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No. 63414-3-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

PATRICIA PAPPAS,

Respondent,

and

CHRISTOPHER PAPPAS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE PATRICIA CLARK

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OPENING BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to impute income to the wife for the purpose of calculating child support. CP 188, 194-198, 199-201.

2. The trial court erred in finding that the husband's gross monthly income was \$11,550 for the purpose of determining his total child support obligation. CP 187193, 194-196, 199-200.

3. The trial court erred in ordering child support in excess of the advisory amount by \$3,800, resulting in a standard calculation of \$2,234.15 per month through August, 2009, including horseback riding (\$2300/mo) and private school at St. Louise Parish School; \$2,849 beginning September 2009, including horseback riding (\$2,300/mo) and Eastside Catholic High School (\$1,500/mo)"

based on the findings:

"The parents' combined monthly net income exceeds \$7,000 and the court sets child support in excess of the advisory amount because: the child support transfer payment includes the child's private school tuition and the cost of the child's competitive horse back riding program." CP 188-189, 194-196, 199-201.

4. The trial court erred in ordering the father to pay child support in an amount exceeding 45% of his monthly net income,

particularly as the court did not find “good cause” to do so, as the statute requires. CP 187-189, 194-196, 199-201.

5. The trial court erred in ruling that the husband “shall pay \$5,500 per month in maintenance for a period of eight years”,

based on the findings of fact that:

Maintenance should be ordered because: the parties have a long-term (21 year) traditional marriage. The wife dropped out of college when she was 20 years old in order to marry the husband. During the marriage, the wife’s primary responsibilities were maintaining the parties’ home and caring for the parties’ three children. The husband was employed earning in excess of six figures and working in excess of 40 hours per week for the last ten years of the marriage, including some years during which the husband earned over \$500,000. The wife has a high school education and has returned to college in hopes of completing a business degree. The wife has taken substantial steps toward obtaining education that will render her employable in the future, however, at present, and for the foreseeable future, the wife lacks the skills to earn more than a minimum wage while the husband retains the ability to earn a substantial six figure income. The wife sacrificed her career opportunities in order to stay home to raise the parties’ three children, two of whom are now in college themselves, and the youngest for whom the wife still has primary responsibility, while the husband has been gainfully employed throughout the marriage and now leaves the marriage with the ability to support himself in a very comfortable and luxurious lifestyle. Given her age and the need for both further education and work experience, the wife will likely ever be able to earn a six figure income, and certainly is not likely to do so within the next eight (8) years, whereas it is likely that with his 25 years of experience, the husband will not only continue to earn a six figure income, but will likely increase his earning substantially over the next (8) years.

CP 165, 171-172, 200-201.

6. The trial court erred in ordering, in the decree, that maintenance “shall continue for a period of eight (8) years, until February 2018.” CP 165, CP 200-201.

7. The trial court erred in making a disproportionate award of property and liabilities, based on the finding that the “distribution of property and liabilities as set forth in the decree is fair and equitable.” CP 162-165, 170-171, 174, 200-201.

8. The trial court erred in failing to divide the property and liabilities 50/50 between the husband and the wife. CP 162-165, 170-171, 199-201.

9. The trial court erred in ordering the husband to pay the wife for horse-related expenses. CP 162, 165, 171, 199-201.

10. The trial court erred in ruling that the husband shall pay 50% or \$21,500, of the wife’s attorney fees, based on the following finding: “The wife “has the need for payment of fees and costs and the other spouse has the ability to pay these fees and costs. The wife has incurred reasonable attorney fees and costs in the amount of \$35,000. The court finds that the husband’s conduct in this

matter was intransigent, and increased the expenditure of attorney's fees by the wife." CP 161, 166, 172, 175.

11. The trial court erred in entering the findings of fact and conclusions of law. CP 168-175.

12. The trial court erred in entering the decree of dissolution. CP 161-167.

13. The trial court erred in entering the order of child support. CP 166, 173-174, 186-189.

14. The trial court erred in entering the order denying reconsideration. CP 199-201.

## **II. STATEMENT OF ISSUES**

1. Did the trial court fail to impute income to the wife for the purpose of setting the child support obligation?
2. Did the trial court err in setting the husband's income higher than the amount he actually earned, as shown on his 2008 W-2s, for the purpose of determining child support?
3. Did the trial court err in ordering child support in excess of the advisory amount by \$3,800?
4. Did the trial court err in ordering a child support obligation that exceeded the husband's net income by more than 45%, without a finding of good cause, as required by RCW 26.19.065?

5. Are the findings, on which the trial court based its award of maintenance of \$5,550 a month for eight years supported by substantial evidence in the record?
6. Did the trial court refuse, for no reason, to correct a typographical error in the decree, which resulted in the wife receiving an additional year of maintenance?
7. Did the trial court err in awarding 60% of the property and minimal liabilities to the wife, but only 40% of the property and significant liabilities to the husband?
8. Did the trial court err in ordering the husband to pay the wife \$17,300 for horse expenses?
9. Did the trial court err in ordering the husband to pay \$21,500 of the wife's attorney fees based on her need and his ability to pay?
10. Did the trial court err in ordering the husband to pay \$21,500 of the wife's attorney fees based intransigence?

### **III. STATEMENT OF THE CASE**

Chris and Patty were married in January 1986. RP 88, 169. They met in college, but neither graduated. RP 91, 217, 274. They had three children; at the time of trial, two of the children, were away at their junior year in college, while the third was in the eighth grade at a private Catholic school. RP 88-90. After the birth of

their first child, early in the marriage, Patty did not work outside of the home again. RP 92-93. She took care of the children and the home, enjoyed activities, such as horseback riding, and managed the family finances. RP 92-93.

Also early in the marriage, Chris began his 23 year career in the automobile sales business, working long hours with few days off. RP 205. For about 18 years, he worked as general manager for the same company, a dealership which was initially owned by Maria Smith and later by AutoNation. RP 207-208, 276-277, 282. His pay fluctuated monthly, as he was compensated with a base salary plus a percentage of the store's "bottom line" pre-tax dollars. RP 279-280. Mirroring economic fortunes more broadly, the husband's annual income from 1986 to 1990 rose from just under \$34,800 to \$51,300. Ex. 5. From 1991 to 1993, his income rose again from \$125,000 to \$135,000. Ex. 5. From 1994 to 1997, he earned between \$230,330 and about \$256,000. Ex. 5. He then enjoyed some "boom years," earning about \$451,000 in 1998, with a peak in 2002 of about \$752,300, thereafter declining to \$565,997 in 2004. Ex. 5, RP 206. These years of great prosperity came to an end in 2005, when profits fell at the dealerships Chris managed. His income dropped precipitously, to just \$221,099 in 2005, for

example; he has not since regained the high income of prior years.

Ex. 5.

After 18 years on the job, Chris was released for poor performance in August 2006. RP 285. Having worked most of that year, Chris earned \$383,510, but \$120,000 of this amount was from a one-time exercise of stock options. RP 313-315, Ex. 2. He was unemployed for about six months, prevented from obtaining work in his field by a noncompete agreement he had with his former employer. RP 210, 277. In 2007, his income dropped \$120,000 to about \$260,000. Ex. 3. During his unemployment, the family got by with the help of a \$68,500 loan from Chris's father. RP 284, 262-267.

His income went down another \$120,000 in 2008 when he earned a total of \$137,446 or \$11,453 a month at two positions. Exs. 23, 137, 179, CP 137, 150. Starting in January 2008, Chris worked for his father at AutoLoan USA, as the noncompete agreement was no longer in effect, but he was let go in April 2008. RP 209-210. In May 2008, he started working for his prior employer, Maria Smith, as general manager of another auto dealership. RP 208.

With these fluctuations, Chris's earnings in the year prior to the initial separation, 2004, and the year preceding trial, 2008, declined approximately \$428,551, about 73%. There was no evidence, especially in light of the broader economy, that Chris's income would improve.

Chris and Patty were separated, on and off, from August 2005 to the spring of 2007, when they separated permanently. RP 115-116, 255. Patty filed for dissolution on June 5, 2007. RP 255, CP 3-8.

After Patty petitioned for dissolution, Chris paid her \$8,000 each month, by agreement and also paid for auto insurance for her and the older children. RP 98, 136, 139, 319. Patty remained in the 4,500 square foot family home on the water at Lake Sammamish. RP 95. They owned the home free and clear of any encumbrance. Ex. 8. Chris lived part of the time in an apartment and part of the time with his parents. RP 273-274, 294, 320.

Chris desperately hoped that he and Patty would be able to reconcile. RP 288-289. He wanted to make a favorable impression on her by arranging to surprise their 14 year old daughter with her own horse. RP 104, 288-290. In December 2007, he asked the owner of the stable where the daughter took riding lessons to find

one and then he told Patty about the plan. RP 104, 231-233. She was excited to surprise their daughter as well. RP 104. They bought the horse for around \$30,000 in January 2008, using funds from their joint bank account. RP 104-105. They each agreed to pay half of the expenses involved, although Chris testified that he told her that it would be impossible to afford the horse as long as they were maintaining two households and incurring attorney fees in the divorce. RP 291-293.

The horse expenses turned out to be tremendous. The stable provided total care of the horse, including feeding, grooming, and tacking, as well as riding lessons for their daughter, for \$1900 a month, plus a few hundred dollars extra for shoeing and veterinary services. RP 201-202, 234-235. A custom saddle cost \$2,682. RP 145-146. And entry fees and transportation to riding competitions were well over \$2000. RP 108-109.

In April 2008, when Chris lost his job at AutoLoan USA, he could not keep up the monthly payments of \$8,000 to Patty. RP 136. Patty testified that she filed a motion and the court ordered him to pay \$5,500 a month for child support, maintenance, private school tuition, and the expenses for the horse. RP 136.

The trial lasted four days, from January 22 to February 4, 2009, and involved issues of division of property and liabilities, maintenance, child support, and attorney fees. Chris was 46 years old and Patty was 43. RP 88. The marital estate consisted of the family home, valued at \$1,650,000, without a mortgage; two retirement accounts, an IRA with a balance of almost \$195,939 and a 401(k) with a balance of about \$88,614; an Edward Jones account with a balance of about \$9,363; Exxon stock valued at about \$1,246; a cash account containing \$50,000; and Chris's life insurance policy with a cash surrender value of \$27,395. CP 162-163, 170, Exs. 8, 11-13. In addition, they had personal property, including household furnishings, valued at \$31,475, a Jet Ski, a Supra Boat, trailers, vehicles, and memberships to golf and athletic clubs. CP 163-164, Ex. 10.

On the first day of trial, January 22, 2009, Chris appeared pro se and was surprised when Patty showed up represented by counsel. RP 59. He thought they had agreed with each other to forgo counsel. RP 60. The trial proceeded anyway. By the second day, February 2, Chris hired counsel of his own. RP 166.

Patty wanted the property and liabilities to be split 60/40 in her favor. RP 220. Chris wanted it split 50/50. RP 201. They both

wanted maintenance to be half of Chris's income, but differed on its duration. RP 222-223, RP 301-302. Patty testified that she needed 10 years and Chris testified that 4.5 years was appropriate, as he had already paid 18 months of temporary maintenance. RP 222-223, RP 301-302.

Patty was enrolled in Bellevue Community College, taking classes to transfer to the University of Washington to earn a business degree. RP 91-92. A career counselor, Janice Reha, testified for Patty that she could earn her bachelor's degree in business in four to five years, with an eventual salary potential of \$60,000 a year. RP 174-190. A competing vocational rehabilitation counselor, John Fountaine, testified for Chris that Patty could earn \$80,000 a few years after graduation. RP 337, 345-346.

Chris and Patty disagreed strongly with each other about what to do with the horse. Chris contended that they could not afford the horse. RP 293. Patty opposed selling it, asserting that their daughter's passion is her horse and equestrian sports. RP 103, 246. Vicki Bergevin, owner of Parkside Stables, where the horse was kept, testified that a less expensive option would be to turn the horse out to pasture. RP 230-231, 239.

Patty also wanted their daughter to continue attending private Catholic school. RP 200. The next year, when she entered high school, the tuition would increase from \$359 to \$1,600 a month. RP 158.

The trial court split the majority of the martial estate 60/40 in favor of Patty, ordering the sale of the home and most personal property. CP 162-164. This included the \$1,650,000 house and the \$295,162 in various accounts, as well as the home furnishings, the Jet Ski, and the Supra Boat, among other things. CP 162-164. Only the cash account and the life insurance were split 50/50. RP 163.

Patty received three vehicles, two of which the college-aged children drive. CP 163. Chris received a 1964 Chevrolet Corvette and memberships to the golf and athletic clubs. CP 164.

The court made Patty accountable for a minimal amount of liabilities, only the outstanding balance on a VISA card of about \$4,500 and 40% of the \$68,500 owed to Chris' parents, or \$27,400. CP 164, 171.

Chris, on the other hand, was ordered to bear about \$122,286 in liabilities, including 60% of the \$68,500 debt and balances on the Wells Fargo line of credit of \$50,000, the Shell

credit cards of \$2,700, the Rainier line of credit of \$3,000, and attorney fees to his prior counsel of \$5,804. CP 164, 171, Ex. 16. The liabilities also included \$19,982 to Patty for horse expenses that she alleged he did not pay, including \$3,500 for horse shows; \$13,800 for the care of the horse; and \$2,682 that Patty's mother paid for Chris's share of the custom saddle. CP 165.

Chris was required to pay \$7,834 a month in maintenance and child support. Maintenance was ordered at \$5,500 a month for a period of eight years. CP 165. Child support was ordered at \$2,234.15 a month through August 2009 and \$2,353.44 thereafter. CP 188. The standard calculation exceeded the advisory amount of \$1,218 by \$3,800 to include monthly horse expenses of \$2,300 and private school tuition of \$1,500. CP 189, 195. Chris's total child support obligation was 54% of his monthly net income. CP 196.

Further, Chris was required to pay 50% of Patty's attorney fees, or \$21,500, based on RCW 26.09.140 and on the finding that his conduct "was intransigent, and increased the expenditure of attorney's fees by the wife." CP 161, 166, 172, 175. A parenting plan was entered for the minor daughter. CP 176. This appeal does not raise any challenge to the parenting plan.

Chris filed a motion for reconsideration. CP 134-153, 199-201. He contended that as a result of errors and inequities in the final orders he would have to pay 81.5% of his monthly net income each month (not counting debt service) and be left with only \$1,780 for his own needs and financial obligations. CP 138-9, 141-2, 150. The trial court denied the motion. CP 199-201.

Chris appeals. CP 157-158.

#### **IV. ARGUMENT**

The combined effect of the court's awards of property, liabilities, maintenance, child support, and attorney fees left the husband with a monthly net income of only \$1,780 to meet his needs and financial obligations, including the support of an older daughter in college. The awards force him to consume his 40% share of the assets to support himself, along with the wife and the 14 year old daughter, while paying the disproportionate amount of liabilities allocated to him. The court accomplished this inequitable result by failing to impute income to the wife for child support, miscalculating the husband's net income, order extraordinary child support expenses without the requisite findings or evidence, and ignoring evidence of the husband's actual income in favor of an unsupported view that the husband's income would return to what it

was in prior “boom” years. Individually and together, the court’s orders achieve a result both unjust and inequitable.

**A. The trial court erred in calculating the child support obligation.**

The trial court made four errors in calculating the child support obligation: failing to impute income to Patty; using a figure for Chris’s income not supported by the evidence of his actual income; exceeding the advisory amount without making the requisite written findings; and, without good cause, making Chris pay an amount exceeding 45% of his monthly net income

Washington child support policy has two goals: to insure support adequate to meet the needs of children commensurate with the parents’ income, resources, and standard of living and to equitably apportion that support obligation between the parents. RCW 26.19.001.<sup>1</sup> In other words, the law aims to provide for the child and to do so fairly. To those ends, the Legislature devised a

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<sup>1</sup> The statute provides:

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.

child support statutory scheme, which operates almost mechanically to allocate the child support obligation between parents. RCWA 26.19. Thus, while a child support order is generally reviewed for an abuse of discretion (State ex rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 423, 154 P.3d 243 (2007)), "[a] court necessarily abuses its discretion if its decision is based on an erroneous view of the law." In re Marriage of Scanlon, 109 Wn. App. 167, 174-75, 34 P.3d 877 (2001), *review denied*, 147 Wash.2d 1026, 62 P.3d 889 (2002). Here, the trial court did not comply with the statute.

In setting child support, a trial court first determines the parents' combined net incomes. In re Paternity of Hewitt, 98 Wn. App. 85, 88, 988 P.2d 496 (1999). The court uses that figure to calculate the basic child support obligation, according to the child support economic table set forth in RCW 26.19.020. Id. The trial court then allocates the basic support obligation between the parents based on each parent's share of the combined monthly net income. RCW 26.19.080(1). This is considered the standard calculation. RCW 26.19.011(8).

As of the time of trial in this case, the economic table ended at a combined monthly net income level of \$7,000. Former RCW

26.19.020, .065 (1998). This level was increased to \$12,000 in the amended statute, which went into effect in August 2009. RCW 26.19.020, .065 Under the prior statute, if the parents' combined monthly income was greater than \$7,000, the court had the discretion to set child support at an amount on the economic table for incomes between \$5,000 and \$7,000 or to exceed the table based on written findings of fact. RCW 26.19.035(3); Former RCW 26.19.020, 065(3) (1998). However, the court may not set a parent's total child support obligation in excess of forty-five percent of his or her net income except for good cause shown. Former RCW 26.19.065(1)(1998).

At the time of trial, Patty was attending college and not working. RP 91-92. Chris was earning a monthly gross income of \$11,453.83. CP 137, 150, Exs. 23, 179. The trial court, ruling orally, stated that, in determining income for child support, it would impute income to Patty and use the amounts on Chris' W-2s for 2008. RP 402. This would be in accord with the statute's mandate. However, this ruling was not reflected in the order of child support and the worksheets. The court did not impute income to Patty, only assigning to her the \$5,500 she received in maintenance from Chris every month. CP 194. The court did not base Chris's income on

his W-2s, but used a higher amount, \$11,550 a month gross income or \$4,346.58 net income. CP 187, 194. The court found that, after deductions, the parties had a combined monthly net income of \$9,262.20. The court then set the support obligation \$3,800 above the advisory amount of \$1218 for a 14 year old child, based on horse back riding and private school for the child. CP 188-189, 194-195. Based on each party's proportionate share, 53.1% for Patty and 46.9% for Chris, Chris's transfer payment was set at \$2,353.44. CP 188, 195. This amount exceeded the limitation of 45% of his net income by \$397.48. CP 196.

In a motion for reconsideration, Chris challenged these errors, but the court denied the motion. CP 134-153, 199-201.

**1. The trial court failed to impute income to Patty.**

In calculating child support, the trial court failed to impute income to Patty, who was attending school full time and not working. Under RCW 26.19.071(6), the court must impute income to a voluntarily unemployed parent:

The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors....In the absence of information to the contrary, a parent's imputed income shall be based on the

median income of year-round full-time workers as derived from the United States bureau of census, current populations reports, or such replacement report as published by the bureau of census.

Former RCW 26.19.071(6)(1998).

Employment status is a relevant factor that must be considered by the court when making a child support calculation. In re Marriage of Brockopp, 78 Wn. App. 441, 446, 898 P.2d 849 (1995). A parent cannot avoid obligations to his or her children by voluntarily remaining in a low paying job or by refusing to work at all. Id. at 445.

Here, the competing vocational experts testified that Patty was in good health, had the aptitude to work in the field of business, and could presently qualify for jobs that paid between \$10 and \$13 an hour. RP 183, 342. Instead of working, Patty chose to attend college. RP 91-92. This choice should not have relieved her of her obligation to support her child. The same issue arose in Dewberry v. George, 115 Wn. App. 351, 62 P.3d 525 (2003). In that case, this court upheld imputation of income to the father because he was working part-time in order to have a “flexible schedule” while pursuing a new career; he was a healthy, 47-year-old college graduate with a history of executive-type jobs; and “all

of the evidence indicates that his underemployment has been brought about by his own free choice.” Id. at 367. The court also said:

While there was no suggestion that George is trying to lower his income to avoid child support, the trial court’s determinations that George is not employed full-time and is voluntarily underemployed are supported by the record.

Id. (emphasis added).

Typically, in determining whether a parent is voluntarily underemployed, a court should look at the level of employment “at which the parent is capable and qualified.” In re Marriage of Schumacher, 100 Wn. App. 208, 215, 997 P.2d 399 (2000).

Accordingly, income should have been imputed to Patty at between \$10 and \$13 an hour—or \$1,733.33 and \$2,253.33 a month.

Certainly, the trial court here erred when it failed to consider this fact. In a similar case, the court found that the mother was voluntarily unemployed but did not impute income to her. In re Marriage of Brockopp, 78 Wn. App. 441, 445-46, 898 P.2d 849 (1995). In that case, this court held that it was error not to make findings and conclusions regarding the employment status of the mother, because voluntary unemployment or underemployment

must be considered whenever a court calculates child support. Id.  
at 446

Here, the court should come to the same conclusion. Patty was voluntarily unemployed. The statute requires the court to impute income to her for the purpose of determining her appropriate child support obligation. The court's failure to do so was error.

**2. The trial court failed to set Chris's income based on the evidence at trial.**

The court, in determining a parent's monthly gross income for the purpose of calculating child support, shall include income from a number of sources, including salaries and wages. RCW 26.19.071(1), (3). Here, the evidence at trial as to Chris's gross monthly income consisted of his W-2 forms for 2008, which indicated that he earned \$11,453.83 a month that year. Ex. 23, 179, CP 137, 150. There was no dispute that this figure accurately reflected his present income. Yet the court set his support obligation using a gross monthly income of \$11,550, \$96 over the amount shown on the W-2s, without findings to explain the additional amount. CP 194. As a result, Chris was ordered to bear more of the total support amount than he should have been obliged

to do. While a relatively minor discrepancy, the court's error was in keeping with the general trend of the court's rulings in this case, disadvantaging Chris. This court should reverse and remand for calculation of his income based on the evidence presented at trial.

**3. The trial court set child support over the advisory amount without the required findings.**

The statute permits a court to exceed the basic support obligation, provided there is adequate justification set forth in findings of fact. RCW 26.19.070. The mere fact of income above the child support table is not an adequate justification. McCausland v. McCausland, 159 Wn.2d 607, 620 n.6, 152 P.3d 1013 (2007) (amount of child support must be based on "the correlation to the child's or children's needs").

Our supreme court held, in McCausland, that the trial court, in setting child support above the basic support amount, must make written findings of fact, showing its consideration of certain factors set out in In re Marriage of Daubert, 124 Wn. App. 483, 99 P.3d 401 (2004), and In re Marriage of Rusch, 124 Wn. App. 226, 98 P.3d 1216 (2004). McCausland v. McCausland, 159 Wn.2d 607, 620, 152 P.3d 1013 (2007). (McCausland overruled both Daubert and Rusch to the extent that these decisions approved of

extrapolation, but also held that the other factors considered in these cases were proper considerations for the trial court.

McCausland, 159 Wn.2d at 620.)

According to Daubert, the trial court must determine whether the additional amounts are “necessary and reasonable,” as well as “commensurate with the parents’ income, resources and standard of living,” in light of the totality of the circumstances:

The findings must explain why the amount of support ordered is both necessary and reasonable. cursory findings are not sufficient. Factors to be considered in determining the necessity for support include but are not limited to the special medical, educational and financial needs of the children. Factors to be considered in determining the reasonableness of the support include the parents’ income, resources and standard of living.

Daubert, 124 Wn. App. At 494-496 (internal citations omitted).

The court’s findings here do not satisfy this standard.

Indeed, the findings are descriptive only, set forth in their entirety below.

The parents’ combined monthly net income exceeds \$7,000 and the court sets child support in excess of the advisory amount because: the child support transfer payment includes the child’s private school tuition and the cost of the child’s competitive horse back program.

CP 188-189. In Daubert, the mother filed a motion to modify support, asking for additional support for orthodontia, missed travel

opportunities, missed college prep classes, missed summer camps, and better computers, without providing the specific costs for these expenses. Id. 496. The court increased support for the children from \$850 per child at the top of the economic table to \$1,880 per child, extrapolating beyond the table. Id. at 497. In support of the modified amount, the court entered the following findings:

1. The father has sufficient wealth and resources that the amount ordered will not work a hardship on him[.];
2. The children need the additional amount to have [a] standard of living commensurate with that of their father's.[; and.];
3. The children will benefit by the opportunities available to them from the additional funds.

Id. at 497. These findings failed the statutory test, i.e., proof that the amount ordered is necessary and reasonable “considering the totality of the circumstances.” Findings that the additional funds might be used in the future or could have been used in the past on opportunities for the children, and that there was an ability of either or both parents to pay more in support, did not justify increased support. Id. at 497-498.

Here, the findings are even more inadequate. Without discussing any of the mandatory factors, the trial court ordered support in excess of the advisory amount by \$3,800 a month, which

included \$2,300 for horseback riding and \$1,500 for private school tuition.

Nor would the evidence support these expenditures. The parties could not agree about whether they could afford to continue to pay for the horse and the private school expenses for the daughter. RP 293, 410. Indeed, in its oral ruling, the court agreed with Chris, stating that the horse was purchased when it “was very clear that this community could no longer afford those kinds of lavish extras” and it “is an expense which this community can no longer afford.” RP 400-401.

The same is true of the private school expense. Though the children attended private Catholic schools during the marriage (RP 88-90), the parties’ economic circumstances were radically altered by the changed earning capacity of Chris and by the fact of the dissolution. In any case, the history of private school attendance alone does not justify private school attendance in the future. Rather, the trial court must look at the parent’s ability to pay when that issue is raised. State ex rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 430, 154 P.3d 243 (2007). For example, in Van Guilder, a father was unable to make his support payments for his first child, after he had four children with his second spouse. On the state’s

petition to modify support downward, he described the hardship a denial of the request would impose on his new family. The court modified support upward, to include the expense of private school for the child. Id. at 423-424. Reversing, the court of appeals held that even if the trial court finds sufficient evidence of the child's need for private schooling, it also must consider whether the father "can afford to pay for private school before ordering him to do so." Id. at 430.

Here, the trial court failed to make a finding about whether Chris could afford to pay for private school for the daughter, especially at the anticipated tuition level. In fact, the evidence showed that Chris could not afford it, even though he did not want to disappoint his daughter. CP 18, 189, 195. As the court itself acknowledged, this family could no longer afford such luxuries.

In short, the findings of fact entered by the court are inadequate to support the amounts ordered in excess of the economic table. Further, the evidence at trial reflects that the additional amounts ordered are not reasonable, in light of the parents' income, resources, and standard of living, after the dissolution. Accordingly, the order must be reversed.

**4. Chris's child support obligation exceeded his net income by more than 45%, without a showing of good cause.**

A parent's total child support obligation "may not exceed forty-five percent of net income except for good cause shown." Former RCW 26.19.065(1)(1998). A parent's "total child support obligation" includes additional support payments in excess of the "basic child support obligation." RCW 26.19.011(1), Former RCW 26.19.065(1)(1998). Additional support payments include extraordinary health care expenses, long distance transportation costs, and postsecondary education support. Former RCW 26.19.080(2),(3)(1998); RCW 26.19.090.

Chris's support obligation of \$2,353.44 exceeds 45% of his monthly net income of \$4,346.42, as shown on the support order and worksheets. CP 187-189, 194-195. The worksheets reflect that \$2,353.44, adjusted to 45% of his net income, would be \$1,955.96. CP 196. The court did not enter the necessary findings of fact, showing good cause, to support the child support order roughly \$400 in excess of this statutory cap. RCW 26.19.035(2). Accordingly, this court must remand for calculation of Chris's total child support obligation in accordance with RCW 26.19.065(1).

**B. The trial court failed to consider the parties' need and ability to pay in awarding maintenance.**

Ordering a disproportionate amount of property to Patty and a disproportionate amount of liabilities and a monthly child support obligation of \$2,353 to Chris, the trial also court ordered him to “pay \$5,500 in maintenance for a period of eight years”, (CP 165) based on the following findings:

Maintenance should be ordered because: the parties have a long-term (21 year) traditional marriage. The wife dropped out of college when she was 20 years old in order to marry the husband. During the marriage, the wife's primary responsibilities were maintaining the parties' home and caring for the parties' three children. The husband was employed earning in excess of six figures and working in excess of 40 hours per week for the last ten years of the marriage, including some years during which the husband earned over \$500,000. The wife has a high school education and has returned to college in hopes of completing a business degree. The wife has taken substantial steps toward obtaining education that will render her employable in the future, however, at present, and for the foreseeable future, the wife lacks the skills to earn more than a minimum wage while the husband retains the ability to earn a substantial six figure income. The wife sacrificed her career opportunities in order to stay home to raise the parties' three children, two of whom are now in college themselves, and the youngest for whom the wife still has primary responsibility, while the husband has been gainfully employed throughout the marriage and now leaves the marriage with the ability to support himself in a very comfortable and luxurious lifestyle. Given her age and the need for both further education and work experience, the wife will likely ever be able to earn a six figure income, and certainly is not likely to do so within the next eight (8) years, whereas it is likely that with his 25 years of experience, the

husband will not only continue to earn a six figure income, but will likely increase his earning substantially over the next (8) years.

CP 171-172.

The trial court has discretion when awarding maintenance. In re Marriage of Marzetta, 129 Wn. App. 607, 624, 120 P.3d 75 (2005). However, a trial court abuses its discretion when it does not base its award upon a fair consideration of the statutory factors under RCW 26.09.090. Id. Moreover, in light of all the relevant factors, the maintenance award must be just. Id.

The applicable statute provides that the required factors include but not limited to:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage or domestic partnership;
- (d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

RCW 26.09.090.

Of primary concern are the parties' respective economic positions following dissolution. Marzetta, 129 Wn. App. at 624. The trial court is required to consider, among other statutory factors, the division of property between the parties. RCW 26.09.090; In re Marriage of Crosetto, 82 Wn. App. 545, 558, 918 P.2d 954 (1996). A significant maintenance award is less likely to be necessary when the parties have received an equal share of the parties' assets. See In re Marriage of Washburn, 101 Wn.2d 168, 182, 677 P.2d 152 (1984) (maintenance necessary to compensate for unequal property division).

The court's decision on maintenance "is governed strongly by the need of one party and the ability of the other party to pay an award." Marriage of Foley, 84 Wn. App. 839, 845-46, 930 P.2d 929 (1997). In assessing that need, the statute commands the court to consider "the time necessary for the party seeking maintenance to

acquire education and training to find employment ... [and] the age ... and the financial obligations of the party seeking maintenance.” RCW 26.09.090(b)(e). After all, the purpose of maintenance is to provide support until a presently dependent spouse is able to become self-supporting. Marriage of Irwin, 64 Wn. App. 38, 55, 822 P.2d 797 (1992).

Here, the trial court, disregarded these principles. In awarding maintenance, the court failed to properly consider the disproportionate award of property to the wife, as shown by the omission of this factor from the findings. With the award of 60% of the majority of the assets, \$21,500 in attorney fees, and very few liabilities, Patty had the financial resources to enable her to meet her needs independently, let alone without a large monthly amount of maintenance. The failure of the court to consider the statutory factor of the wife’s financial resources was an abuse of discretion.

Rather than considering all the statutory factors, the trial court focused entirely on comparing the earning capacity of the parties, yet, even then, based its maintenance award on findings that were not supported by substantial evidence. See In re Marriage of Zier, 136 Wn. App. 40, 45, 147 P.3d 624 (2006) (court reviews findings of fact for substantial supporting evidence).

There was no substantial evidence at trial to support the finding that “at present, and for the foreseeable future, the wife lacks the skills to earn more than a minimum wage.” CP 171. The competing career counselors testified that presently Patty could earn between \$10 and \$13 an hour, which, at the high end, is almost double the federal minimum wage of \$7.25 and even considerably more than the state level of \$8.55. RP 183, 342. They further testified that after she graduated with her business degree in just four or five years she could start earning between \$40,000 and \$55,000, with eventual increases to between \$60,000 and \$80,000. RP 185-186, 189-190, 341, 344. Patty herself agreed with this time frame. RP 92. There was no evidence she could not support herself on this income.

Similarly, there was no substantial evidence at trial to support the findings that Chris “retains the ability to earn a substantial six figure income” and “leaves the marriage with the ability to support himself in a very comfortable and luxurious lifestyle.” CP 171-172. While true that Chris had some very good earning years, the evidence did not show a present or future ability to earn the kind of income from 1998 to 2004. Rather, the proven trend has been downward. After 2005, his income declined

significantly such that he was earning \$137,446 a year, working almost every day, by the time of trial. RP 281, 283, 304, 319, Exs. 23, 179.

Patty claimed that Chris had been intentionally depressing his income since 2005, but nothing supported that accusation. RP 215. Indeed, she repeatedly contradicted this claim. She acknowledged that while Chris was unemployed in 2006 and 2007, he was prevented from obtaining employment, due to a noncompete agreement with his former employer. RP 210, 215. She testified that she knew he was working every day at the position he held since May 2008, making considerably less than in the good days. RP 211, 216. She offered no evidence to support her claim that Chris could earn more.

Rather, what the record reflects about Chris's present and future earning ability is far from that which supported the "luxurious lifestyle" of the past. In fact, the record shows that Chris was unable to earn enough to meet his needs and pay the \$7,853 in combined maintenance and child support ordered by the court. CP 150. He earned a monthly income of \$9,636 after taxes in 2008. RP 304, Exs. 23, 179, CP 150. His monthly expenses were \$7,956, which included college expenses for the older daughter.

Ex. 179. During the pendency of the case, he had to draw \$40,000 on the Wells Fargo line of credit to meet his financial obligations. RP 316. Accordingly, the court's finding as to his present standard of living is simply unsupported by substantial evidence of his income now and in the foreseeable future. The court's wishful thinking is not fact.

Finally, there was no substantial evidence to support the finding that Chris "will not only continue to earn a six figure income, but will likely increase his earning substantially over the next (8) years." CP 172. This finding rests entirely on Patty's claim that Chris "is the Michael Jordan of the car business" and that even if he could not work in automobile sales, he could sell anything. RP 209, 216. But it was undisputed that Chris worked his entire 23 year career in automobile sales. RP 276, 282. There was no evidence that he could change fields and earn his pre-2005 income levels. He did not think he was qualified for another job. RP 319. There was no evidence, aside from Patty's self-serving opinions, to the contrary.

Rather, the evidence about Chris's potential for increased income in his field—and about the economy in general—was not hopeful. Patty's expert, Ms. Reha, offered the only economic

forecast, calling the present economic situation “dire” and “supposed to last for four years, according to Bill Gates, and that it affects every career, across the board.” RP 192-193. Chris testified that it was the worst economic situation in his 23 years in the automotive sales industry. RP 282. He named local dealerships that went out of business, and described how his father’s business, AutoLoan USA, was two million dollars in debt. RP 282, 288.

In short, no substantial evidence supports the findings on which the court based its maintenance award, i.e., that now and in the future, Patty could earn only minimum wage, and that Chris would be earning salaries like he did from 1998 to 2004. Rather, the evidence reflects that Chris was unable to meet his needs and financial obligations of over \$7,950, as well as \$2,353 in child support, while paying another \$5,500 in maintenance for eight years. Further, the findings do not show that the court considered how the disproportionate award of property to Patty would enable her to live independently, with maintenance in such sums or for such duration. Accordingly, the maintenance award was an abuse of discretion, requiring reversal.

**C. The decree contains a typographical error, extending maintenance an additional year.**

In any event, the trial court entered a decree with a typographical error as to the duration of maintenance, thereby extending it for one year longer than intended. The decree should say that Maintenance shall continue for a period of eight (8) years, until February 2017, not “until February 2018.” CP 165. As it stands, Patty improperly gets a ninth year of maintenance. The error is clear, given the repeated reference to “eight” and (8) in the provisions on spousal maintenance in the decree and the findings. CP 165, 172. Also, the court’s oral ruling, providing for eight years of maintenance, indicates that the end date, 2018, in the decree was a mistake. RP 401. However, the trial court denied Chris’s request, on reconsideration, to correct the error. CP 135-136. This Court should, at minimum, remand for correction of the typographical error, since the trial court did not give a reason for extending maintenance a year beyond what it initially ordered. See State v. Finch, 137 Wash.2d 792, 842, 846, 975 P.2d 967, *cert. denied*, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999) (exercise of discretion must be founded upon a factual basis set forth in the record.).

**D. The trial court failed to consider the parties' economic circumstances at the time the property division was to become effective.**

Just as the trial court erred in failing to consider its award of property when awarding maintenance, it failed to consider the awards of maintenance and child support in allocating the property and liabilities. The result was neither just nor equitable.

In dividing property in a dissolution proceeding, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership;  
and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

RCW 26.09.080. The paramount concern is the economic condition in which the decree will leave the parties. In re Marriage of Mathews, 70 Wn. App. 116, 853 P.2d 462 (1993).

Here, the trial court did not consider Chris's economic circumstances as of the entry of the decree. The court, ruling orally, found that he "has tremendous earning potential going forward" and intended to equalize the parties' situations on that basis. RP 397. But the statute required the court to consider his economic circumstances "at the time the division of property is to become effective". RCW 26.09.080(4). Failure to do so was an error.

At the time the property division was to become effective, Chris had only \$1,780 a month remaining, after paying child support and maintenance. CP 150. He received only 40% of the assets, a good deal of which are tied up in retirement accounts, and the rest he will have to consume to meet his own needs and financial obligations, including the \$122,300 in liabilities and \$21,500 in attorney fees allocated to him, as well as the college expenses for the older daughter. CP 164, 166, 171. Given Chris's economic circumstances at that time, the court's division of

property and liabilities was an abuse of discretion that should be reversed.

**E. Chris already paid Patty for the horse expenses.**

The trial court ordered Chris to reimburse Patty for \$19,982 in horse expenses. CP 162, 165. He will pay \$2,682 for the saddle. CP 165. He already paid the \$13,500 for horse care and \$3,500 for horse shows during the pendency of the case as part of temporary maintenance. At trial, Patty admitted that this was so. She testified that the maintenance payments were for horse expenses and that when they liquidated a CD in May 2008, \$10,000 of the total funds went to horse expenses. RP 136, 256. Patty should not be unjustly enriched by receiving funds for these expenses twice. The order to reimburse her for the horse expenses should be reversed.

**F. The award of attorney fees should be reversed.**

The trial court ordered Chris to pay 50% of Patty's attorney fees, entering a judgment for \$21,500, based on need and ability to pay and for intransigence. CP 161, 166, 172. The award was not proper for either reason.

**1. Chris does not have the ability to pay.**

In a dissolution action, the trial court may, “after considering the financial resources of both parties,” order one party to pay the other party's attorney fees. RCW 26.09.140. The trial court must balance the needs of the spouse requesting fees against the other spouse's ability to pay. In re Marriage of Morrow, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). A trial court's decision regarding attorney fees is reviewed for an abuse of discretion. Id.

Here, the trial court failed to balance the relative need and ability to pay of the parties. With the awards of property and maintenance, Patty's need for payment of her attorney fees was nonexistent. Better than Chris, she could afford the fees. Likewise, the court's awards, along with child support, greatly reduced Chris's ability to pay Patty's fees, in addition to his own. The trial court abused its discretion in awarding fees under RCW 26.09.140 and should be reversed.

## **2. Chris was not intransigent.**

A trial court may award fees based on the intransigence of a party, without regard to the parties' financial resources. Marriage of Crosetto, 82 Wn. App. at 564, 918 P.2d 954. Intransigence is reserved for cases involving conduct beyond the pale, such as extreme acts of frivolous obstructionism or outright maliciousness.

For example, intransigence was found when the husband's recalcitrant, foot-dragging, obstructionist attitude increased the cost of litigation to his former wife in Eide v. Eide, 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969). Intransigence was justified by the husband's deliberate failure to provide financial information; fraudulent transfer of money, stock, and property to family members; deliberate waste of community assets; and fraudulent consent to an adverse judgment in In re Marriage of Wallace, 111 Wn. App. 697, 702-703, 45 P.3d 1131 (2002). Intransigence also was warranted where a husband filed numerous frivolous motions, refused to attend his own deposition, and refused to read correspondence from his wife's attorney, all of which conduct caused numerous delays in the trial and unnecessarily increased the cost of the litigation in In re Marriage of Foley, 84 Wn. App. 839, 846, 930 P.2d 929 (1997).

Here, the trial court did not enter any findings specifying what conduct of Chris's was intransigent. It only found that his "conduct in this matter was intransigent, and increased the expenditure of attorney's fees by the wife." CP 172. In its oral ruling, the court based its award of attorney fees for intransigence on the mere fact that the case took 18 months to resolve:

The father's actions throughout this case have resulted in greatly increased attorney's fees for the petitioner and frankly for himself. His actions over – this case was filed in 2007 and this is now 2009 before this case is resolved. His actions constitute intransigence, justifying him to pay 50 percent of the petitioner's legal fees.

RP 401. The length of time involved in getting to trial, and the necessity of retaining trial counsel, does not support a finding of intransigence, particularly where it remains unclear what conduct was objectionable and how it increased the cost of litigation.

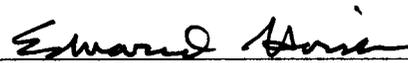
Patty contended, in her trial brief, that she spent thousands of dollars conducting discovery with her prior counsel, then, after she and Chris discharged their respective counselors and represented themselves, following an unsuccessful mediation, she had to retain trial counsel, because Chris would not settle or mediate. CP 85-86. Even if this was true, his vigorous defense or refusal to settle on her terms does not constitute intransigence.

At trial, neither party testified that Chris's conduct in choosing to go to trial instead of settling the case was improper. In fact, the case took about 18 months to get to trial due to the fact that, after the parties dismissed their attorneys, they and were unprepared to handle the case pro se. Both appeared at trial on December 8, 2008, completely unprepared, without trial briefs,

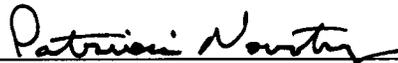
adequate financial papers, or guidance about the law. RP 15, 17, 24, 45, 50-51. The court continued the trial date, ordering them either to mediate, settle, or retain counsel for trial. RP 46-49. The fact that Patty retained counsel for trial, because they did not settle or mediate, does not support a finding of intransigence against Chris. The trial court, in finding intransigence based merely on the fact that Patty spent legal fees on trial counsel manifestly abused its discretion. The award of fees should be reversed.

Dated this 3<sup>rd</sup> day of November, 2009.

RESPECTFULLY SUBMITTED BY:



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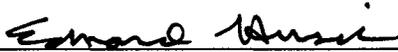
**DECLARATION OF MAILING**

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

That on November 3, 2009, I arranged for service of the foregoing Opening Brief to the Court and the parties to this action as follows:

Office of Clerk Court of Appeals – Division I 600 University St Seattle, WA 98101-1176	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivered
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Emmelyn Hart-Biberfeld Talmadge/Fitzpatrick 18010 Southcenter Parkway Tukwila, WA 98188 emmelyn@tal-fitzlaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> Electronic Mail

DATED at Seattle, Washington this November 3, 2009.

  
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