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Division III  
State of Washington  
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COA No. 32650-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

KERT A. CARLSON,

Appellant,

and

REBECCA M. CARLSON, (now EISMANN),

Respondent.

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BRIEF OF APPELLANT

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Kenneth H. Kato, WSBA # 6400  
Attorney for Appellant  
1020 N. Washington St.  
Spokane, WA 99201  
(509) 220-2237

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1. The court erred by entering its order of child support in case 32650-1-III.

2. The court erred by entering the following supplemental financial findings of fact for its order of child support in case 32650-1-III:

The court finds the Respondent/Mother's net income is \$4,452 and the Petitioner/Father's net income is \$16,692. These findings are based in great part on the 2012 tax return and the testimony of the [*sic*] Todd A. Carlson. The court finds Todd Carlson was correct in disallowing the depreciation expense and the home office expense. The court has reviewed the Financial Declaration of the Petitioner/Father and finds automobile expense on a monthly basis of \$550 are appropriate. The court finds the Petitioner/Father will pay no federal taxes and as such arrives at \$15,592 monthly net income for Petitioner/Father.

Based upon the incomes of the parties, the Court finds child support will be between \$2,400 and \$2,500 . . . (CP 1869).

3. The court erred by entering the following supplemental conclusion of law for its order of child support in case 32650-1-III:

Accordingly, the court concludes the law supports the entry of pleadings in conformance with these Findings of Fact. (CP 1892).

4. The court erred by entering judgment against Mr. Carlson for back child support and maintenance as well as attorney and expert fees in case 32650-1-III.

5. The court erred by awarding Ms. Eismann \$20,000 attorney fees for Mr. Carlson's intransigence in case 32650-1-III.

6. The court erred by entering its order of child support in case 35266-8-III.

7. The court erred by making these findings of fact in its letter decision regarding child support in case 35266-8-III:

As to income, the evidence reflects the respondent, Ms. Eismann is presently under contract with the Kalispell, Montana School District and is making \$2,798.83 gross a month. It is true her 2016 income is greater, as she held several different jobs before she moved from Spokane. Although the Court was not provided a 2016 tax return, the W-2s and 1099s were provided, showing an income of over \$50,000 for 2016. Given that Ms. Eismann has moved and is holding one job, her income is set as noted above.

Mr. Carlson's income is disputed. Mr. Carlson is self-employed and claims to have a net income of \$2,070. At the time of trial in 2014 Mr. Carlson made similar claims, but the court found, after trial and hearing from experts, his income to be over \$15,000 net per month. Mr. Carlson has been challenging that determination since trial.

It is Mr. Carlson's burden to prove his income has changed since the trial, less than three years ago. He produced a profit and loss statement for documentary evidence. Certain bank statements were produced from 2015 and early 2016 by the Respondent's counsel as to Mr. Carlson's business, but it became apparent there were other accounts Mr. Carlson uses in his business that were not produced. The Administrative Law Judge hearing the matter in 2016 commented to the effect that the profit and loss statement for 2015 simply was not an accurate reflection of personal earnings. Mr. Carlson's financial

statement shows expenses of approximately \$8,500. In closing argument Mr. Carlson suggested the Court use the figure of \$43.00 an hour as a wage, the amount the Administrative Law Judge imputed. That would mean a gross income of over \$7,000 a month.

As to the grounds of a change in income, the proof of the exact income earned by Mr. Carlson is his. He did not meet that burden. However, the Respondent suggested the Court use the sum of \$8,500 as a net income, the amount Mr. Carlson claims he expends each month to live. While this is a reduction of \$7,000 from the finding of the court less than three years ago, it will be accepted as a reasonable sum under the circumstances. (CP 3168-69).

8. The court erred by entering its conclusion from those findings that set support for the youngest child at \$204 to be paid by Mr. Carlson to Ms. Eismann in case 35266-8-III.

*Issues Pertaining to Assignments of Error*

A. Did the court err in entering its order of child support in case 32650-1-III because (1) substantial evidence did not support its over-calculation of Mr. Carlson's income and under-calculation of Ms. Eismann's income and (2) the court made an error in law by so calculating their incomes? (Assignments of Error 1-4).

B. Did the court err in entering judgment against Mr. Carlson for back child support and maintenance as well as attorney and expert fees when the evidence did not support the judgment in case 32650-1-III? (Assignment of Error 4).

C. Did the court abuse its discretion by awarding Ms. Eismann \$20,000 attorney fees for Mr. Carlson's intransigence in case 32650-1-III? (Assignment of Error 5).

D. Did the court err in entering its order of child support in case 32566-8-III because (1) substantial evidence did not support its over-calculation of Mr. Carlson's income and (2)

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## II. STATEMENT OF THE CASE

### Case 33650-6-III

In case 33650-6-III, Mr. Carlson appealed the trial court's decision denying adequate cause for his petition for modification of the parenting plan. The issue is moot and need not be addressed.

### Case 32650-1-III

Mr. Carlson filed a petition for dissolution. (CP 3). Ms.

Eismann filed a Washington State Child Support Worksheet and financial declaration. (CP 92-96, 97-248). Mr. Carlson filed a declaration challenging her financials. (CP 275). He also filed a Washington State Child Support Worksheet and financial declaration. (CP 289-98).

Ms. Eismann's employer at Gemtext filed a declaration stating her 2012 income was \$40,000, consisting of \$24,000 salary and \$16,000 commissions. (CP 301). On June 24, 2013, Ms. Eismann's 2013 income was \$24,000 salary and \$2,600 commission year-to-date. (*Id.*). The Commissioner entered temporary orders, including maintenance for Ms. Eismann upon her moving out of the family home. (CP 366-69). An amended order on a motion for revision was later filed. (CP 397).

Subsequently, Ms. Eismann filed another child support worksheet and financial declaration. (CP 405-10, 412-17, 420-550). She asked for temporary orders and filed her supporting declaration. (CP 567-69, 574). Mr. Carlson filed a response declaration regarding financial issues. (CP 583-1100). He later filed another declaration stating Ms. Eismann had "significant income" she denied having, although it showed in her financial and bank records. (CP 1123-28). She responded. (CP 1136-42).

CPA Todd Carlson filed a declaration stating he calculated Mr. Carlson's 2012 gross monthly income at \$19,692. (CP 1156-60). In doing so, he relied on 2010, 2011, and 2012 income tax returns. (*Id.*). The CPA filed another declaration addressing 2013 year-to-date income. (CP 1174-77). Kert Carlson filed a reply declaration stating his bank statements did not reflect his income as he transferred money from his business account for KC Enterprises to other accounts as required. (CP 1180-81). He also declared he grossed \$8,100/month and Ms. Eismann netted \$6,200/month. (CP 1187).

On February 14, 2014, the court entered a temporary child support order, finding Mr. Carlson's actual monthly net income was \$13,903 and Ms. Eismann's was \$5,471. (CP 1342, 1343). They had three minor children so the standard calculation resulted in a total monthly transfer payment from father to mother of \$2,266.01 and a split on other expenses of 72%/28% respectively. (CP 1343, 1344). The court further ordered judgment against Mr. Carlson of \$43,862.07 for back child support and maintenance and for attorney and expert fees. (CP 1349).

The case went to trial with Mr. Carlson pro se. The court entered an order of child support finding the father's monthly net

income was \$15,592 and the mother's monthly net income was \$4,452. (CP 1852-61, 1868). Using the standard calculation, it ordered a transfer payment from June 1, 2014, through December 31, 2014, of \$1,969.11; for January 2015 only of \$2,337.71; and from February 2015 forward of \$2,517.03. (CP 1869).

Supplemental findings and conclusions on the financials were entered along with other findings and conclusions. (CP 1876-82, 1883-92). The decree of dissolution further ordered Mr. Carlson to pay \$20,000 attorney fees for his intransigence. (CP 1898). He appealed. (CP 1900).

#### Case 35266-8-III

Alleging a substantial change in circumstances with the two older children now living with him, Mr. Carlson filed an amended petition for modification of child support on September 22, 2015. (CP 2024, 2026). He filed a financial declaration stating he netted \$1,712.05/month and grossed \$6932.20/month. (CP 2093-99). Mr. Carlson had availed himself of administrative proceedings with the State Division of Child Support (DCS), whereupon Ms. Eismann obtained a superior court order staying (1) a DCS notice of financial responsibility for child support for the two older children and (2) collection of that support from her. (CP 2230-33).

Mr. Carlson filed a financial declaration stating he paid \$10,000 directly to Ms. Eismann on the arrearage. (CP 2238). He also noted the two older children, Kylee and Krystal, had been living with him since January 12, 2015. (CP 2239). About two weeks later, he filed another declaration regarding Ms. Eismann's 2013 and 2014 QuickBooks profit and loss statements, which she had represented she did not have. (CP 2305-09). Attached was a letter from a CPA to the Commissioner showing these profit and loss statements. (CP 2311-17). Ms. Eismann acknowledged she had been paid \$10,000 on the arrearage by Mr. Carlson and said he had been given credit for it. (CP 2525-28).

After Ms. Eismann gave notice of an intent to relocate with the youngest child, Kenna, the parties eventually agreed there was adequate cause to change the parenting plan. (CP 2699-2702, 2824-26). They also agreed on a temporary order of relocation. (CP 2828, 2831-32). Mr. Carlson was the court-authorized primary custodial parent for Kylee and Krystal. (CP 2835).

On November 11, 2016, the court ordered the present transfer payment from Mr. Carlson to Ms. Eismann would be zero with all monies he paid to be applied to back support. (CP 2908-

09). A temporary child support order was entered on December 5, 2016. (CP 2910-15).

Before trial, Mr. Carlson filed a financial declaration stating he netted \$2,070/month and grossed \$7,728/month from his business, KC Enterprises. (CP 2973, 2974). He submitted profit and loss statements for January through December 2016. (CP 2979-81). For the year, he had negative net income of \$28,551.98. (CP 2981). Mr. Carlson filed a child support worksheet. (CP 2982-86). Ms. Eismann's child support worksheet showed Mr. Carlson's net income at \$8,489/month and her net income at \$2,798.83. (CP 3027). There was a residential split adjustment. (CP 3032).

Mr. Carlson filed a reply declaration stating Ms. Eismann overstated his income by \$761/month and understated hers by \$1183/month. (CP 3055). Thus, her net income should have been \$4,160. (*Id.*). He filed attachments regarding her income. (CP 3063-70). Mr. Carlson's child support worksheet showed his gross income as \$7,728/month and Ms. Eismann's gross at \$4,682 and their respective net incomes at \$2,070 and \$4,160. (CP 3071-76). He calculated a transfer payment from her to him of \$1,255/month. (CP 3076).

After a trial, the judge issued letter decisions on the relocation and child support. (CP 3119-21, 3138-42). The transfer payment was set at \$204/month from Mr. Carlson to Ms. Eismann. (CP 3157-63). He appealed. (CP 3164).

### III. ARGUMENT

A. The court erred in entering its order of child support in case 32650-1-III.

In setting child support, the trial court determined Mr. Carlson's net income was \$15,592/month. (CP 1868, 1889). But he neither made nor makes anywhere near that amount, which is not supported by substantial evidence. See *In re Marriage of Raskob*, 183 Wn. App. 503, 510, 334 P.3d 30 (2014).

The court's findings were "based in great part on the 2012 tax return and the testimony of Todd A. Carlson." (CP 1189). It found "Todd Carlson was correct in disallowing the depreciation expense and the home office expense." (*Id.*). Allowing \$550/month as automobile expense, the court found Kert Carlson would pay no federal taxes so his monthly net was \$15,592. (*Id.*).

Todd Carlson was a CPA and valuation expert. (5/20/14 RP 345). He did an earnings analysis of Kert Carlson's business and looked at tax returns, internal profit and loss statements, sales by

customer, and customer lists. (*Id.* at 347). He came up with gross monthly income of \$19,692 before taxes based on tax returns for the three-year period 2008-2011. (*Id.* at 350). As of May 1, 2014, he opined Kert Carlson's gross monthly income was \$17,242. (*Id.*).

Todd Carlson looked at updated information from internal profit and loss statements of KC Enterprises through October 18, 2013, and used a 50% weighted average for 2013 and 100% for 2012. (5/20/14 RP 351). The net result was a decline in the weighted average monthly gross income. (*Id.*). 2012 showed monthly income before taxes of \$19,193 with 100% weighting (*Id.* at 352). 2013 showed monthly income before taxes of \$13,341 for 9.5 months with 50% weighting. The result was a weighted average of \$17,242/month. (*Id.*). Although he had figures for 9½ months of 2013, Mr. Carlson did not give any reason for only weighting a 50% average when he had data for 80% of 2013. Todd Carlson considered expense adjustments to schedule C of the 2012 income tax return and specifically added back depreciation expense. (5/20/14 RP 352). He did so because he "was never able to ascertain the specific asset." (*Id.*). But he did not ask what that asset was in forming his opinion and simply

speculated the asset had to be of significant value to generate \$70,000 of annual depreciation and he saw none. (*Id.* at 353-54).

To the contrary, the depreciation expense was justified. Kert Carlson testified he had a large depreciation expense relating to the nonprofit Sports USA, also known as the Valley Hub. (5/20/14 RP 287-90). There was no justification in law or fact for Todd Carlson to add back the depreciation expense. Accordingly, the court erred by adopting his rationale for doing so and thus inflating his gross monthly income. Substantial evidence did not support the court's finding that disallowed the depreciation expense based on Todd Carlson's testimony. *In re Marriage of Raskob*, 183 Wn. App. at 510.

The CPA also added back a "home business exemption" of \$25,455. (5/20/14 RP 355). It was more than he had ever seen and he did not have "data to actually substantiate what the use or business use of the home property was." (*Id.*). Again, this information could have been provided to him if asked. Indeed, Mr. Carlson said his office and shop for KC Enterprises was the equivalent of a separate rental building, thus justifying the deduction. (*Id.* at 367-71). Substantial evidence does not support

the court's finding that Todd Carlson was correct in disallowing the home expense. *In re Marriage of Raskob*, 183 Wn. App. at 510.

The court arrived at a monthly net income of \$15,592 for Kert Carlson. (CP 1889). This figure, however, was calculated by using numbers expressly adopted from Todd Carlson's testimony that were not supported by substantial evidence. *In re Marriage of Raskob*, 183 Wn. App. at 510. On his child support worksheet, Kert Carlson acknowledged a net monthly income of \$8442 as he worked on a 15%-18% margin. (5/19/14 RP 165). Because substantial evidence did not support its finding that his monthly net income was \$15,592, the court necessarily abused its discretion in setting the father's net monthly income as the decision was based on facts not meeting the requirements of the correct standard. *In re Marriage of Krieger*, 147 Wn. App. 952, 959, 199 P.3d 450 (2008).

The court further determined Ms. Eismann's monthly net income was \$4,452. (CP 1889). But in its oral ruling, the court found her monthly net income was \$5,300 from 2015 on. (5/23/14 RP 627). The record reflects nothing changed from the time of its oral ruling to the time of entry of the order of child support and supplemental financial findings. The court's finding that Ms. Eismann's monthly net income was \$4,452 does not account for

2015 forward when it found her net monthly income would then be \$5,300. The court's finding of \$4,452 is not supported by substantial evidence as it does not reflect her increased net income of \$5,300 from 2015 on as the court found and is therefore an abuse of discretion because the facts do not meet the requirements of the correct standard. *In re Marriage of Krieger*, 147 Wn. App. at 959.

Since the court erred in setting the monthly net incomes of Mr. Carlson and Ms. Eismann, remand is appropriate to determine the actual net monthly incomes of the parties so the correct amount of child support and the monthly transfer payment can be calculated. *See In re Marriage of Scanlon*, 109 Wn. App. 167, 175-76, 34 P.3d 877 (2001), *review denied*, 146 Wn.2d 1014 (2002).

B. The court erred by entering judgment against Mr. Carlson for back child support and maintenance as well as attorney and expert fees in case 32650-1-III.

On February 14, 2014, the court entered a \$43,862.07 judgment against Mr. Carlson for back child support and maintenance as well as attorney and expert fees. (CP 1349). At trial he acknowledged he was unable to pay the child support and maintenance as he had no money to do so and there was no way

to pay. (5/19/14 RP 154). Mr. Carlson had been ordered to pay a monthly transfer amount of \$2,266 to Ms. Eismann, based on his net income of \$13,903 and her net income of \$5,471. (CP 1341-48). These amounts were calculated from 2012 income amounts. (12/6/13 RP 54). The court further ordered maintenance of \$2000/month to year's end. (*Id.*). Mr. Carlson argued the finances regarding their income and expenses had not been determined with any reasonable certainty. (*Id.* at 5). Three months later after trial, however, the court found the monthly net incomes of both parties was different although the financial data was essentially the same.

At presentment for the judgment order, Mr. Carlson again objected on the ground that the figures used by the court to enter the judgment were incorrect. (2/14/14 RP 9). In these circumstances, that part of the judgment for back child support is not supported by substantial evidence and the court abused its discretion by basing it on facts not meeting the requirements for the correct standard. *In re Marriage of Krieger*, 147 Wn. App. at 959.

The court also ordered as part of the judgment \$8,000 attorney fees to Ms. Eismann because Mr. Carlson had used community funds in that amount to pay for his lawyer. (12/6/13 RP 37). But there is no evidence in the record supporting that finding.

As it turned out, Mr. Carlson borrowed money from his mother to pay the \$8,000 attorney fees. (5/19/14 RP 239-40). The court's reason for awarding attorney fees to Ms. Eismann is not supported by substantial evidence. *In re Marriage of Raskob*, 183 Wn. App. at 510. The court thus abused its discretion in making the award as the facts do not meet the requirements of the correct standard of review. *In re Marriage of Krieger*, 147 Wn. App. at 959.

The court ordered Mr. Carlson to pay \$6,000 for Ms. Eismann's expert to value his business. (12/6/13 RP 54). It made no findings regarding why he should pay for a business valuation. (*Id.*; CP 1349). Ms. Eismann showed sufficient income to pay for her own valuation, if one were needed. But Mr. Carlson was the business and, without him, there was neither a business nor value. (4/18/14 RP 53). The court can award expert fees in its discretion, but there must be a tenable ground or reason for doing so. *See In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985). The court did not make findings. Without them, the court abused its discretion as there is nothing on which to determine whether a pretrial award of expert fees was appropriate. *Cf. Sentinel C3, Inc. v. Hunt*, 181 Wn.2d 127, 144, 331 P.3d 40 (2014). The award cannot be sustained and remand is required.

C. The court erred by awarding Ms. Eismann \$20,000 attorney fees for Mr. Carlson's intransigence in case 32650-1-III.

The court found Mr. Carlson was intransigent and awarded \$20,000 attorney fees to Ms. Eismann. (CP 1898). In its oral ruling, it stated:

I have to say that I think a lot of attorney's fees that Mrs. Carlson generated were in response to the activities of Mr. Carlson. So Mrs. Carlson does not really have much of an ability – I think she could make monthly payments to Mr. Mack but they wouldn't be very much. I think Mr. Carlson, by virtue of the fact that he's caused a lot of this and he has an ability to pay, that I will order a contribution of \$20,000 to the attorney fees of Mrs. Carlson. (5/23/14 RP 631).

As to intransigence, the supplemental findings of fact provided:

The court finds the Petitioner/Father was intransigent in this case and caused the Respondent/Mother to incur additional fees and costs. Accordingly, the court finds a \$20,000 attorney fee award from the Petitioner/Father to the Respondent/Mother based on intransigence is appropriate. (CP 1889).

Determining the father was intransigent is a legal conclusion and must be based on facts supporting that determination. *See In re Kelly*, 170 Wn. App. 722, 739-40, 287 P.3d 12 (2012), *review denied*, 176 Wn.2d 1018 (2013). Intransigence may be shown by "litigious behavior, bringing excessive motions, or discovery

abuses.” *In re Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002). The court has also deemed intransigence to describe parties motivated by their desire to delay proceedings or to run up costs. (*Id.*).

The court found Mr. Carlson caused Ms. Eismann to incur additional fees and costs. But it failed to make any findings of fact supporting why the father caused the mother to incur those additional expenses. Such findings are required. *Sentinel C3, Inc.*, 181 Wn.2d at 144. In its oral ruling, the court did not even mention intransigence and decided a \$20,000 contribution to Ms. Eismann’s attorney was warranted as Mr. Carlson had the ability to pay. Intransigence, however, is not related to need and ability to pay so the court abused its discretion by using the wrong legal analysis. *In re Marriage of Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001).

Mr. Carlson was pro se after December 2013. He filed appropriate motions and responses showing no litigious behavior, excessive motions, or discovery abuses. Mr. Carlson did not do anything that had not been done by counsel who had represented him and no prior claim of intransigence had been made. He had no reason to delay the proceedings or run up costs as he did not have

the money to be “intransigent.” Without the required findings to support intransigence, the court abused its discretion on this ground as well as the record is again insufficient to determine whether the award of fees for intransigence was justified. *Sentinel C3, Inc.*, 181 Wn.2d at 144.

D. The court erred by entering its order of child support in case 35266-8-III.

Mr. Carlson filed an amended petition for modification of child support since there was a substantial change in circumstances as Kylee and Krystal had been living with him since January 12, 2015. (CP 2024, 2154-56). On December 21, 2016, he filed a financial declaration stating he grossed \$6,932/month and netted \$1,712.05. (CP 2093-99). He later filed a declaration noting a DCS finding Ms. Eismann had hidden income. (CP 2165). On March 18, 2016, Mr. Carlson filed a declaration attaching Ms. Eismann’s QuickBooks profit and loss statements for 2013 and 2014, which she had represented she neither had nor could access. (CP 2305-09, 2312-14, 2315-17).

As of October 1, 2016, the court ordered there would be no transfer payment of \$725/month from Mr. Carlson to Ms. Eismann based on the older two children living with him. (11/8/16 RP 32, 41-

42). At presentment of the order of child support, the parties did not agree on their respective incomes. Mr. Carlson was ordered to keep paying \$500/month on child support arrearages. (*Id.* at 47).

Since the end of August 2016, Ms. Eismann worked at Edgerton Elementary School in Kalispell, Montana. (3/27/17 RP 154-55). She made \$2,798.83/month. (CP 3027).

After trial, the court determined Mr. Carlson grossed \$8,489/month and netted the same amount beginning April 15, 2017. (CP 3152, 3158). It determined Ms. Eismann grossed \$2,798.83/month and netted \$2,277/month. (*Id.*). Finding the residential split adjustment was appropriate, the court deviated from the standard calculation and ordered a total transfer payment of \$204/month from Mr. Carlson to Ms. Eismann. (CP 3159). It set a starting date of April 1, 2017, and determined the new incomes were not retroactive. (*Id.*).

Mr. Carlson contends the court over-calculated his income. He filed a declaration on the child support worksheet presented to the trial judge, which was accepted and signed by him. (CP 3269). He claimed the worksheet lacked accurate information in the record. (CP 3269-72). Mr. Carlson declared his child support worksheet was prepared “hand in hand with DCS to make sure they

followed the Law and all information was provided properly.” (CP 3270). He voiced his objection to the worksheet prepared by Ms. Eismann and accepted by the court:

For the record the Petitioners income on these forms is still over stated but will use the income listed for reference purposes only.

1. Line 4 – on both CSW=\$10,865,85 for a combined net income.

2. Line 5 – is the Basic Child Support Obligation (error on Respondents). If you look at Exhibit C the Economic Table and reference THREE CHILDREN FAMILY (Top middle of page) and then look down the left side (Combined monthly net income) and follow the chart down to \$10,800 you will see that Kenna age 8 (currently living with Respondent) is \$904 and Krystal age 14 (permanently living with Petitioner) is \$1117 and Kylee age 16 (permanently living with Petitioner) is \$1117. Now Look at the CSW for the Respondent, she provides \$904 for all three children (which is wrong) and the CSW for the Petitioner is accurate. This error is huge when it comes to whom owes who child support. How can a parent that has two living with him pay a parent of one currently living with her?

So just with this first error of \$426 is shorted the Respondents worksheet continuing on is consistently wrong. So moving forward you must follow the accurate CSW which is the Petitioners.

4. Line 20 – the Respondent leaves off real estate of \$376 for the Petitioner (which is the Home he was awarded in the divorce by Moreno).

Now here is the big one, on Exhibit B the Respondents CSW she has forgotten to attach the Residential Time Split Adjustment, but if you look on Exhibit A, the Petitioners, you will see it is attached. This form clearly

states that it must be attached when each parent has at least one of the children from the relationship living with them most of the time. But the Respondent did not supply this form to the court at trial. Now at trial the Petitioner attempted to express this to Judge Clarke, but he had no interest in listening or maybe he just did not understand what is required by Law in a CSW. Now if you see that with the correct Monthly Basic Support Obligation PER CHILD (the Petitioners CSW) the payment and whom pays who greatly changes. (CP 3270-71).

Mr. Carlson declared his child support worksheet showed his gross monthly income was \$7,728 and Ms. Eismann's was \$4,682. (CP 3071). He further stated his business income was overstated by \$761/month in her worksheet. (CP 3055). Mr. Carlson said he netted \$2,070/month and Ms. Eismann netted \$4,160. (CP 3071). Accordingly, there should be a monthly transfer payment from Ms. Eismann to him of \$1,255. (CP 3076).

In its letter decision, the court found Mr. Carlson had requested an administrative review of support with DCS:

Over the objection of Respondent, DCS conducted a hearing on January 25, 2016. The Administrative Law Judge found the Respondent's income to be \$4,004.74 net per month and imputed the Petitioner's income at a net of \$5,880.71 monthly. This was based on a 2005-2006 report to the Department of Employment Security. The Administrative Order noted it may be rendered void by the Superior Court.

On February 25, 2016 the Superior Court Commissioner assigned to this matter stayed the collection of support

ordered under the Administrative Order. Further, the Commissioner found Ms. Eismann (formerly Ms. Carlson), the respondent, owed a zero-support obligation for Kylee and Krystal Carlson while in the care of the Petitioner from January 1, 2015 moving forward. (CP 3167).

The court determined Ms. Eismann's sole income was \$2,798.83 with the school district in Kalispell, Montana. (CP 3168). It stated her income was greater in 2016, but further noted her 2016 W-2s and 1099s had been provided even though her 2016 return had not. Nonetheless, her income was over \$50,000 in 2016. (*Id.*).

As to Mr. Carlson's income, the court found:

Mr. Carlson's income is disputed. Mr. Carlson is self-employed and claims to have a net income of \$2,070. At the time of trial in 2014 Mr. Carlson made similar claims, but the court found, after trial and hearing from experts, his income to be over \$15,000 net per month. Mr. Carlson has been challenging that determination since trial.

It is Mr. Carlson's burden to prove his income has changed since the trial, less than three years ago. He produced a profit and loss statement for documentary evidence. Certain bank statements were produced from 2015 and early 2016 by the Respondent's counsel as to Mr. Carlson's business, but it became apparent there were other accounts Mr. Carlson uses in his business that were not produced. The Administrative Law Judge hearing the matter in 2016 commented to the effect that the profit and loss statement for 2015 simply was not an accurate reflection of personal earnings. Mr. Carlson's financial statement shows expenses of approximately \$8,500. In closing argument Mr. Carlson suggested the Court use the figure of \$43.00 an hour as a wage,

the amount the Administrative Law Judge imputed. That would mean a gross income of over \$7,000 a month.

As to the grounds of a change in income, the proof of the exact income earned by Mr. Carlson is his. He did not meet that burden. However, the Respondent suggested the Court use the sum of \$8,500 as a net income the amount Mr. Carlson claims he expends each month to live. While this is a reduction of \$7,000 from the finding of the court less than three years ago, it will be accepted as a reasonable sum under the circumstances. (CP 3168-69).

Mr. Carlson's income was overstated and there is no substantial evidence supporting the court's finding that his net monthly income was \$8,500. Mr. Carlson's 2015 and early 2016 profit and loss statements were of record. There were other accounts he used, but they were pass-throughs from his business account to payment accounts from which bills were paid. (3/28/17 RP 364-73). As such, these payment accounts did not reflect any additional income that did not appear in his business account. What went in, went out. (*Id.* at 373-377). No evidence was presented to the contrary.

On this record, there is no evidence, substantial or otherwise, supporting the court's finding that Mr. Carlson netted \$8500/month. At most, he grossed \$7,000/month using the imputed \$43/hour figure of DCS. The court simply set his net

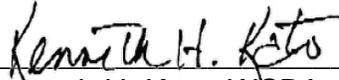
income at the amount of his monthly expenses. Since the finding is not supported by substantial evidence, the court abused its discretion as the facts for the decision did not meet the requirements of the correct standard. *In re Marriage of Krieger*, 147 Wn. App. at 959. Remand is required to determine the respective incomes of the parties, set proper child support; and provide for a monthly transfer amount from Ms. Eismann to Mr. Carlson based on their incomes and the residential split adjustment. *Id.*

#### IV. CONCLUSION

Based on the foregoing, Mr. Carlson urges this court to reverse the trial court's orders of child support; the judgment for back child support and maintenance, attorney fees and expert fees; the award of \$20,000 for intransigence; and remand for further proceedings.

DATED this 13<sup>th</sup> day of February, 2018.

Respectfully submitted,

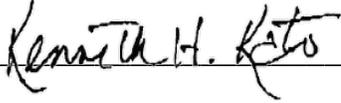


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Kenneth H. Kato, WSBA #6400  
Attorney for Appellant  
1020 N. Washington  
Spokane, WA 99201  
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on January , 2018, I served a copy of the Brief of Appellant through the eFiling portal on Hailey Landrus at her email address.

  
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