondent’s business for his health insurance, accelerated depreciation, capital losses and business investment losses, and charitable contributions.

Considering all of the circumstances, the Court finds that the cost of acquiring the Buschini portfolio may properly be subtracted from the gross profit from the Buschini income. Regardless of the artfulness of the drafting of the initial contract or the amended contract therefor and the IRS’s treatment of same, the dollars paid to the Buschini estate were never really available to the Respondent and should not be considered in determining his income for child support purposes.

While it is not uncommon for a business to have some charitable deductions; to take accelerated depreciation if it elects; to pay for employee health insurance; and also for individuals to deduct capital losses and business investment losses, these are all choices made simply to take advantage of at least arguably available tax deductions. However, these are not really mandatory costs of doing business and did not negatively affect the Respondent’s net cash available for child support purposes. In that sense, they are not “normal business expenses” and will not be allowed for child support purposes.

An appropriate child support order and worksheet should be prepared and submitted for entry, effective March 1, 2013.

Judge Schacht previously did not deem it appropriate to award attorney fees and/or costs to either party. Both

parties claim a lack of ability to pay, and the Court finds that neither has been intransigent. The Court therefore denies the Petitioner's request for attorney fees and accountant fees.

(CP 129-130; 150-53).

The trial court entered an Order finding that John's actual monthly net income was \$7,247. (CP 132). This amount reflects a monthly gross income of \$8,387, as initially proposed by Jenny (CP 18-20, 52-54), minus a deduction of \$1,140 for the Buschini consulting agreement fees. The trial court found that Jenny's actual monthly net income was \$2,155. (CP 133). The trial court entered a written Order re adjustment of child support with its findings, an Order of Child Support, and the Washington State Child Support Schedule Worksheets. (CP 131-153).

I. Jenny's Motion for Reconsideration is Denied; this Appeal Timely Follows.

Jenny moved for reconsideration of the deduction of the Buschini fees, and the denial of her costs and attorney's fees. (CP 154-155). In support, Jenny filed another declaration of Hassler, who explained her disagreement with the trial court's decision.⁵ (CP 156-163). Jenny also filed a Memorandum of Authorities, (CP 232-239). as well as an additional declaration (CP 240-241). and additional sealed financial documents. (CP 242-262). However, neither Jenny's pleadings on the

⁵ The trial court found that Hassler reached her reconsideration opinions based upon erroneous information. (CP 172-73).

initial child support modification motion, nor her pleadings on reconsideration address or discuss RCW 26.19.071(5)(h), which was the trial court's basis for its decision.

John opposed the motion by declaration and a memorandum of authorities. (CP 164-171; 264-69).

The trial court denied Jenny's Motion for Reconsideration, and this appeal timely followed. (CP 172-199).

IV. ARGUMENT

A. Standards of Review.

Trial court decisions concerning the modification of child support orders are reviewed for a manifest abuse of discretion. *In re Marriage of McCausland*, 159 Wn.2d 607, 616, 152 P.3d 1013 (2007). The appellate court "cannot substitute its judgment for that of the trial court unless the trial court's decision rests on unreasonable or untenable grounds." *In re Marriage of Leslie*, 90 Wn. App. 796, 802-03, 954 P.2d 330 (1998).

Appellate courts grant deference to trial court domestic relations decisions because they involve emotional and financial interests that are best served by finality, because *de novo* review may encourage appeals, and because abuse of discretion is the proper standard of review. *In re Parentage of Jannot*, 149 Wn.2d 123, 126-28, 65 P.3d 664 (2003).

We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal.

Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality...The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.

In re Marriage of Landry, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985).

B. The Trial Court Did Not Abuse its Discretion in Deducting Monthly Business-Related Fees Paid by John from John's Net Income.

This matter came before the trial court on Jenny's motion for biennial modification of the order of child support pursuant to RCW 26.09.170(7)(i), based upon a change in the income of the parents. To determine the parents' income for the purposes of child support, the trial court employs the standards set forth in RCW 29.19.071. That statute provides, in pertinent part:

(1) Consideration of all income. All income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent.

...

(2) Verification of income. Tax returns for the preceding two years and current paystubs shall be provided to verify income and deductions. Other sufficient verification shall be required for income and deductions which do not appear on tax returns or paystubs.

...

(5) Determination of net income. The following expenses shall be disclosed and deducted from gross monthly income to calculate net monthly income:

...

(h) Normal business expenses and self-employment taxes for self-employed persons. Justification shall be required for any business expense deduction about which there is disagreement.

RCW 26.19.071.

Here, John argued that the fees his company paid for the Buschini book of business in 2011 and 2012 constitute a normal business expense under RCW 26.19.071(5)(h), and could therefore be deducted from his gross income for the purposes of calculating his net monthly income. (CP 227-231). Jenny failed to supply the trial court with a memorandum either discussing RCW 26.19.071(5)(h), or refuting its applicability.

The trial court agreed that the applicable statute is RCW 26.19.071(5)(h), and held that the Buschini fees were “dollars...[that] were never really available to [John,] and should not be considered in determining his income for child support purposes.” (CP 130).

On appeal, Jenny denies the applicability of RCW 26.19.071(5)(h), but her arguments are overcome by the text of the statute itself.

1. *The trial court has specific statutory authority to deduct normal business expenses from gross monthly income to determine monthly net income for child support purposes.*

Jenny argues “[t]he fact that certain items may be deducted from net income provides no authority to make such deductions from gross income under RCW 26.19.071(1), (3) or (4).” (Appellant’s Brief, p. 16).

RCW 26.19.071(5)(h) provides, in pertinent part:

Determination of net income. The following expenses shall be disclosed and deducted from gross monthly income to calculate net monthly income[...]

(h) Normal business expenses and self-employment taxes for self-employed persons. Justification shall be required for any business expense deduction about which there is disagreement. (emphasis added)

The trial court is specifically authorized to deduct ‘normal business expenses’ from gross monthly income to determine net monthly income. Jenny’s argument is contradicted by the plain text of the statute.

2. *The trial court’s written ruling specifies the basis for its decision.*

Jenny argues “[t]he Child Support Worksheets approved by the trial court made no such deductions to achieve net income.” (Appellant’s Brief, p. 16). The trial court entered written findings, in pertinent part, as follows: “Considering all of the circumstances, the Court finds that the cost of acquiring the Buschini portfolio may properly be subtracted... the dollars paid...were never really available to the Respondent and should not be considered in determining his income for child support purposes.” (CP 130, 153). On this basis, the trial court entered a Final Order of Child Support, which provided that John’s “actual monthly net income” is \$7,247, which reflects the subtraction of \$1,140 from Jenny’s proposed monthly gross income for John of \$8,387. (CP 132). The Child Support

Worksheets reflect the trial court's determination as to net monthly income. (CP 140). The Child Support Worksheet does list the same figure, \$7,247, under both monthly gross income and monthly net income. (*Id.*)

On review of a child support modification decision, "[t]he question is whether the findings which were made are supported by the evidence and support the conclusions of law and order of the court." *Marriage of Daubert*, 124 Wn. App. 483, 491, 99 P.3d 401 (2004), *overruled in part on other grounds by McCausland*, 159 Wn.2d at 619-20. Technical failures concerning the mandatory forms are, at worst, harmless error. *Id.*

Here, the trial court's written opinion, as well as the trial court's Order of Child Support set forth John's monthly net income, and set forth the trial court's basis for arriving at that figure. The fact that the Child Support Worksheet does not have a separate figure for gross monthly income is, at worst, a harmless error, particularly where the trial court used Jenny's proposed monthly gross income figure for John (\$8,387) as the basis for its calculation.

3. *Jenny has failed to establish either the application of, or the "violation" of the "matching rule."*

Jenny argues that RCW 26.19.071(5)(h) is inapplicable because it "violate[s] the 'matching rule[.]'" (Appellant's Brief, p. 17). This argument bears a citation to CP 107, and is not otherwise accompanied by

any analysis. CP 107 is a portion of a letter opinion from Hassler; it defines the ‘matching rule’ as: “[O]ne should recognize expenses within the same period in which revenues related to those expenses are recognized.” (CP 107). It is unclear why the “matching rule” should trump RCW 26.19.071(5)(h), and it is further unclear how the “matching rule” was “violated.” Recall that John’s business, Buckley Investment Group, entered into a consulting agreement with retiring investment manager Buschini for a book of business. Under the agreement, Buckley Investment Group paid percentage fees on a monthly basis for any revenue generated from the Buschini clients. The amount deducted for the purposes of determining net monthly income was John’s proportional share of the monthly fees Buckley Investment Group paid under the Buschini contract. (CP 202-05; 130; 221-26). Under this set of facts, the “matching rule” was adhered to: the ‘expense’ of the fee was ‘recognized’ in the same month the revenue was generated.

Notwithstanding the above, the issue is not GAP accounting standards, but the trial court’s decision under RCW 26.19.071(5)(h). Jenny’s argument as to the “matching rule” fails to identify any abuse of discretion on the part of the trial court.

4. *Federal tax treatment is irrelevant to the determination of 'normal business expenses' under RCW 26.19.071(5)(h).*

Citing *In re Marriage of Mull*, 61 Wn. App. 715, 722, 812 P.2d 125 (1991)⁶, Jenny argues: “Nor does the fact that Federal tax law may allow John to deduct the entire amount of acquisition costs in one year require the characterization of those costs as normal business expenses for purposes of child support.” (Appellant’s Brief, p. 17).

Federal tax treatment is not relevant to the trial court’s determination under RCW 26.19.071(5)(h) that the monthly fees paid under the Buschini contract constitute “normal business expenses” for the purposes of the statute. Indeed, *Mull* is factually similar to the present case, and supports the trial court’s determination that the monthly fees under the Buschini contract constitute “normal business expenses.”

In *Mull*, the trial court permitted one parent to deduct from his gross income as “normal business expenses” capital contributions made to his firm. *Mull*, 61 Wn. App. at 721-22. On appeal, the other parent argued that one should not be permitted to deduct capital contributions to the firm, because, *inter alia*, those contributions were not deducted as business

⁶ It appears that only two other published cases discuss deductions for “normal business expenses.” *Marriage of Rusch*, 124 Wn. App. 226, 235-36, 98 P.3d 1216 (2004), *overruled in part on other grounds by McCausland*, 159 Wn.2d at 619-20, turned on the lack of adequate documentation before the court. *Marriage of Gainey*, 89 Wn. App. 269, 274-75, 948 P.2d 865, 869 (1997) likewise turned on the fact that the claimant failed to provide adequate documentation to substantiate his claim of a ‘normal business expense’ deduction from gross monthly income.

expenses for federal income tax purposes. *Id.* The *Mull* court rejected this argument, first by explaining that “whether or not such expenditures may be deductible for federal income tax purposes does not control whether they are deductible for purposes of child support calculations.” *Id.* at 722. The *Mull* court then held 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[.]’” *Id.*

Here, John’s company, Buckley Investment Group, entered into a contract with a retiring investment manager to attempt to attract and retain her clients. Under the contract, Buckley Investment Group paid fees on a monthly basis to the retiring investment manager upon revenues generated from the clients. As in *Mull*, the investment by John’s company was in order to maintain his source of income, and there is no allegation that the investment was made “to evade greater support obligations.” Consequently, under *Mull*, the trial court here was correct in deducting the Buschini fees from John’s monthly net income as “normal business expenses” pursuant to RCW 26.19.071(5)(h).

5. *26 U.S.C. 179 is not pertinent to the issues before the Court.*

Jenny argues as follows: “John’s decision to expense acquisition costs of the Buschini Portfolio in one year produced a similar effect as an election by a taxpayer under 26 U.S.C.A. § 179 (West) to deduct certain depreciable property as an expense which is not charged to capital account.” (Appellant’s Brief, p. 17). This argument was not raised with the trial court; moreover, this argument is a *non sequitur*.

The statement “John’s decision to expense acquisition costs of the Buschini Portfolio in one year,” is not descriptive of the record, vis-à-vis the inquiry required by RCW 26.19.071. (*See* CP 64-66; 202-05; 221-26). Buckley Investment Group paid 60% of its fees collected from Buschini clients in the first year to Buschini, on a monthly basis. (*Id.*) Buckley Investment Group paid 50% of its fees collected from Buschini clients in the second year to Buschini, on a monthly basis. (*Id.*) Buckley Investment Group paid 40% of its fees collected from Buschini clients in the third year to Buschini, on a monthly basis. (*Id.*) The trial court determined, under RCW 26.19.071(5)(h), that a portion of the fees was a “normal business expense” for John,⁷ and therefore could be deducted to determine his monthly net income. “John’s decision to expense acquisition costs of

⁷ ...given that a part owner in the business is likewise responsible for a proportional share of costs, as well as profits. (*See* CP 65-66).

the Buschini Portfolio in one year,” is an inaccurate description; though were it accurate, it would not be pertinent, as 26 U.S.C. 179 bears no relationship to the present case, even by analogy.

26 U.S.C. 179 concerns a taxpayer electing “to treat the cost of any section 179 property as an expense which is not chargeable to capital account.” 26 U.S.C. 179(a). 26 U.S.C. 179 property is “tangible property” and “computer software.” 26 U.S.C. 179(d). Federal tax treatment of depreciation of tangible property does not support Jenny’s contention that the trial court abused its discretion by treating the monthly payment of fees by John’s company as “normal business expenses” under RCW 26.19.071(5)(h).

Jenny cites *Asfaw v. Woldberhan*, 147 Cal.App.4th 1407 (2007). *Asfaw* concerned, in pertinent part, the court’s determination that a parent’s deduction of depreciation of his rental property from his income for the purposes of calculating child support was impermissible under the relevant California statute. *Id.* at 1412-13. *Asfaw* was decided under California law, and is inapplicable to the issue here, which is the trial court’s determination that the monthly payment of fees by John in connection with his business constitutes “normal business expenses” under RCW 26.19.071(5)(h). Moreover, the deduction of depreciation of a rental property from income not being at issue, *Asfaw* is inapt.

Jenny cites *Reid v. Reid*, 121 Idaho 15, 822 P.2d 534 (1992). *Reid* concerned a self-employed farmer who argued that straight line depreciation of his farm equipment should be deducted from his gross income. *Id.* at 15. Under Idaho law at the time, there was no requirement that straight line depreciation be deducted. *Id.* at 16. Even though later amendments to Idaho law would have required the trial court to deduct straight line depreciation, since those laws were not in effect at the time of the trial court's decision, the *Reid* court affirmed that the trial court had not abused its discretion in disallowing the deduction. *Id.* at 17. *Reid* was decided under Idaho law in effect in 1989, and is inapplicable to the issue here, which is the trial court's determination that the monthly payment of fees by John in connection with his business constitutes "normal business expenses" under RCW 26.19.071(5)(h). Moreover, the deduction of straight line depreciation of farm equipment not being at issue, *Reid* is inapt.

Jenny cites *Baker v. Baker*, 183 Ariz. 70, 900 P.2d 764 (App. 1995). *Baker* concerned, *inter alia*, a deduction under 26 U.S.C. 179 for depreciation of equipment. *Id.* at 71-73. The *Baker* court held that "trial courts [should] look at all the circumstances before deciding whether to allow a parent to deduct depreciation from his or her gross income and, if so, how much." *Id.* at 72 (citations omitted). *Baker* was decided under

Arizona law in effect in 1995, and is inapplicable to the issue here, which is the trial court's determination that the monthly payment of fees by John in connection with his business constitutes "normal business expenses" under RCW 26.19.071(5)(h). Moreover, the deduction of equipment depreciation not being at issue, *Baker* is inapt.

Jenny cites *Perlenfein and Perlenfein*, 316 Or. 16, 848 P.2d 604 (1993). *Perlenfein* concerned the calculation of "gross income" under Oregon law; specifically, whether a parent's gross income included that parent's share of profits earned by a corporation in which he is a shareholder. *Id.* at 19, 22-23. *Perlenfein* was decided under Oregon law in effect in 1993, and is inapplicable to the issue here, which is the trial court's determination that the monthly payment of fees by John in connection with his business constitutes "normal business expenses" under RCW 26.19.071(5)(h). *Perlenfein* is inapt.

Jenny cites *Miller v. Miller*, 610 So.2d 183 (La.App. 3 Cir. 1992). *Miller* concerns the factual and procedural requirements under Louisiana law to deviate from Louisiana's child support guidelines. It is inapt.

Jenny cites *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992). *Lawrence* concerns, *inter alia*, the consideration of depreciation of rental properties in determining gross income under North Carolina law. *Id.* at 147. As with the other foreign authorities cited by Jenny, *Lawrence*

is inapplicable to the issue here, which is the trial court's determination that the monthly payment of fees by John in connection with his business constitutes "normal business expenses" under RCW 26.19.071(5)(h).

Finally, Jenny cites *In re Marriage of Wiese*, 41 Kan. App. 2d 553, 203 P.3d 59 (2009). *Wiese*, like *Reid*, *supra*, concerned the deduction of straight line depreciation of farm equipment. *Id.* at 553-54. As with *Reid*, *Wiese* is inapplicable to the issue here, which is the trial court's determination that the monthly payment of fees by John in connection with his business constitutes "normal business expenses" under RCW 26.19.071(5)(h).

Here, pursuant to RCW 26.19.071(5)(h), the trial court deducted a specific amount from John's gross monthly income based upon specific monthly business expenses actually paid. Jenny's analogy to depreciation of tangible property under the federal tax code does not accurately address the factual or legal issues at hand, nor does it provide a basis for Jenny's contention that the trial court abused its discretion.

C. RCW 26.19.071(1), (3), (4), and (5) Are Mutually Applicable, Rather Than Mutually Exclusive.

Jenny argues as follows: "Neither RCW 26.19.070(1) or RCW 26.19.070(3), (4) authorize the deduction of any item of expense from gross income. The trial court's deduction of John's acquisition cost of the

Buschini Portfolio from his gross income thus finds no support in RCW 26.19.071(1), (3) or (4).” (Appellant’s Brief, p. 15). That statement is technically true, in that subsection (1) concerns “consideration of all income,” subsection (3) concerns “income sources included in gross monthly income,” and subsection (4) concerns “income sources excluded from gross monthly income.” The trial court expressly determined this matter under the next section of the statute, RCW 26.19.071(5)(h), “determination of net income.” (CP 129-30). That section provides:

(5) Determination of net income. The following expenses shall be disclosed and deducted from gross monthly income to calculate net monthly income:

...

(h) Normal business expenses and self-employment taxes for self-employed persons. Justification shall be required for any business expense deduction about which there is disagreement.

RCW 26.19.071(5)(h). Based upon this statute, the trial court held that the Buschini fees were “dollars...[that] were never really available to [John,] and should not be considered in determining his income for child support purposes.” (CP 130).

Jenny cites *Marriage of Bucklin*, 70 Wn. App. 837, 855 P.2d 1197 (1993). *Bucklin* concerned a party’s failure to substantiate his income by providing the court with tax returns and pay stubs. *Id.* at 840-41. Here,

there is no contention that either party failed to provide tax returns or pay stubs. *Bucklin* is inapt.

In determining that the monthly payment of fees by John in connection with his business constitutes “normal business expenses,” the trial court exercised its discretion under the express statutory authority granted it in RCW 26.19.071(5)(h). Jenny has identified neither an error of law, nor an abuse of discretion on the part of the trial court.

D. Jenny’s Remaining Assignments of Error are Predicated upon her Contention Concerning RCW 26.19.071(4), and Fail for the Same Reasons.

Jenny asserts various additional errors by the trial court, each of which is predicated upon Jenny’s contention that the trial court erred in determining John’s monthly net income by reference to RCW 26.19.071(5)(h). Jenny argues that the trial court erred in finding John’s monthly net income is \$7,247. (Appellant’s Brief, p. 18). This is a restatement of the arguments addressed *supra*.

Jenny argues that the trial court erred in finding a transfer payment of \$1,805.00. (Appellant’s Brief, p. 18). This argument is predicated upon Jenny’s argument that the trial court erred in finding John’s monthly net income is \$7,247. (*Id.*). It fails for the same reasons described *supra*.

Jenny further assigns error to additional line items in the Child Support Worksheet. (Appellant’s Brief, pp. 19-20). These arguments, as

well, are predicated upon Jenny's argument that the trial court erred in finding John's monthly net income is \$7,247, and fail for the same reasons.

E. The Trial Court Did Not Err in Denying Costs and Fees, and the Same Should Be Denied to Jenny on Appeal

The trial court's determination concerning costs and attorney's fees under RCW 26.09.140 is reviewed for an abuse of discretion. *Marriage of MacDonald*, 104 Wn.2d 745, 751, 709 P.2d 1196 (1985); *Marriage of Moody*, 137 Wn.2d 979, 993-94, 976 P.2d 1240 (1999).

The appellate court may award costs and fees, in addition to statutory costs, at its discretion. RCW 26.09.140; RAP 18.1. "In awarding attorney fees on appeal, the court should examine the arguable merit of the issues on appeal and the financial resources of the respective parties." *Marriage of Griffin*, 114 Wn.2d 772, 779-80, 791 P.2d 519 (1990).

Here, both parties requested costs and fees from the trial court, and both parties claimed each had need and that the other had the ability to pay. Jenny's assignment of error on appeal is that because the trial court allegedly erred in calculating John's monthly net income, she should have been entitled to fees as well. (Appellant's Brief, p. 20). Jenny has failed to demonstrate an abuse of discretion either in determining monthly net income per the terms of the relevant statute, or in denying her fees.

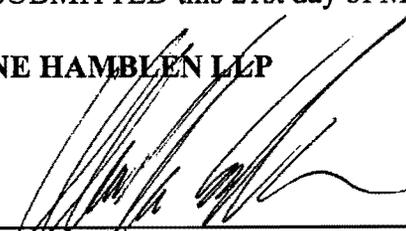
Moreover, for the reasons described *supra*, the Court should find that Jenny's appeal lacks "arguable merit," and deny her request for fees on appeal.

V. CONCLUSION

For the foregoing reasons, John respectfully requests that the Court affirm the decision of the trial court.

RESPECTFULLY SUBMITTED this 21st day of March, 2014.

PAINE HAMBLÉN LLP

By: 

William C. Schroeder, WSBA #41986
Jane E. Brown, WSBA #25093
717 W. Sprague Avenue, Suite 1200
Spokane, WA 99201-3505
(509) 455-6000
Attorneys for Respondent

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