

No. 35795-3-III

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

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In re the marriage of:  
ALICIA ANNE MARROQUIN,  
Petitioner/Respondent,

v.

RAUL MARROQUIN, JR.,  
Respondent/Appellant.

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AMENDED BRIEF OF APPELLANT

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### III. ASSIGNMENTS OF ERROR

1. The trial court erred in Conclusion 1 of the Pretrial Order by denying Appellant's request for live testimony on his request for a downward deviation from the standard calculation of the monthly child support obligation.
2. The trial court erred in paragraph 3 of the Pretrial Order by denying Appellant's request for live testimony and ruling the written record will be the record for any appeal.
3. The trial court erred in Conclusion 1 and paragraph 3 of the Pretrial Order by authorizing the deprivation of Appellant's property without due process of law.
4. The trial court violated Washington Constitution Article 1, § 10 by deciding Appellant's request for live testimony on the deviation issue outside of the courtroom.
5. The trial court erred in Section 9 of the Final Child Support Order by finding the amount of child support ordered in section 10 was the same as the standard calculation listed in section 8 because it found there was no basis for a deviation from the standard calculation.
6. The trial court erred in Section 8 of the Final Child Support Order by finding Appellant's standard calculation to be \$712.00.

7. The trial court erred in Section 10 of the Final Child Support Order the monthly child support amount (transfer payment) owed by Appellant was \$712.00.
8. The trial court erred in entering the Final Child Support Order without providing Appellant a meaningful opportunity to be heard, in violation of Washington Constitution Article I, § 3 and the Due Process Clause of the 14<sup>th</sup> Amendment to the United States Constitution.
9. The trial court erred in Finding 21 by reciting it had signed the Final Child Support Order.
10. The trial court erred in paragraph 19 of the Final Divorce Order by reciting it had signed the final Child Support Order and Worksheets.
11. The trial court erred in denying Appellant's request for a deviation from the standard calculation.
12. The trial court erred in denying Appellant's motion for reconsideration.
13. Appellant requests an award of attorney fees on appeal.

#### **IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court violate Appellant's right to due process of law by denying Appellant's request for live testimony regarding the downward deviation? (Pertains to Assignments of Error Nos. 1, 2, 3, 8, 9, 10).

2. Did the trial court violate Washington Constitution Article 1, § 10 by deciding Appellant's request for live testimony on the deviation issue outside of the courtroom? (Pertains to Assignments of Error Nos. 4, 5, 6, 7, 9, 10).
3. Did the trial court err in denying Appellant's request for a deviation from the standard calculation? (Pertains to Assignment of Error No. 11).
4. Did the trial court abuse its discretion in denying Appellant's motion for reconsideration? (Pertains to Assignment of Error No. 12).
5. If the trial court's challenged provisions of its orders, findings, and decree are reversed, is Appellant entitled to an award of attorney fees under RCW 29.09.140? (Pertains to Assignment of Error No. 13).

## **V. STATEMENT OF THE CASE**

### **A. Facts**

Appellant, Raul Marroquin Jr., and respondent, Alicia Anne Marroquin, were married in Walla Walla on July 12, 2012. CP 3. The parties separated on or about June 23, 2016. CP 57. The parties have a child as a result of their marriage, A, age 4. CP 57.

Appellant is a firefighter for the City of Richland. RP I p. 21. 23-24. As of December 2017, appellant had a net monthly income of \$5,628.15. CP. 214. Respondent has a net monthly income of \$4,840.83. CP 214.

## **B. Procedural History.**

Respondent filed a petition for dissolution of the parties' marriage in July 2016. CP 3-6. Temporary orders were entered on September 9, 2016. CP 62. The parenting plan provided appellant would have residential time with his son on his days off work, which averaged 144 nights per year. CP 62. Appellant's request for a downward deviation was denied at the time of the temporary orders. CP 62.

Appellant had been paying \$800 per month in child support since the date of separation. CP 62. In November 2016, appellant obtained a new job which changed the standard calculation to approximately \$712.00 per month. CP 62-63. Notwithstanding that change, appellant continued to pay \$800 per month in child support. CP 63.

The parties entered into a mediated settlement agreement on October 31, 2017. CP 201-05. The parties were unable to reach an agreement on child support. The agreement provided, inter alia, "*[t]he issue of whether there could be a downward deviation based on the residential schedule should be litigated.*" CP 205. Appellant believed, based upon that provision in the settlement agreement, he would have the opportunity to have his day in court regarding the downward deviation of child support, rather than have it resolved on a motion. CP 181.

In October 2017, appellant's counsel informed respondent's counsel and the trial court that appellant wanted a trial date on the deviation issue.

CP 172. The trial court called “meeting” (outside of the courtroom). *Ibid.* The trial judge and respondent’s counsel (who is also the court commissioner) were present at the meeting and were signing ex parte orders. CP 172. The trial court there and then informed appellant’s counsel the court did not need testimony and appellant and his attorney should present briefing and declarations regarding the deviation issue, and the court would rule based upon the written material and the written material would be the record for appeal. CO 172.

The trial court entered a pre-trial order in which it found the mediated agreement indicated the issue of a downward deviation due to residential time be litigated and that appellant had requested live testimony on that issue. CP 31; App. 1. The trial court concluded live testimony is not necessary regarding the downward deviation. CP 32. The trial court therefore denied appellant’s request for live testimony. CP 32. Respondent’s counsel then noted the matter on the docket. CP 27. Appellant’s counsel objected and sent several messages regarding her objection to the matter being heard on a motion docket. CP 172, CP 175-180.

Appellant moved to strike the hearing set for December 11, 2017. CP 171-180. Appellant’s counsel argued the denial of appellant’s request for live testimony violated due process. CP 171-72. Appellant also filed a

declaration in which he objected to the trial court's denial of his request for live testimony as violating his right to due process of law. CP 81-182.

On December 11, 2017, the trial court entered Findings of Fact and Conclusions of Law. CP 193-196; App. 3. The trial court on that date also filed the Final Divorce Order. CP 197-205 App. 4.

On December 12, 2017, the trial court entered the Final Child Support Order. CP 207-223; App. 2. In paragraph 8, the trial court set a standard calculation of \$712.00. CP 208. In paragraph 9, the trial court denied a deviation from the standard calculation. CP 208. In paragraph, the trial court set a transfer payment of \$712.00. CP 208-09.

Appellant filed a letter requesting reconsideration on December 13, 2017. CP 234. On December 15, 2017, the trial court entered an order denying reconsideration. CP 242-244.

On January 10, 2018, appellant filed a notice of appeal . CP 245-268.

## VI. ARGUMENT

### A. **The trial court violated due process of law in denying appellant the opportunity to provide live testimony on the deviation issue.**

Error is assigned to Conclusion 1 of the Pretrial Order. CP 32; App. 1.

Error is assigned to paragraph 3 of the Pretrial Order. CP. 32; App. 1.

Error is assigned to Sections 8, 9, 10 of the Final Child Support Order. CP 208-09; App. 2. Error is assigned to Finding of Fact 21. CP 196; App. 3.

Error is assigned to paragraph 19 of the Final Divorce Order. CP 199;  
App. 4.

**1. Standards of Review**

The trial court's order of child support is reviewed for abuse of discretion. *Marriage of Booth*, 114 Wn. 2d 772, 776, 791 P. 2d 519 (1990); *Marriage of Selley*, 189 Wn. App. 957, 959, 359 P. 3d 891 (2015). A judgment entered in violation of due process is void and must be vacated. *In re Marriage of Maxfield*, 47 Wn. App. 699, 706, 737 P. 2d 671 (1987).

**2. The trial court violated appellant's right to due process of law by denying him an opportunity to present live testimony to establish grounds for deviation from the standard calculation.**

Washington Constitution Article 1, § 3 provides as follows: "*No person shall be deprived of life, liberty, or property, without due process of law.*" In this case, respondent seeks the right to impose a child support obligation against appellant. That obligation carries with it the right to secure a judgment against appellant for failure to pay support. RCW 26.09.160 (5).

The possibility of such a judgment implicates appellant's due process rights. "*We think it abundantly clear that money is "property" and that suffering such a judgment is a deprivation of property that implicates due process rights.*" *State Bureau of Child Support v. Garcia*, 132 Idaho 505, 975 P. 2d 793, 798 (Idaho App. 1999). *See also, Superior Court of*

*California v. Ricketts*, 153 Md. App. 281, 836 A. 2d 707, 741 (2003)  
 (“[I]n a proceeding to determine child support, ‘the private interest at stake is financial.’”(Citation omitted)).

The process due a parent in determining a child support obligation is determined by consideration of three factors: (1) the parent's interest, (2) the risk of error created by the procedure, and (3) the State's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18, (1976); *In re Welfare of Shantay*, C.J., 121 Wn. App. 926, 937, 91 P. 3d 909 (2004).

A parent’s interest in his child is a formidable interest. *In re Ebbinghausen*, 42 Wn. App. 99, 102, 708 P. 2d 1220 (1985) (“Given a parent’s significant interest in his children, there can be no doubt the Fourteenth Amendment establishes a parental constitutional right to the care, custody and companionship of the child.”).

The risk of error created by the trial court’s reliance solely upon the written record is simply too great to allow it here. Note *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970):

...[W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision...

While *Goldberg v. Kelly* arose in the benefits-eligibility context, its rejection of written submissions has also found favor in cases involving child support issues. In *Volk v. Brame*, 235 Ariz. 462, 333 P. 3d 789 (2014), the court, following *Goldberg v. Kelly*, rejected the trial court's exclusive reliance upon written submissions in a hearing sought by the father for modification of child support. 333 P. 3d 794-95.

In *Goldberg v. Kelly*, the court recognized due process requires an effective opportunity to defend by confronting any adverse witnesses and to present one's own arguments and evidence orally. 397 U.S. 268. In *Volk v. Brame*, again following *Goldberg v. Kelly*, the court concluded, “[w]ithout allowing Father an opportunity to explain his own evidence and dispute Mother's evidence, there is a grave risk that the court erroneously determined his income...” 333 P. 3d 797. That grave risk is no less present here.

In *Heidbreder v. Heidbreder*, 230 Ariz. 377, 284 P. 3d 888 (2012), the trial court in a child custody modification proceeding sua sponte raised the issue of child support. The trial court ordered both parties to testify as to child support and to file affidavits of financial need. The trial court issued an order reducing the father's child support by \$500.00 per month. On appeal, the appellate court reversed the trial court's modification of child support. The appellate court concluded the trial court erred in modifying child support without providing adequate notice and by ordering the

parties to submit financial affidavits in lieu of a full hearing allowing the parties to present evidence. 284 P. 3d 892-93.

In *Flowers v. Flowers*, 799 NE 2d 1183 (Ind. App. 2003), the trial court denied the support obligor's petition for termination of wage assignment and determination of child support arrearages. The child support agency made a child support arrearage determination without conducting a hearing in his presence. The appellate court reversed, concluding that by failing to conduct such a hearing, the agency had violated the support obligor's right to due process. 799 N.E. 2d 1190.

In *Rooney v. Rooney*, 478 N.W. 2d 545 (Minn. App. 1991), an employer sought an evidentiary hearing after being ordered to withhold income in order to make the obligor's maintenance and support payments. The trial court authorized the obligee to levy on assets of the employer if payments were late and denied the employer's request for oral argument. The appellate court reversed, concluding "[o]rdinary rules of due process mandate a hearing." 478 N.W. 2d 547.

In *Bellamy v. Bellamy*, 110 Ohio App. 3d 576, 674 N.S. 2d 1227 (1996), the trial court sua sponte modified the obligor's child support obligation during a contempt proceeding. The trial court held the contempt hearing in abeyance. The trial court announced the support modification was temporary, and that it intended to hold a hearing for presentation of evidence on the contempt issues, but no hearing was ever

held, and the interim support modification became permanent. The appellate court ruled due process required notice and the opportunity to present evidence, which was not done in that case. 674 N.E. 2d 1230-31.

In *Valentine v. Valentine*, 149 Conn. App. 799, 90 A. 3d 300 (2014), the obligor spouse appealed the trial court's order granting reconsideration and clarification of its financial orders and the trial court's additional financial orders entered without a hearing. Those orders significantly increased the obligor spouse's financial obligations. The obligor spouse had only one day's prior notice of the reconsideration. The appellate court concluded the trial court had violated the obligor spouse's right to due process of law. 90 A. 3d 804-05.

*Goldberg, Mathews, Garcia, Ebbinghausen, Ricketts, Volk, Heidbreder, Flowers, Rooney, Bellamy* and *Valentine* present an unbroken line of authority that due process of law requires a party faced with an obligation to provide child support to be afforded an opportunity to present evidence and cross-examine the obligee. Appellant was not provided such an opportunity and he was thereby deprived of due process of law.

An order issued in violation of due process is void. *Esmieu v. Schrag*, 88 Wn. 2d 490, 497, 563 P. 2d 203 (1977); *Hesthagen v. Harby*, 78 Wn. 2d 934, 944-45, 481 P. 2d 438 (1971); *In re Marriage of Maxfield*, 47 Wn. App. 699, 706, 737 P. 2d 671 (1987). Paragraph 3 of the Pretrial Order,

Sections 8, 9, 10 of the Final Child Support Order, Finding of Fact 21, and paragraph 19 of the Final Divorce Order were entered in violation of due process and are therefore void and must be reversed.

**B. The trial court violated Washington Constitution Article 1, § 10 by deciding appellant's request for live testimony on the deviation issue outside of the courtroom.**

Error is assigned to Conclusion 1 and paragraphs 1, 2, 3 of the Pretrial Order. CP 32. In October 2017, appellant's counsel informed both respondent's counsel and the court that appellant wanted a trial date on the deviation issue. CP 172. Appellant's counsel was summoned to a meeting where both the trial court judge and the court commissioner (who is also respondent's attorney) were signing ex parte orders. CP 172. Appellant's counsel was told at that meeting the court did not need testimony. CP 172. The court informed appellant's counsel that appellant could submit briefing and declarations on the deviation issue and the court would rule based upon the written material. CP 172. The conduct of that meeting occurred outside of a courtroom with no court reporter present at that time.

That meeting violated Washington Constitution Art. 1 § 10: "*Justice in all cases shall be administered openly, and without unnecessary delay.*" The core concern of that section is stated in *Bennett v. Smith, Bunday, Berman, Britton, PS*, 156 Wn. App. 293, 306, 234 P.3d 236, *affirmed*, 176

Wash.2d 303, 291 P.3d 886 (2013): “*The core concern of the constitutional article is to guarantee the public’s right to observe ‘the operations of the courts and the judicial conduct of judges.’ (Quoting Dreiling v. Jain, 151 Wn. 2d 900, 908, 93 P. 3d 861 (2003)).*”

Courts use the experience and logic test to determine whether the constitutional right to a public trial right is implicated by a particular proceeding. *State v. Jones*, 185 Wn. 2d 412, 421, 372 P.3d 755 (2016). In applying this test, the court takes care to define the proceeding at issue with precision because the court’s focus is on the proceeding that actually occurred, not on the general label that might be attached to a variety of related proceedings. *Id.*

Here, the proceeding in question was an informal hearing conducted outside a courtroom with no court reporter present. The subject of the hearing, appellant’s request for live testimony on the deviation issue, which should have been presented in a courtroom by a written motion. CR 7 (b) (1).

Washington courts regard the courtroom setting as essential to the integrity of the proceedings. *State v. Jamie*, 168 Wn. 2d 857, 862, 233 P. 3d 554 (2010). By addressing appellant’s request for live testimony on the deviation issue outside of a courtroom, the trial court undermined the integrity of its decision.

**C. The trial court erred in denying appellant's request for a deviation from the standard deduction.**

Error is assigned to paragraphs 8, 9, 10 of the Final Child Support Order. CP 207-209; App. 1. Error is assigned to Finding of Fact 21. CP 196; App. 3. Error is assigned to paragraph 19 of the Final Divorce Order. CP 199; App. 4. Error is assigned to the Order Denying Motion for Reconsideration. CP 242-244.

The authority for the trial court to deviate from the standard calculation is found in RCW 26.19.075 (1) (d):

The court may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment. The court may not deviate on that basis if the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child or if the child is receiving temporary assistance for needy families. When determining the amount of the deviation, the court shall consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the parent making the support transfer payment.

The trial court's determination whether to deviate from the standard calculation is committed to the court's discretion.

*Marriage of Booth*, 114 Wn. 2d 772, 776, 791 P. 2d 519 (1990).

Deviation should be allowed when it is inequitable not to do so.

*Marriage of Pollard*, 99 Wn. App. 48, 55, 991 P.2d 1201 (2000);

*Marriage of Selley*, 189 Wn. App. 957, 960, 359 P. 3d 891 (2015).

RCW 26.19.075 (1) (d) guides the court's exercise of discretion. Deviation from the standard calculation is allowed if the child spends a significant amount of time with the obligor parent, here the appellant. Deviation is not allowed if it would result in the parent receiving the support to meet the basic needs of the child. If the court makes a determination to deviate, the court shall consider evidence of the increased expenses to the obligor parent resulting from the significant amount of time spent with that parent. The court shall also consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the obligor parent.

Appellant spends a significant amount of residential time with his son,

A. As set forth in paragraph 8a of the Final Parenting Plan:

The father shall have residential time with the child 4 overnights during his days off beginning September 1, 2016. During the father's next 4 days odd work he shall have the child for 3 overnights. The schedule shall then continue rotate when he has the child for 4 overnights, and for 3 overnights on his days off from work. CP 186.

Under this schedule, appellant has residential time with his son approximately 144 days per year. CP 109; CP 113-124. The parties' residential time with the child is split approximately 60/40. RP I p. 34 l. 6-8. In contrast, under the current guidelines, children were spending approximately 5 days per month with the non-primary residential parent. CP 64. Due to his flexible work schedule, appellant is able to have more residential time with his son than average. CP 64; RP I, p. 33 l. 15-17.

Deviation from the standard calculation will not deprive respondent of sufficient funds to meet the basic needs of the child. Respondent has a good job and her net income is over \$4,000.00 per month. CP 214, CP 249. Respondent's expenses do not exceed her net income. CP 64-65. Respondent also receives monthly child support of \$712.00 per month. CP 250. Respondent thus enjoys monthly income of more than \$700 per month above her expenses.

Respondent also incurs significant expenses for personal items that have no relation to the child. During the first seven months of 2017, respondent incurred monthly expenses averaging \$1,751.21 for eating out, beauty supplies, groceries, Amazon purchases and women's clothing. CP 69-72; CP 73-108. These expenditures illustrate that respondent does not need a child support payment of \$712.00 per month.

Appellant has increased expenses due to the significant amount of time the child spends with him. CP 126-152. Appellant's expenses for his son include activities such as amusement parks, aquarium, museums, fishing and camping. CP 110. Appellant also expends money for his son for bedding, birthdays, books, boots and shoes, cable, clothes, fuel, haircuts, holidays, home supplies, lodging, meals, medical copays, medicine, photography, sports and sports equipment, and travel expenses. CP 110. Appellant's monthly expenses exceed his monthly income even before considering the child support transfer payment. CP 65. Thus, it would be

inequitable to require appellant to pay the full transfer payment when he needs those resources to support his son while he is in appellant's home.

As appellant's expenses increase as a result of the significant residential time spent with his son, it follows appellant's expenses are thereby decreased.

Authorities relied upon by respondent do not support the order of child support in this case. *Marriage of Schnurman*, 178 Wn. App. 634, 316 P. 3d 514 (2013) is distinguishable here in that case the parties shared substantially equal time with their two children. In *Schnurman*, the trial court found the obligor parent's time with the children did not significantly increase the costs to support them and a downward deviation would leave the obligee parent with insufficient funds to support the children. 178 Wn. App. 643. Here, in contrast, no such findings were made in either the Final Child Support Order, the Findings of Fact and Conclusions of Law or the Final Divorce Order. CP 20-233, CP 193-196, CP 197-205.

In contrast to *Schnurman*, here appellant produced substantial evidence of increased costs resulting from the residential time spent with his son and if the requested deviation is ordered, respondent will not be deprived of sufficient funds to support the child when he is in her care. CP 110, 126-152, CP 64-65, CP 214, CP 249. Appellant thus met the requirements for a deviation under RCW 26.19.075 (1) (d), and it was

inequitable for the trial court to fail to grant appellant his requested deviation. *Marriage of Pollard, Marriage of Selley, supra*.

*Marriage of Langford*, 184 Wn. App. 1006 (2014 unpublished), relied upon by respondent, is not controlling here. As an unpublished decision has no precedential value, is not binding on any court, and may be cited only for such persuasive value as the court deems appropriate. GR 14.1; *Crosswhite v. Washington State Department of Social and Health Services*, 197 Wn. App. 539, 544, 389 P. 3d 731 (2017).<sup>1</sup> To the extent it may be relied upon by respondent in this appeal, it is distinguishable. The court in *Langford* addressed the sufficiency of the trial court's findings. 184 Wn. App. 1006 at 2. *Langford* did not address a claim such as made by appellant here, that he has produced substantial evidence of increased costs resulting from the residential time spent with his son and if the requested deviation is ordered, respondent will not be deprived of sufficient funds to support the child when he is in her care.

In light of the foregoing, appellant asks the Court to reverse paragraphs 8, 9, 10 of the Final Child Support Order, Finding of Fact 21, paragraph 19 of the Final Divorce Order and the Order Denying Motion for Reconsideration, and to remand the case to the trial court for entry of

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<sup>1</sup> Disagreed with in *Karanjah v. Department of Social and Health Services*, 199 Wn. App. 903, 912-13, 401 P. 3d 381(2017).

an order of child support with a deviation from the standard calculation consistent with the evidence submitted by appellant.

**D. The trial court erred in denying appellant's motion for reconsideration.**

Error is assigned to the Order Denying Motion for Reconsideration.

CP 242-244. Appellant incorporates herein the arguments and authorities in paragraphs A through D, above.

**E. Appellant requests an award of attorney fees and costs on appeal.**

RAP 18.1 (a) provides as follows:

If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

RCW 26.09.140 provides, in pertinent part, “[u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.”

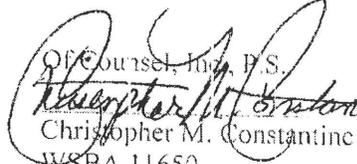
In exercising its discretion, the appellate court considers the issues' arguable merit on appeal and the parties' financial resources, balancing the financial need of the requesting party against the other party's ability to pay. *In re Marriage of Kim*, 179 Wn. App. 232, 256, 317 P. 3d 555, review denied, 180 Wash.2d 1012, 325 P.3d 914 (2014). The foregoing argument establishes the merit of the issues brought by appellant before

this Court. Further, as indicated above, the record here establishes appellant's need for an award of attorney fees and respondents' ability to pay the same.

## VII. CONCLUSION

In light of the foregoing, Paragraph 3 of the Pretrial Order, Sections 8, 9, 10 of the Final Child Support Order, Finding of Fact 21, paragraph 19 of the Final Divorce Order and the Order Denying Motion for Reconsideration were entered in violation of due process and are therefore void and must be reversed. The case should be remanded to the trial court for entry of an order of child support with a deviation from the standard calculation consistent with the evidence submitted by appellant. The Court should grant appellant's request for attorney fees and costs.

Respectfully submitted,

  
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## **VIII. Appendices**

1. Pretrial Order
2. Final Child Support Order (less worksheets)
3. Findings of Fact and Conclusions of Law
4. Final Divorce Order
5. Order Denying Motion for Reconsideration