

No. 69442-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

SHUDAN ZHU ROHDE,

Appellant/Cross-Respondent,

vs.

JOSEPH THOMAS ROHDE,

Respondent/Cross-Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE SHARON ARMSTRONG

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AMENDED BRIEF OF RESPONDENT/CROSS-APPELLANT  
(RAISING CONDITIONAL CROSS-APPEAL)

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## **I. INTRODUCTION**

This court should affirm the trial court's decision in its entirety because the challenges raised by the appellant are not preserved, moot, and harmless. The appellant challenges the trial court's decision to not designate Chinese New Year as a holiday in the parenting plan, but appellant presented no evidence during trial of the significance of this holiday to either her or the children. Nor did she explicitly ask the court to designate Chinese New Year as a holiday during the trial. Even if appellant's challenge was preserved, the trial court's decision was well within its broad discretion in addressing holidays in the parenting plan.

The appellant also complains that the trial court conditioned her 3-year maintenance award on her full-time enrollment in school. But after final orders were entered, the parties executed a CR2A Agreement waiving the school requirement, rendering this challenge on appeal moot. Even if this issue was not moot, the trial court's decision was well within its discretion in light of the appellant's testimony that she sought maintenance so that she could complete her accounting degree. In conditioning any further spousal maintenance on appellant's full-time enrollment in school, the trial court considered the fact that this was a relatively short

marriage, the appellant had work experience and education, had already received one year of spousal maintenance under a temporary order while the dissolution was pending, and she was awarded a disproportionate share of the parties' community assets. The trial court reasonably concluded that no further spousal maintenance was necessary unless it was to further her education.

Finally, the appellant challenges the trial court's decision to exclude the husband's discretionary "performance" bonus in his income for purpose of child support when it found the bonus was both "variable" and "non-recurring." The trial court's finding is supported by substantial evidence. Even if the bonus should have been included, it would have only a minimal impact on the husband's child support payment, because the parties' combined monthly net income is already near the top of the economic table.

This court should affirm the trial court's decision in its entirety. In the event of remand on any issue raised by appellant, this court should direct the trial court to reconsider its decision to not impute income to the wife because she is voluntarily unemployed.

## **II. CONDITIONAL CROSS-APPEAL ASSIGNMENT OF ERROR**

The trial court erred in failing to impute income to the mother for purposes of child support. (CP 448)

## **III. CONDITIONAL CROSS-APPEAL STATEMENT OF ISSUE**

RCW 26.19.071 (6) requires the trial court to impute income to a parent who is voluntarily unemployed or voluntarily underemployed unless that parent is “unemployable” or is unemployed due “to the parent’s efforts to comply with court-ordered reunification efforts” under RCW ch 13.34. Neither of these circumstances is present and it is undisputed that the mother can work; she is educated and has experience as a bookkeeper and freight forwarder. Did the trial court err in failing to impute income to the mother when she is voluntarily unemployed?

## **IV. RESTATEMENT OF FACTS**

### **A. The Parties Were Married For Less Than Eight Years. Joe Is A Software Developer. Although Danni Stayed Home To Care For The Children During the Marriage, She Is Educated And Has Experience As A Bookkeeper.**

Respondent Joseph (“Joe”) Rohde, age 44, and appellant Shudan (“Danni”) Rohde, age 46, were married on August 30, 2003, after a short courtship. (CP 1; RP 48-49) The parties

separated in June 2011, less than eight years after they married. (RP 120) Joe petitioned to dissolve the parties' marriage on June 28, 2011. (CP 1)

When the parties married, Joe was employed with Microsoft. (RP 123) At the time of trial, he was working as a software developer for Valve Software, where he had been employed since July 2009. (RP 135; CP 70; Ex. 98) Joe earns \$185,000 annually, including a \$10,000 bonus that used to be designated a Christmas bonus by his employer, but was made part of his base salary while the divorce was proceeding. (RP 139) Joe is also eligible for "performance" bonuses. (See RP 30-31) The amount of these discretionary bonuses has gone down every year since Joe started at Valve. (See RP 30-31; RP 405) Joe testified that his "performance at work has been an issue this last year." (RP 60) There was no evidence that Joe would receive a bonus for that year or in the future.

Danni was born in China. (RP 271; Ex. 80 at 2) She arrived in the United States in 1997, and is now a citizen. (RP 271) Prior to arriving in the U.S., Danni earned a four-year degree in China. (See RP 271, Ex. 80 at 3) After arriving here, Danni studied accounting at Seattle Central Community College. (RP 45, 272-73; Ex. 80 at 3)

When the parties married, Danni worked for a small family-owned stone import business. (RP 50, 273-74) Shortly after marriage, Danni worked for Stonepath Logistics, a “more general import/export trade business,” as a “freight forwarder” and bookkeeper. (RP 50-51, 273-74) Danni considered her employment at the time to be “entry level,” and earned approximately \$29,000 annually. (RP 274, 414)

After leaving Stonepath Logistics, Danni was admitted to the accounting program at the University of Washington, where she could earn her B.A. degree in two years. (RP 273) Danni, who was then pregnant with the parties’ older child, attended orientation, but never matriculated. (RP 45, 275) Danni has not worked outside the home since before the older son was born in 2006. (RP 274)

By the time of trial, the parties had been separated for over a year. During that period, Danni was awarded temporary child support, spousal maintenance of \$1,300, and Joe was ordered to pay the mortgage on the home where Danni and the children resided, as well as her car payment. (CP 20, 33)

Despite this support, and even though the children were in school and/or daycare, Danni made limited effort to actively pursue

employment during this period. (RP 449-50) Further, despite testifying that she wanted to pursue her accounting degree at the University of Washington, Danni made no attempt to re-enroll while the litigation was pending. (RP 413) Nevertheless, Danni testified that she planned to start classes at the University of Washington for the January 2013 term. (RP 415-16) The application was due shortly after trial, and Danni testified that she “will immediately get busy. I’m not a person who sits around.” (RP 415-16) Even though it would only take her two years to get her degree if she went full time (RP 272), Danni testified that it will likely take her three years because she did not think it was “practical” to be full time. (RP 415)

**B. The Parties Have Two Sons, The Older Son Has Special Needs.**

The parties’ older son, Joseph (“Little Joe”), was born in May 2006. (RP 58) Their younger son, Nathaniel (“Nate”) was born in September 2009. (RP 58) Although Danni did not work outside the home, both children were in daycare. (RP 95, 101, 361) Prior to starting school, Little Joe, who has been diagnosed with high functioning autism and ADHD, attended daycare four days per week. (RP 95, 102, 303, 361, 372-73) At the time of trial, Little Joe

had just completed full-day kindergarten and was enrolled in first grade for the following school year in Fall 2012. (RP 108) Nate, then age 3, was two years away from starting kindergarten. (RP 96, 108-09)

Among the parties' conflicts during the marriage was their difference in parenting style, especially as it dealt with Little Joe's needs. (RP 164, 323-24, 626-27) Joe described himself as more optimistic in Little Joe's progress than Danni, who was more reserved in what she believed Little Joe could accomplish. (RP 74, 626-27)

After Joe filed to dissolve the parties' marriage, Pam Edgar was appointed parenting evaluator by agreement of the parties. (RP 316) Ms. Edgar believed that both parents brought different strengths to the parent-child relationship. (RP 320-24)

Ms. Edgar described Joe as "attuned" to the children's needs, providing good direction for the children, and was a good disciplinarian. (RP 320-21) However, she expressed concern that because Joe is more introverted, he may limit the children's activities with larger groups, unlike Danni, who has a "broad support network [and] is able to generate a lot of play dates for the children." (RP 322-23)

Ms. Edgar described Danni as a “very nurturing and warm parent.” (RP 323) Ms. Edgar also described Danni as a “fierce advocate” for Little Joe with regard to his difficulties related to his autism. (RP 323) However, Ms. Edgar expressed concern that Danni was “territorial” with the children, and resisted Joe having residential time with the children during the week. (RP 324) Ms. Edgar testified that Danni makes emotionally based decisions, and gets a little bit reactive or overly emotional. (RP 323) Ms. Edgar was concerned that Danni was exposing the children to the parents’ conflict, including by speaking pejoratively of Joe in front of them. (RP 324-26)

Ms. Edgar recommended a residential schedule that designated Danni as the primary residential parent, but with substantial residential time for Joe. (*See Ex. 80 at 22; RP 333*) Danni apparently disagreed with Ms. Edgar’s recommendation and retained Dr. Daniel Rybicki to critique Ms. Edgar’s evaluation and report. (RP 486) Dr. Rybicki, who had not met either parent or the children, criticized Ms. Edgar’s “methods” in her evaluation, including the fact that she had a separate Ph.D. psychologist administer the MMPI testing on the parents. (RP 495-96) There apparently was also some concern that Ms. Edgar showed a “racial

and cultural bias” when she recommended that Danni have residential time every Chinese New Year and Joe have residential time every “American” New Year. (See RP 520-21)

Danni presented no evidence during trial that she wanted to celebrate Chinese New Year with the children or that this particular holiday had any significance to her or the children. However, Ms. Edgar testified that it was her “understanding” that Danni wanted Chinese New Year every year:

**Question:** On page 24, you’ve recommended that Chinese New Year should be spent with the mother each year and the American New Year with the father each year.

**Pam Edgar:** Right.

**Question:** Is it your understanding that Danni is not an American citizen or is an American citizen?

**Pam Edgar:** Well, no. But my understanding is that she wanted Chinese New Year every year.

(RP 348)

Ultimately, the trial court rejected the mother’s insinuation that there was any bias in Ms. Edgar’s proposal that Danni have every Chinese New Year and Joe every “American” New Year:

I don’t know if he’s going to be able to say that shows racial and cultural bias to give the father New Year’s on the 31<sup>st</sup> of December every year and to give the mother Chinese New Year’s. She’s an American

citizen, she was here, she has American children. You know, is that racial and cultural bias? I think we all probably have our opinions about that.

(RP 521)

**C. After A Three-Day Trial, The Trial Court Designated Danni As The Primary Residential Parent, Conditioned Any Further Award Of Spousal Maintenance To Danni On Her Full-Time Enrollment In School, And Awarded Her A Disproportionate Award Of Assets.**

The parties appeared before King County Superior Court Judge Sharon Armstrong for a three-day trial on July 30, 2012. By then, Danni was represented by her third attorney since the litigation had begun a year earlier. (CP 93) In dispute at trial were parenting, child support, maintenance, and property division.

On parenting, the trial court expressed concern that Danni viewed the residential schedule as a “competition between parents as opposed to what’s really going to work for these children, and I’m worried about conflict.” (RP 675) Nevertheless, the trial court noted that “I think both these parents love their children very much and they really want the best for their kids.” (RP 678) The trial court then crafted a parenting plan that gave the children 6 out of 14 overnights with Joe. (CP 436)

The trial court rejected the parenting evaluator's proposal designating Chinese New Year to Danni every year and "American" New Year to Joe every year. The trial court stated that "if [Chinese New Year] happens to fall when the kids are with the mom, they spend it with the mom; otherwise not. Because the mother was aggrieved about not having New Year's, so I did an odd-even with respect to the Christmas holiday and the New Year holiday." (RP 704-05)

The trial court awarded Danni more of the net proceeds from sale of the family residence in order to effect a disproportionate award of the community property. (CP 463) The trial court also awarded spousal maintenance to Danni to "help support her education," and ruled that any spousal maintenance should be tied to Danni's expressed desire to further her education. (RP 685-86, 708) The trial court noted that there was no evidence presented that Danni would not be admitted to the University of Washington where she intended to apply, and presumed based on her testimony that she could begin school in the January term. (See RP 415-16, 686) The trial court described Danni as "very capable" and "very bright." (RP 685) The trial court stated: "I want her to go to school. I want her to get the degree. I want her to have a career." (RP 686)

The trial court found that Danni “need[ed] to return to school to obtain a degree which will provide her the means to support herself,” and that she only needed maintenance for a “short period of time.” (Finding of Fact (FF) 2.12, CP 470) The trial court awarded Danni monthly maintenance of \$4,500 per month, which it found was “pretty substantial,” for 36 months. (RP 708) Because maintenance was intended for Danni to further her education, the trial court “conditioned” the maintenance award on her “being enrolled in university full time [by January 2013] working toward her accounting degree.” (CP 462) The trial court ordered Danni to “immediately apply for entry in school and [ ] provide proof of acceptance,” and to begin school no later than January 2013. (CP 462)

After finding that Joe’s performance bonus was non-recurring, the trial court found that for purposes of child support his monthly net income was \$7,695.59 after his spousal maintenance payment. (CP 447, 455) Even though there was evidence that Danni was able to earn \$29,000 annually in an “entry level” position in her previous career field, the trial court declined to impute income to her for purposes of child support. (CP 448) The trial court stated that it would not impute income to Danni if

she was going to school full-time, but if she “fails to enroll in school, she will be deemed voluntarily unemployed and income will be imputed to her.” (CP 448)

Joe was ordered to make a child support transfer payment of \$1,503.20 for both sons. (CP 448) The trial court ruled that at the time of the first adjustment or when maintenance terminates, the father could pursue a downward deviation in his transfer payment based on the “significant amount of time” the children reside with the father. (CP 449)

After trial, Danni’s third attorney withdrew<sup>1</sup> and filed an Attorney’s Lien of \$5,202.50 for his services. (CP 213-14) The attorney also filed a motion for a judgment for his attorney fees. (CP 177) Joe took no position on the lien or the attorney’s motion. Danni responded to her former attorney’s motion, largely challenging the reasonableness of the fees incurred. (CP 180-212) The trial court found the fees were reasonable, but expressed reservations as to whether it could enter a judgment in favor of the attorney in the dissolution action. (RP 737-39) The trial court

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<sup>1</sup> She is represented by new counsel on appeal.

ordered that the attorney lien be paid from Danni's share of the sale proceeds. (CP 463)<sup>2</sup>

On September 30, 2012, the trial court denied Danni's two motions for reconsideration, as well as her motion for a new trial. (CP 476, 479, 482) Danni appealed. (CP 433) Joe raises a conditional cross-appeal. (CP 493)

On February 7, 2013, Danni and Joe entered into a CR2A Agreement that provided that "so long as Respondent (hereafter 'Danni') resides inside Creekside boundaries, little Joe (minor child) shall be enrolled at Creekside and the maintenance payments for the remainder of the term provided for in the Decree of Dissolution (entered August 2012) will be paid without the requirement that Danni attends school." (Supp. CP 497, Sub no. 221)

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<sup>2</sup> Respondent takes no position on appellant's challenge to the trial court granting appellant's trial counsel's request that his lien be paid from the sale proceeds. However, respondent does note that the appellant's claim that the court's ruling "deprived Ms. Rohde of the fundamental right to answer Mr. Glass' claim against her," (App. Br. 27) is not true. Appellant did answer her attorney's motion and was thus given the opportunity to "speak or object to Mr. Glass' bill," and did so at length. (CP 180-212) (App. Br. 25) Therefore, there is no basis for remand on this issue.

## V. ARGUMENT

### A. **The Trial Court Did Not Abuse Its Discretion In Not Granting Chinese New Year To The Mother Every Year When The Mother Presented No Evidence During Trial Of The Holiday's Significance To Either Her Or The Children.**

This court should reject the mother's challenge to the trial court's decision not designating Chinese New Year as a holiday under the parenting plan, because she failed to raise this issue during trial. While the mother dedicates nearly a third of her brief complaining that the trial court did not designate Chinese New Year as a holiday in the parenting plan (App. Br. 8-17), she presented absolutely no evidence at trial that: 1) she wanted the trial court to include Chinese New Year as a holiday in the parenting plan; 2) Chinese New Year has any particular significance to her or the children; 3) she and the children have any traditions related to Chinese New Year; or 4) she wanted the trial court to designate Chinese New Year every year to her. The mother's trial brief never mentioned Chinese New Year in the 5 pages dedicated to the parenting plan (CP 77-81), nor was it raised in her trial counsel's opening argument. (RP 35-42)

Absent any indication in the record that appellant advanced this particular claim in any substantive fashion at trial, it cannot be

considered on appeal. *Marriage of Studebaker*, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); *see also* RAP 2.5(a); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (declining to review issue, theory, argument, or claim of error not presented at the trial court level). The purpose of this rule is to afford the trial court an opportunity to correct alleged errors, thereby avoiding unnecessary appeals and retrials. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447, *rev. denied*, 145 Wn.2d 1004 (2001).

The mother cannot complain that “trial court’s failure to allow the children an opportunity to consistently celebrate Chinese New Year with their mother means that they will not consistently experience the most important holiday of the year relating to their Chinese heritage,” (App. Br. 15), when she made no attempt to argue or present evidence during trial that would have assisted the trial court in making its decision. The mother presented no evidence during trial that would have put the trial court on notice that she wanted to celebrate Chinese New Year every year with the children, that it was important to her, or that it was in the children’s best interests. As the mother acknowledges, “there was no testimony by

either party disputing who should receive which holidays.” (App. Br. 9)<sup>3</sup>

It is untrue that the mother “requested the children be allowed to celebrate Chinese New Year with her” at trial. (App. Br. 9) The citation to the record is not to her testimony, but that of the parenting evaluator who testified it was her “understanding” that the mother wanted the children to reside with her every Chinese New Year. (App. Br. 9, *citing* RP 348) And this testimony appeared to have been elicited solely for the purpose of showing some form of bias by the evaluator. This court should reject the mother’s challenge to the trial court’s decision on Chinese New Year when the mother failed to adequately preserve this issue for review in this court.

Even if the mother had somehow adequately preserved this issue, it was well within the trial court’s broad discretion to deny the mother’s request to have Chinese New Year designated to her every year because it found it was a “source of problems,” and because it

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<sup>3</sup> Chinese New Year was hand crossed-out as a “holiday” in the parties’ temporary parenting plan, which implies that there was some dispute over this holiday prior to trial. (*See* CP 39)

“falls differently every year.”<sup>4</sup> (RP 704, 705) Trial courts are given broad discretion to fashion a parenting plan based upon the child's best interests after consideration of the statutory factors. *Marriage of Jacobson*, 90 Wn. App. 738, 743, 954 P.2d 297, *rev. denied*, 136 Wn.2d 1023 (1998) (*citing Marriage of Littlefield*, 133 Wn.2d 39, 52, 940 P.2d 1362 (1997)). Discretion is abused only if the decision is manifestly unreasonable or based on untenable grounds. *Jacobson*, 90 Wn. App. at 743. Appellate courts are “extremely reluctant” to disturb a trial court’s decision on parenting. *Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001) (citations omitted).

In this case, the parenting evaluator testified that because it was her “understanding” that the mother wanted every Chinese New Year, the evaluator proposed that the husband be designated every “American” New Year, as an “equitable distribution of holidays.” (RP 348-49) Because the mother apparently took offense to the evaluator’s proposal, the trial court ruled that the parties would alternate “American” New Year, and if Chinese New Year “happens to fall when the kids are with the mom, they spend it with the mom;

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<sup>4</sup> Chinese New Year falls on a different date each year, but generally is in either January or February.  
<http://www.chinesenewyears.info/chinese-new-year-calendar.php>

otherwise not.” (RP 704-05) This decision was well within the trial court’s discretion.

**B. In Light Of The Fact That The Wife Already Received One Year Of Maintenance And A Disproportionate Award Of The Community Property, The Trial Court Did Not Abuse Its Discretion In Conditioning Any Further Maintenance On The Wife’s Full-Time Enrollment In School.**

As a preliminary matter, the wife’s challenge to the trial court’s order conditioning the wife’s maintenance award on her attending school full-time is moot because the parties have stipulated to waiving that requirement so long as she remains in the children’s school district. (Supp. CP 497, Sub no. 221) “It is a general rule that, where only moot questions or abstract propositions are involved, the appeal should be dismissed.” *Hart v. Dep’t of Social and Health Services*, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988) (quoting *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)); see also *State ex rel. Layton v. Robinson*, 2 Wn.2d 614, 616, 99 P.2d 402 (1940) (the court will not pass upon a “purely academic” question). “A case is moot when a court can no longer provide effective relief.” *State v. Enlow*, 143 Wn. App. 463, 470, ¶ 22, 178 P.3d 366 (2008); see also *Burd v.*

*Clarke*, 152 Wn. App. 970, 974, ¶¶ 7, 8, 219 P.3d 950 (2009), *rev. denied*, 168 Wn.2d 1028 (2010).

Even if this issue is not moot, the trial court's decision was well within its discretion. An award of spousal maintenance is discretionary, and will not be disturbed on appeal absent a showing that the trial court abused its discretion. *Marriage of Luckey*, 73 Wn. App. 201, 209-10, 868 P.2d 189 (1994). The trial court's discretion in awarding maintenance is "wide;" the only limitation on the amount and duration of maintenance is that the award must be "just." *Luckey*, 73 Wn. App. at 209.

In this case, the trial court properly considered the statutory factors under RCW 26.09.090 based on the evidence presented during trial, and properly concluded that further spousal maintenance to the wife was not necessary unless it is for the purpose of her attending school full time to obtain her accounting degree. (See RP 707: "[Spousal maintenance] is conditioned on the wife being enrolled full time to get her education. That is the reason for the maintenance, to help support her education.")

"The purpose of spousal maintenance is to support a spouse until she is able to earn her own living or otherwise become self-supporting." *Luckey*, 73 Wn. App. at 209. In deciding to condition

spousal maintenance on the wife attending school full time, the trial court considered the fact that this was a relatively short-term marriage (eight years by the time the parties separated), and that the wife had already received a year of temporary support. The wife, who is relatively young, already has a four-year degree from a university in China, as well as additional schooling here in the United States. Prior to marriage, the wife earned nearly \$30,000 a year as a bookkeeper and freight forwarder. Further, the wife was awarded a disproportionate share of the marital estate.

Based on this evidence, the trial court properly recognized that the wife was already capable of supporting herself without further spousal maintenance. An “unequal distribution of property obviate[s] the need for spousal maintenance as it substantially improve[s] [the wife]’s financial position.” *Marriage of Wright*, 78 Wn. App. 230, 238, 896 P.2d 735 (1995) (App. Br. 17); *see also Luckey*, 73 Wn. App. at 210 (the trial court properly considered the level of support paid in the first year of separation, the level of child support, and the fact that the property division was unequal in favor of the wife in concluding that no further spousal maintenance was necessary). However, in light of the wife’s testimony that she wanted to complete her accounting degree, the trial court awarded

spousal maintenance of \$4,500 a month for three years so long as she was enrolled full time.

This decision was “just” and well within the trial court’s broad discretion in making its maintenance award and consistent with the statutory factors under RCW 26.09.090. As the wife concedes, so long as it is evident that the trial court considered the statutory factors under RCW 26.09.090, specific findings of fact are not necessary. (See App. Br. 21, citing *Murray v. Murray*, 28 Wn. App. 187, 189-90, 622 P.2d 1288 (1981)) While the wife specifically complains that the trial court failed to consider RCW 26.09.090 (1)(b), “the time necessary to acquire sufficient education or training to enable the party to seeking maintenance to find employment,” it is evident that the trial court in fact considered this factor because it based the duration of maintenance on the wife’s testimony that it would take approximately 3 years to complete her accounting degree. (See RP 41, 408, 415)

In claiming that the trial court failed to consider the “time necessary” to find employment, the wife complains that “the court did not explain how it arrived at the finding that Ms. Rohde could handle full time classes in addition to being the majority caregiver for an autistic child and a 3 year old.” (App. Br. 20) But there was

evidence that the older child was starting first grade the following school year – 4 months before the wife’s requirement to start full-time school in January 2013 – and that she regularly placed both children in daycare even when she was not working or attending school. (See § IV.B Restatement of Facts)

Further, the wife relies on her declaration in support of her motion for reconsideration to claim that she is “not physically and mentally ready to go to school full time,” and that her care for the parties’ children limited her ability to go to school full time. (App. Br. 20) But at trial, the wife testified that she intended to “immediately get busy [towards applying to and attending school]. I’m not a person who sits around.” (RP 415-16) While the wife testified that she did not think that going full time to school was “practical,” the trial court apparently disagreed. The trial court could, based on the evidence presented at trial, determine that the wife could reasonably attend school full-time while the children, who would be either in school or daycare during the day, reside with her 8 out of 14 days.

This court should affirm the trial court’s decision on maintenance. In the event it remands for reconsideration of the “condition” that the trial court placed on the wife’s spousal

maintenance award, this court should direct the trial court to also reconsider the amount and duration of the award. It is apparent that the “pretty substantial” award of maintenance to the wife was premised on her full-time attendance at school, including the attendant costs related to school and on the assumption that she would not be working at all. If she is no longer required to attend school full-time, the trial court should be given an opportunity to reassess the amount of any spousal maintenance award and its duration.

**C. Substantial Evidence Supports The Trial Court’s Finding That the Husband’s Performance Bonus Was “Non-Recurring” Income That Should Be Excluded From Income For Purposes Of Child Support.**

This court will uphold a trial court's decision regarding child support unless there was a manifest abuse of discretion, and it will uphold findings of fact supported by substantial evidence. *Mattson v. Mattson*, 95 Wn. App. 592, 599, 976 P.2d 157 (1999) (citations omitted). In this case, substantial evidence supports the trial court’s finding that the husband’s discretionary performance bonus was “non-recurring,” and thus it was within its discretion to exclude it from his income for purposes of child support. (CP 458, RP 718)

While RCW 26.19.071 (3)(r) includes bonuses as an “income source” for purposes of calculating child support, a source of income may be excluded from the calculation of the basic support obligation if it is not a recurring source of income under RCW 26.19.075 (1)(b). “Deviations for nonrecurring income shall be based on a review of the nonrecurring income received in the previous two calendar years.” RCW 26.19.075 (1)(b).

Here, there was evidence that in the previous two years, the husband’s performance bonuses went from \$40,000 to \$30,000. (See RP 31, 405) There was no evidence that there would be any future performance bonuses, and the husband testified that his performance at work had “become an issue” over the last year. (RP 60) This evidence was sufficient to support the trial court’s finding that the husband’s previously awarded discretionary performance bonuses were “non-recurring,” and the trial court properly excluded it as income when calculating the basic child support obligation for the parties’ two children. See *Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002) (“Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise.”), *rev. denied*, 149 Wn.2d 1007 (2003).

Even if the trial court should have included the discretionary performance bonus as part of the husband's gross income, any error is *de minimis* because it would have only a small impact on the husband's child support payment. "Error without prejudice [ ] is not grounds for reversal." *Welfare of Ferguson*, 41 Wn. App. 1, 5, 701 P.2d 513, *rev. denied*, 104 Wn.2d 1008 (1985); *Ford v. Chaplin*, 61 Wn. App. 896, 899, 812 P.2d 532 (1991) (appellant must show that her case was materially prejudiced by a claimed error. Absent such proof, the error is harmless), *rev. denied*, 117 Wn.2d 1026.

Excluding any performance bonus, the trial court found the parties' combined monthly net income was \$11,776. (CP 455) The total "basic child support obligation"<sup>5</sup> for the parties' two children based on this income is \$2,302 (CP 455) –the total amount owed by *both* parents for the support of the children; each parent's obligation is based on their proportionate share of the combined net income. If the trial court had found that the parties' combined monthly net income was \$12,000 or greater by including the husband's performance bonus, the total "basic child support

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<sup>5</sup> The "basic child support obligation" is the monthly child support obligation as determined from the child support schedule based on the parties' combined monthly net income and the number of children for whom support is owed. RCW 26.19.011(1).

obligation” for both children would be \$2,330. *See* RCW 26.19.020. The difference is only \$28 – an amount that the parents would share in proportion to their income. Thus, the amount in dispute does not warrant the additional resources that would necessarily be expended by the parties if this court remands to the trial court for recalculation of the husband’s income.

This court should affirm the trial court’s child support order, which is based on substantial evidence and provides adequate support for the parties’ two young children. If this court remands, it should direct the trial court to reconsider its decision to not impute income to the wife. (*See* § VI Conditional Cross Appeal) This court should also direct the trial court to consider the father’s actual income while this appeal has been pending, including whether he in fact received a bonus for the last year. *George v. Helliard*, 62 Wn. App. 378, 384, 814 P.2d 238 (1991) (court “mindful” that parties’ circumstances may have changed between entry of trial court’s order and issuance of appellate opinion, and remanding for review of current situation).

**D. This Court Should Deny The Appellant's Request For Attorney Fees.**

The wife does not have any need for an award of attorney fees. After a less than eight-year marriage, she was awarded 53% of the community property, including a greater share of the proceeds from the sale of the family home, maintenance for one year under a temporary order, and an additional three years of maintenance to allow her to further her education. The wife can pay her own fees for bringing this appeal, which raises issues that are not preserved and moot. If any party should be awarded attorney fees, it should be the husband, who is forced to respond to this appeal that unnecessarily continues the litigation at great expense. *Marriage of Greenlee*, 65 Wn. App. 703, 711, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992).

**VI. CONDITIONAL CROSS-APPEAL**

Only if this court remands on any of the issues raised by appellant should this court also remand for the trial court to reconsider its decision to not impute income to the mother. RCW 26.19.071 (6) requires the trial court to impute income to a parent who is voluntarily unemployed or underemployed, in order to prevent that parent from avoiding his or her child support

obligation. *Marriage of Didier*, 134 Wn. App. 490, 496, ¶ 9, 140 P.3d 607 (2006), *rev. denied*, 160 Wn.2d 1012 (2007). To determine whether a parent is voluntarily underemployed, the court looks at “that parent’s work history, education, health, and age, or any other relevant factors.” RCW 26.19.071 (6).

Here, the mother previously worked as a bookkeeper and freight forwarder, she is healthy, educated, and relatively young. There was no evidence that she could not find full time employment. The trial court declined to impute income to the wife because it presumed she would be attending school full-time. (CP 448) But the statute does not allow the court to *not* impute income because a parent is in school. Instead, the only bases the statute provides to allow a trial court to not impute income to a parent is if that parent is “unemployable” or because the parent is “unemployed or significantly underemployed due to the parent’s efforts to comply with court-ordered reunification efforts.” RCW 26.19.071 (6). Neither of these circumstances is present here.

The trial court erred in failing to impute income to the mother. In the event that this court remands on any of the issues raised by the appellant, it should remand on this issue and direct the trial court to impute income to the mother.

## VII. CONCLUSION

This court should affirm the trial court's decision in its entirety and deny the appellant's request for attorney fees. Because the issues raised by appellant were not properly preserved or are moot, the respondent should be awarded his attorney fees. If this court remands on any issue raised by the appellant, this court should reverse the trial court's decision declining to impute income to the mother.

Dated this 17th day of June, 2013.

SMITH GOODFRIEND, P.S.

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**DECLARATION OF SERVICE**

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

That on June 17, 2013, I arranged for service of the foregoing Amended Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Email
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**DATED** at Seattle, Washington this 17th day of June, 2013.

  
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Victoria K. Isaksen