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*h/h*

No. 77890-6

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OF THE STATE OF WASHINGTON

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In re the Marriage of:

Angela K. McCausland, Petitioner,

and

Robert G. McCausland, Respondent/Cross-Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER –  
ANGELA K. MCCAUSLAND

---

Lowenberg, Lopez & Hansen, P.S.

By: James A. Lopez

Attorney for Petitioner

950 Pacific Avenue, Suite 450  
Tacoma, WA 98402  
253.383.1964  
WSBA No. 08642

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR ..... 1

Assignment of Error

No error has been assigned by Robert.

Issues Pertaining to Assignments of Error

There is no issue pertaining to an assignment of error as Robert has not assigned any error.

B. STATEMENT OF THE CASE ..... 1

The statement of the case is set forth in the reported opinion of *Marriage of McCausland*, 129 Wn. App. 390, 118 P.3d 944 (2005).

C. ARGUMENT ..... 1

D. CONCLUSION ..... 11

TABLE OF AUTHORITIES

Table of Cases

*Marriage of Clarke*, 112 Wn. App. 370, 48 P.3d 1032 (Division Two, June 28, 2002) . . . . . 2, 3, 4, 6, 7, 8, 10

*Marriage of Daubert*, 124 Wn. App. 483, 99 P.3d 401 (Division One, October 25, 2004) . . . . . 2, 3, 4, 5, 6, 10, 11

*Marriage of Fiorito*, 112 Wn. App. 657, 50 P.3d 298 (Division One, July 22, 2002) . . . . . 6, 8, 10

*Marriage of Leslie*, 90 Wn. App. 796, 954 P.2d 330 (Division One, April 13, 1998) . . . . . 2

*Marriage of Marzetta*, 129 Wn. App. 607, 120 P.3d 75 (Division Three, April 21, 2005, *published with modifications* September 20, 2005) . . . . . 2

*Marriage of Mattson*, 95 Wn. App. 592, 976 P.2d 157 (Division Two, May 7, 1999) . . . . . 10

*Marriage of McCausland*, 129 Wn. App. 390, 118 P.3d 944 (Division Two, August 30, 2005) . . . . . 1, 3, 4, 5, 6, 11

*Marriage of Rusch*, 124 Wn. App. 226, 98 P.3d 1216 (Division One, August 23, 2004) . . . . . 2, 4, 6, 7, 9

*Marriage of Scanlon*, 109 Wn. App. 167, 34 P.3d 877 (Division One, November 19, 2001) . . . . . 2

*State ex. rel. M.M.G. v. Graham*, 123 Wn. App. 931, 99 P.3d 1248 (Division One, November 1, 2004), *reconsideration denied* (September 14, 2005), *review granted*, 157 Wn. 2d 1008 (2006) . . . . . 2, 4, 6, 7, 8, 9

Statutes

RCW 26.09.100 . . . . . 1

RCW 26.19.001 . . . . . 1, 2

RCW 26.19.020 . . . . . 2

RCW 26.19.065 ..... 4  
RCW 26.19.080 ..... 5

Other Authorities

Limitation Standard, Appendix-Child Support Schedule of RCW 26.19 . 3  
WPF DR 01.0500 Order of Child Support ..... 5, 6

**A. ASSIGNMENTS OF ERROR.**

Assignment of Error

No error has been assigned by Robert.

Issues Pertaining to Assignment of Error

There is no issue pertaining to an assignment of error as Robert has not assigned any error.

**B. STATEMENT OF THE CASE.**

The statement of the case is set forth in the reported opinion of *Marriage of McCausland*, 129 Wn. App. 390, 118 P.3d 944 (2005).

**C. ARGUMENT.**

The five cases cited by Robert are not analytically inconsistent, but certain of the cases contain misleading language that obscures the plain reading of the statutes that their opinions attempted to address.

The statutory basis for orders of child support in our state is set forth in RCW 26.09.100(1), as follows:

In a proceeding for dissolution of marriage, legal separation, declaration of invalidity, maintenance, or child support, after considering all relevant factors but without regard to marital misconduct, the court shall order either or both parents owing a duty of support to any child of the marriage dependent upon either or both spouses to pay an amount determined under chapter 26.19 RCW.

RCW 26.09.100(1) then directs our gaze forward to RCW 26.19.001:

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

....

Looking further into RCW 26.19, there is found RCW 26.19.020:

The economic table is presumptive for combined monthly net incomes up to and including five thousand dollars. When combined monthly net income exceeds five thousand dollars, support shall not be set at an amount lower than the presumptive amount of support set for combined monthly net incomes of five thousand dollars unless the court finds a reason to deviate below that amount. The economic table is advisory but not presumptive for combined monthly net incomes that exceed five thousand dollars. When combined monthly net income exceeds seven thousand dollars, the court may set support at an advisory amount of support set for combined monthly net incomes between five thousand and seven thousand dollars or the court may exceed the advisory amount of support set for combined monthly net incomes of seven thousand dollars upon written findings of fact.

*Marriage of Leslie*, 90 Wn. App. 796, 803, 954 P.2d 330 (1998);

*Marriage of Scanlon*, 109 Wn. App. 167, 176-77, 34 P.3d 877 (2001);

*Marriage of Clarke*, 112 Wn. App. 370, 378, 48 P.3d 1032 (2002);

*Marriage of Rusch*, 124 Wn. App. 226, 231-32, 98 P.3d 1216 (2004);

*Marriage of Daubert*, 124 Wn. App. 483, 495, 99 P.3d 401 (2004); *State*

*ex. rel. M.M.G. v. Graham*, 123 Wn. App. 931, 99 P.3d 1248 (2004);

*Marriage of Marzetta*, 129 Wn. App. 607, 623, 120 P.3d 75 (2005);

*Marriage of McCausland*, 129 Wn. App. 390, 405, 118 P.3d 944 (2005).

Continued scrutiny of the statute finds, contained in the **LIMITATIONS STANDARDS** section of the Appendix – Child Support Schedule of RCW 26.19, the following:

**1. Limit at forty-five percent of a parent’s net income.** Neither parent’s total child support obligation may exceed 45 percent of net income except for good cause shown. Good cause includes but is not limited to possession of substantial wealth, children with day care expenses, special medical need, educational need, psychological need, and larger families.

....

**3. Income above five thousand and seven thousand dollars.** In general setting support under this paragraph does not constitute a deviation. The economic table is presumptive for combined monthly net incomes up to and including five thousand dollars. When combined monthly net income exceeds five thousand dollars, support shall not be set at an amount lower than the presumptive amount of support set for combined monthly net incomes of five thousand dollars unless the court finds a reason to deviate below that amount. The economic table is advisory but not presumptive for combined monthly net income that exceeds five thousand dollars. When combined monthly net income exceeds seven thousand dollars, the court may set support at an advisory amount of support set for combined monthly net incomes between five thousand and seven thousand dollars or the court may exceed the advisory amount of support for combined monthly net income of seven thousand dollars upon written findings of fact.

A review of the Limitations Standard (3) above reflects that setting support for incomes above \$7,000 is generally not a deviation. *Clarke*, 112 Wn. App. at 379 n.6; *Daubert*, 124 Wn. App. at 495.

The view of the reader, in the next analytical step in calculating child support in cases where the combined monthly net income exceeds \$7,000, is directed to RCW 26.19.065(3):

**(1) Limit at forty-five percent of a parent's net income.** Neither parent's total child support obligation may exceed forty-five percent of net income except for good cause shown. Good cause includes but is not limited to possession of substantial wealth, children with day care expenses, special medical need, educational need, psychological need, and larger families.

....

**(3) Income above five thousand and seven thousand dollars.** The economic table is presumptive for combined monthly net incomes up to and including five thousand dollars. When combined monthly net income exceeds five thousand dollars, support shall not be set at an amount lower than the presumptive amount of support set for combined monthly net incomes of five thousand dollars unless the court finds a reason to deviate below that amount. The economic table is advisory but not presumptive for combined monthly net incomes that exceed five thousand dollars. When combined monthly net income exceeds seven thousand dollars, the court may set support at an advisory amount of support set for combined monthly net incomes between five thousand and seven thousand dollars or the court may exceed the advisory amount of support set for combined monthly net incomes of seven thousand dollars upon written findings of fact.

*Clarke*, 112 Wn. App. at 381, 382, 383; *Rusch*, 124 Wn. App. at 231-32;

*Daubert*, 124 Wn. App. at 495-96; *Graham*, 123 Wn. App. at 938;

*McCausland*, 129 Wn. App. at 405-06.

Moving forward progressively through the analysis, RCW

26.19.080, in relevant part reads:

(1) The basic child support obligation derived from the economic table shall be allocated between the parents based on each parent's share of the combined monthly net income.

(2) Ordinary health care expenses are included in the economic table. Monthly health care expenses that exceed five percent of the basic support obligation shall be considered extraordinary health care expenses. Extraordinary health care expenses shall be shared by the parents in the same proportion as the basic child support obligation.

(3) Day care and special child rearing expenses, such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses shall be shared by the parents in the same proportion as the basic child support obligation....

(4) The court may exercise its discretion to determine the necessity for and the reasonableness of all amounts ordered in excess of the basic child support obligation.

*Daubert*, 124 Wn. App. at 494, 495, 497; *McCausland*, 129 Wn. App. at 405, 409, 410.

As not all expenses and their cost can be itemized and set forth in the Washington State Child Support Schedule Worksheets due to space and the fact that specific monthly amounts may be unknown presently, paragraph 3.15 of the Order of Child Support contained in mandatory form WPF DR 01.0500 provides:

**3.15 PAYMENT FOR EXPENSES NOT INCLUDED  
IN THE TRANSFER PAYMENT.**

[ ] Does not apply because all payments, except medical, are included in the transfer payment.

The mother shall pay \_\_\_\_% and the father \_\_\_\_% (each parent's proportional share of income from the Child Support Schedule Worksheet, line 6) of the following expenses incurred on behalf of the child listed in Paragraph 3.1:

- day care.
- educational expenses.
- long distance transportation expenses.
- other:

Payments shall be made to  the provider of the service  the parent receiving the transfer payment.

A court is not required to extrapolate merely because the income of the parents exceeds \$7,000. *Clarke*, 112 Wn. App. at 379; *Daubert*, 124 Wn. App. at 495; *Fiorito*, 112 Wn. App. at 664-65; *Rusch*, 124 Wn. App. at 232-33; *McCausland*, 129 Wn. App. at 408; *Graham*, 123 Wn. App. at 941-42.

Confusion in this matter is created by the language utilized in the opinions, which is seemingly contradictory. In *Clarke*, confusion is first created in the use of the words “expressly invites” as observed by a review of a portion of the opinion on page 379:

Michael argues that the child support statute does not give any ‘meaningful direction’ to the trial court to decide child support when the net monthly income is greater than \$7,000. Wendy counters that the trial court has discretion to extrapolate support obligation amounts for incomes greater than \$7,000. Because the statute expressly invites the court to extrapolate from the existing schedule when the parents’ income exceeds the amounts calculated in the schedule, we agree with Wendy.

The *Clarke* opinion does not stand for the proposition that a court is required to extrapolate in cases in excess of \$7,000. The proper reading of the opinion is that *Clarke* holds that a court has discretion to extrapolate and not that it is required to do so.

This unfortunate use of “expressly invites” was then picked up by *Rusch*, 124 Wn. App. at 232, as follows:

Terri relies on *In re Marriage of Clarke*, for the proposition that ‘the statute expressly invites the court to extrapolate from the existing schedule when the parents’ income exceeds amounts calculated in the schedule.’ The *Clarke* court also explained that an absence of specific findings to support the extrapolated amount is not fatal. Both propositions are questionable. First, the statute does not expressly invite the court to exceed the statutory amount. Second, the statute specifically requires that when exceeding the statutory amount, the court must enter written findings of fact.

A consistent reading of *Clarke* is different than the reading it was given in *Rusch*. It is submitted that the *Rusch* court misread *Clarke*. Neither *Clarke* nor *Rusch* stand for the proposition that the court is required to extrapolate in all cases where the net income exceeds \$7,000.

Continuing, further confusion is raised by Robert in his parenthetical portion of his citation of *State ex. rel. M.M.G. v. Graham* on pages 9-10 of his Answer to Petition for Review (Raising Conditional Cross-Petition), which parenthetical reads as follows: “(encouraging the trial court on remand to reconsider its decision not to extrapolate, despite lack of evidence of additional expenditures).” This is an incorrect

reading of the opinion.

As observed by a review of *Graham* at pages 941-42 of the opinion, we see what the court held:

We disagree with Cunliffe's argument that the trial court necessarily erred when it refused to extrapolate an increased net child support obligation because the parties' combined monthly income exceeded \$7,000. Chapter 26.19 RCW provides that

[w]hen combined monthly net income exceeds seven thousand dollars, the court *may* set support at an advisory amount of support set for combined monthly net incomes between five and seven thousand dollars or the court *may* exceed the advisory amount of support set for combined monthly net incomes of seven thousand dollars upon written findings of fact.

RCW 26.19.020 (emphasis added). This statute grants the court express authority to exceed by extrapolation the amount calculated in the child support schedule when the parents combined net monthly incomes exceed \$7,000. *In re Marriage of Clarke*, 112 Wn. App. 370, 379, 48 P.3d 1032 (2002). While a trial court must consider what additional amounts might be paid where monthly net incomes exceed \$7,000, the trial court retains discretion to decide whether or not to extrapolate above the advisory amounts. *In re Marriage of Fiorito*, 112 Wn. App. 657, 664-65, 50 P.3d 298 (2002).

The *Graham* court clearly is in accord with all of the cases alleged by Robert to be analytically inconsistent. The confusion that is caused is due to the misreading by Robert of a further part of the *Graham* holding, which is set forth on page 942 of the opinion:

The trial court here had information regarding the incomes

of both parties as well as the incomes of their spouses, their debts and assets, their additional children and various expenditures including costs of child care. Because the trial court considered these factors, it does not appear that it abused its discretion solely by refusing to extrapolate in this particular case. While remand for recalculation of child support is necessary because the trial court erroneously applied *Arvey*, we emphasize that the trial court retains discretion to determine whether to extrapolate an increase in the child support obligation where the parents' combined monthly income exceeds \$7,000. We also emphasize, however, that the trial court is not precluded from reconsidering extrapolation, in light of our rejection of the *Arvey* formula -- it being unclear from the record whether the court rejected extrapolation entirely on its own merits under the facts of this case, or whether the primary reason for the rejection was based on *Arvey*. For a recent discussion by this court of principles guiding the trial court's exercise of discretion with respect to extrapolation, see *Rusch*, 124 Wn. App. 226.

The *Graham* court did not "encourage" the trial court on remand to consider its decision not to extrapolate. It merely held that the trial court was not precluded from reconsidering extrapolation, as again quoted from page 942 of the opinion, due to

-- it being unclear from the record whether the court rejected extrapolation entirely on its own merits under the facts of this case, or whether the primary reason for the rejection was based on *Arvey*. For a recent discussion by this court of principles guiding the trial court's exercise of discretion with respect to extrapolation, see *Rusch*, 124 Wn. App. 226.

The cases cited by Robert further distract our view due to the specific findings that are necessary to support the decision of a court to extrapolate. All cases cited by Robert as being analytically inconsistent

do require the court to comply with the statute regarding findings of fact. It is doubtless true that written findings of fact are required.

Robert, however, wishes to have this court create an exhaustive appellate template for the court to fit over each case. This is unnecessarily confusing and is impossible as each case is specific to its own facts.

The *Clarke* case reviewed the findings of fact and found them to be “very cursory” as noted on page 381 of the opinion. However, it is not always the case that the findings of fact are adequate on appeal. In that case, the appellate court reviews the evidence in the case. *Daubert*, 124 Wn. App. at 491. The appellate court also reviews the oral decision and testimony. *Fiorito*, 112 Wn. App. at 666-67. This is no different than the analysis undertaken by the *Clarke* court. *Clarke*, 112 Wn. App. at 380-83.

Cases that are supported by substantial evidence are affirmed. *Marriage of Mattson*, 95 Wn. App. 592, 599, 976 P.2d 157 (1999). If there is not substantial evidence in the record, the case is either reversed and/or remanded.

Robert encourages the court, again, to create a template so that no finding of fact will generate an appeal. No appeal, whether family law or otherwise, is subject to a cookie cutter or one-size-fits-all approach to the drafting of findings of fact. If Robert is requesting such, it is, at least, a legislative function to revise the Child Support Schedule to extend it to greater income levels as a buffer against such a daunting task.

Additional confusion is created by the *McCausland* court's language on page 412 of the opinion that "We reject Robert's invitation to adopt the strictures of Division One in *Daubert*." Nowhere in the *McCausland* opinion does the court itemize the limiting, restrictive, "strictures" of *Daubert* that it is not going to adopt. In all other respects, both the *McCausland* court and the *Daubert* court cite the identical statutes to support their holdings. It was rather in the quantum of proof in these cases that brought about the reversal and/or remand.

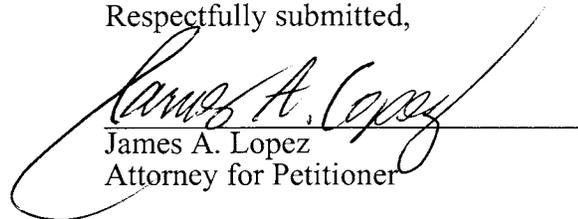
**D. CONCLUSION.**

Robert requests this court to "...provide needed guidance to practitioners and litigants on the calculation of child support in over-\$7,000 cases." as observed by a review of page 10 of his Answer to Petition for Review (Raising Conditional Cross-Petition). The statutes are clear and it is only the unfortunate verbiage used by Division One and Division Two that creates confusion.

The court should note this and address the opinions in accordance with the same.

Dated this 25<sup>th</sup> day of August, 2006.

Respectfully submitted,

  
James A. Lopez  
Attorney for Petitioner

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**DECLARATION OF SERVICE** BY C. J. MERRITT

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

That on August 25, 2006, I arranged for service of the foregoing  
Supplemental Brief of Petitioner – Angela K. McCausland to the court and  
the parties to this action as follows:

Office of Clerk Washington State Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input checked="" type="checkbox"/> Messenger
Catherine W. Smith Edwards, Sieh, Smith & Goodfriend, P.S. 1109 First Avenue, Suite 500 Seattle, WA 98101	<input checked="" type="checkbox"/> Messenger
Jeffrey A. Robinson Attorney at Law 4700 Point Fosdick Dr. N.W., Suite 301 Gig Harbor, WA 98335	<input checked="" type="checkbox"/> Messenger

**DATED** at Tacoma, Washington, this 25<sup>th</sup> day of August, 2006.

  
\_\_\_\_\_  
Sheri Sills