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COURT OF APPEALS NO. 73119-0-I

SUPREME COURT
OF THE STATE OF WASHINGTON

SHEILA KOHLS,

Petitioner,

and

KENNETH B. KAPLAN,

Respondent.

PETITION FOR REVIEW

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Sheila Kohls, the Appellant/Cross-Respondent below, petitions this Court to accept review of the Court of Appeals' decision terminating review, entered herein on June 13, 2016; its Order Denying Motion for Reconsideration and its Order Denying Motion to Publish Opinion, both of which were entered on June 28, 2016. Each of these rulings may be found in the Appendix.

Issues Presented for Review.

1. When does a change in the obligor's income constitute a substantial change of circumstances?

2. When calculating a parent's net income, may the court deduct items which do not reflect an actual reduction in the personal income of the party claiming the deductions?

3. What must be shown to establish that an order of child support works a severe economic hardship?

4. When can and should child support be set above the maximum advisory level?

5. In what kind of proceeding may a parent obtain post-secondary support ?

6. What are reasonable attorney fees to be awarded, pursuant to RCW 26.09.140?

Statement of the Case.

Kenneth Kaplan and Sheila Kohls were divorced on March 22, 2005, with two children: Zachary and Idalia.[1] CP 14-18.

The Order of Child Support was modified in 2010. CP 220-234. Kohls had returned to work as an elementary school nurse and no longer received maintenance. CP 269. Kaplan had stopped practicing law. His income is derived from his wholly owned Kaplan Real Estate Services, LLC ("KRES"), which invests in and manages apartment buildings. CP 269-270.

Due to the conflicting financial information provided by Kaplan, the court found that it was appropriate to impute income to Kaplan in the net amount of $8,137 each month, CP 221.

It found that Kohls' net monthly income was $2,444. CP 222.

When Z.K. graduated from University Prep, Kohls filed a Petition for Modification of Child Support *pro se*, on June 7, 2013, to seek post-secondary support for Z.K. and increased support for I.K. CP 209-234. I.K. was a sophomore. CP 269.

In his Response to Kohls' Petition, Kaplan lied. He attested that "his income has *decreased* by approximately $1,024 per month

[1] For ease of consideration, the parties shall be identified by their last names. Like the Court of Appeals, Zachary shall be identified as Z.K., and Idalia as I.K.

since the last Order of Child Support was entered," CP 248, to a net monthly income of $7,112.74. CP 250, CP 241.

Kohls was thus compelled to retain counsel who could undertake the discovery necessary to enable the Court to calculate Kaplan's true income. Throughout discovery, Kaplan continued to be dishonest and disingenuous. CP 272-302; Decision, pp. 16-19.

Following a trial by affidavit, the Honorable Jacqueline Jeske, Court Commissioner, imputed a *net* income to Kaplan of $31,713.72 per month.[2] She found that Kohls had a net monthly income of $2,334.55. CP 1493. But, when Kohls presented a Final Order of Child Support Following Reconsideration, CP 1382, which included her mandatory pension reductions, CP 1382, she imposed CR 11 sanctions against Kohls and her attorney, CP 1489-1490, and refused to permit those deductions. CP 1493, 1500.

Both parties moved to revise the commissioner's final orders. CP 1231-1262, 1355-1368; 1547-1548.

On revision, the Honorable Sean O'Donnell found that Commissioner Jeske "correctly concluded that Mr. Kaplan's net monthly income was $31,713.72". CP 1796. He also ruled that

[2] The court commissioner and the lower court imputed income to Kaplan, not because he was voluntarily unemployed or underemployed, but because it found that his financial records substantially underreported his actual income. A-16-19.

Kohls could deduct her pension contributions, which reduced her net monthly income to $1,812.53, CP 1702, 1842, but upheld Commissioner Jeske's CR 11 sanctions, CP 1702.[3]

Yet, in his Order On Revision, and contrary to the findings of the Court Commissioner, CP 1207, Judge O'Donnell concluded that there had not been a substantial change of circumstances and that the 2010 Order of Child Support did not create a severe economic hardship. He then ruled, *sua sponte*, that he would treat Kohls' *pro se* Petition for Modification as a motion to adjust. He then arbitrarily determined which issues on the parties' cross-motions for revision he would or would not address. CP 1693-1702.

When Kaplan prepared the final orders, CP 1702, he included items which had not been identified as errors in his motion for revision, as required by KCLR 7(b)(8)(A),[4] or had been denied at the revision hearing. Over Kohls' objections, CP 1827-1833, the court entered its Order re Adjustment of Child Support and its Adjusted Order of Child Support on Revision, and included items Kaplan first raised in his presentation of these orders, or which the

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[3] These rulings are irreconcilable, and should not have been affirmed by Decision 1, for the reasons stated in Kohls' Motion for Reconsideration, A-29-49, incorporated herein.

[4] KCLR 7(b)(8)(A) requires that "The motion [for revision] shall identify the error claimed.". It thus became an order subject to appellate review, but not revision. RCW 2.24.050; *Robertson v. Robertson,* 113 Wash. App. 711, 714-715, 54 P.3d 708 (2002).

court had previously denied---including a previously denied 22.2% downward deviation in the transfer payment, CP 1843, based on a mistaken view of the law, A-21.

Kohls appealed. Division I affirmed.

Additional facts will be presented as they become relevant to the issues and the argument which follow.[5]

Argument.

In the past, the Court of Appeals has hidden "bad" decisions under the rug of non-publication, secure in the knowledge that it was highly unlikely that this Court would accept review of a decision which lacked precedential value despite its legal errors and unjust results. However, as this Court is aware, GR 14.1 has now been amended, effective September 1, 2016. While unpublished decisions still have no precedential value...

> unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

Accordingly, unpublished decisions can no longer be ignored

[5] The 20 page limit on the length of this Petition for Review, RAP 13.4(f) precludes the Petitioner from addressing every issue which this Court should consider if it accepts review. But please see, Kohls' Motion for Reconsideration and Motion to Publish, which are reincorporated herein by reference.

or disregarded by this Court.

This case provides this Court with an opportunity to address and to clarify numerous issues which confront family court practitioners, commissioners, and judges every day. Accordingly, these are issues which are of "substantial public interest that should be determined by the Supreme Court". RAP 13.4(b)(4).

1. When Does A Change In the Obligor's Income Constitute A Substantial Change of Circumstances?

Contrary to the conclusion of the court commissioner, CP 1207, the revision court concluded there had been no substantial change of circumstances warranting a modification of support based on its finding that "the disparity between Kaplan's and Kohls' earnings has remained constant and was predicted to do so at the time the 2010 order was entered." CP 1698.

Division I affirmed, holding, A-11:

> ...it is evident that [Judge O'Donnell] Concluded that the relatively small variances in both Kohls' and Kaplan's income and expenses between 2010 and 2013, coupled with the fact that Kohls' and Kaplan's income had historically been disparate, evidenced that a substantial change of circumstances had not occurred.

But the disparity between Kaplan's and Kohls' earnings did not "remain constant". Kohls' net monthly income *decreased* 26% from $2,444 to $1,812.53, CP 1842. Kaplan's net monthly income *nearly quadrupled* from $8,137, CP 205, to $31,713.72, CP 1796; A-12, in only two and a half years. Division I's decision is in conflict with *In re Marriage of Scanlon and Witrak*, 109 Wash. App. 167, 173-174, 34 P.3d 877 (2001), where the Court held:

> ...that the mere passage of time and routine changes in incomes do not constitute a substantial change in circumstances. But some changes in incomes are such that they will not have been contemplated by the parties at the time the previous order of child support was entered and thus a change in incomes could constitute a substantial change of circumstances.

In *Scanlon*, *supra,* the Court found that there had been a substantial change of circumstances when Witrak's *gross* income increased to more than $270,000 per year in the 11 years since the entry of the original decree. In this case, Kaplan's *net* income increased by $282,920.64 in just two and half years.

It was undisputed that the quadrupling of Kaplan's net monthly income from $8,137 to $31,713.72, barely two and a half

years later, was **not** a "routine change in incomes", and was **not** contemplated when the 2010 Order of Child Support was entered.

But, according to Division I, so long as a court finds that the parents' incomes "had historically been disparate", it does not matter how non-routine a change of income might be, even if that disparity does not "remain constant", as it "was predicted to do...".

This Court should accept review.

2. When Calculating A Parent's Net Income, May The Court Deduct Items Which Do Not Reflect An Actual Reduction In The Personal Income Of The Party Claiming The Deductions?

In *In re Marriage of Stenshoel*, 72 Wash.App. 800, 806, 86 P.3d 635 (1993), the Court held:

> [D]epreciation and depletion expenses should be deducted from gross income *only* where they reflect an actual reduction in the personal income of the party claiming the deductions, such as where, *e.g.,* he or she actually expends funds to replace worn equipment or purchase new reserves.

Yet, in conflict with this case, Division I upheld the exercise of the court's discretion permitting Kaplan to deduct $10,397 for depreciation for undocumented expenditures for equipment and furniture purportedly purchased by certain LLCs in which KRES

held an ownership interest, CP 804, 1345-1346; the $2,921 KRES paid for Kaplan's professional liability insurance[6]; and the $2,665 KRES paid for Kaplan's Key Man insurance[7]. A-14-20.

Kaplan never even claimed that these alleged expenditures actually reduced his own personal income---much less, produced properly verified evidence to show that they had, as required by, and in conflict with, RCW 26.19.071(5)(h); *In Marriage of Gainey*, 89 Wash.App. 269, 274-275, 948 P.2d 865 (1997), *reversed on other grounds, In re Marriage of Moody,* 137 Wash.2d 979, 93, 976 P.2d 1240 (1999); and *In re Marriage of Bucklin,* 70 Wash. App. 837, 841, 855 P.2d 1197(1993).

Yet, without any supporting legal authority, Division I held that since the "imputation of income is an equitable determination", A-19, the court can disregard RCW 26.19.071(5)(h) and these well-established legal principles, and permit any deductions it wants, so long as "the imputed amount is within the range of evidence presented," A-20, even though there is no such range of evidence.

This Court should accept review.

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[6] This undocumented alleged expense was particularly peculiar since the court found in the 2010 order of child support that Kaplan had resigned from the WSBA on November 17, 2009 and discontinued his malpractice insurance. CP 221.

[7] Since Kaplan's children are beneficiaries, CP 1331, Kaplan is an indirect beneficiary, so premiums for Key Man insurance are not tax deductible. 26 U.S.C.A.§ 264(a)(1).

3. What Must Be Shown To Establish That An Order of Child Support Works A Severe Economic Hardship?

RCW 26.09.170(6)(a) provides that a child support order may be modified "without a showing a substantial change of circumstances...if the order in practice works a severe economic hardship on either party or the child." Yet, in direct conflict with this statute and *In re Marriage of Sievers*, 78 Wn.App. 287, 304, 897 P.2d 388 (1995), Division I affirmed the revision court "that the 2010 order of child support did not work a severe economic hardship on either Kohls or I.K. because Kohls' economic situation was contemplated at the time the 2010 order was entered." A-11.

Contrary to Division I's decision, *Schumacher v. Watson,* 100 Wash.App. 208, 211-212, 997 P.2d 399(2000), did not hold that the "existence of a severe economic hardship is a factual determination that is within the discretion of the trial judge." No legal authority supports this holding. Rather, *Schumacher, supra,* held that the existence of a severe economic hardship is a factual determination which must be supported by substantial evidence. *Id.*

By providing no criteria as to how a trial judge might exercise such discretion---and indeed, by stating "that there is no legal test

for a severe economic hardship", A-11---a lower court's discretion in determining the existence of a severe economic hardship is unfettered---which means that the "existence of a severe economic hardship" is whatever a court might say it is. In such a situation, there can be no meaningful appellate review.

In holding "that there is no legal test for a severe economic hardship", Division I abandoned and is in conflict with the formula the Court used in *In re Marriage of Krieger and Walker*, 147 Wash. App. 952, 963-965, 199 P.3d 450(2009), to determine whether a child support order is adequate to meet a child's basic needs.

Contrary to Division I's mischaracterization, Kohl's claim of economic hardship was not based simply on the fact that "child support payments ended for Z.K. and the fact that I.K. was hampered in participating in various extra-curricular activities", but rather based on the fact that I.K.'s basic needs were not being met by the $750 Kohls received from the 2010 Order of Child Support.[8]

According to the identical formula used by the Court in *Marriage of Krieger and Walker, supra*, I.K.'s monthly expenses for her *basic needs* for housing, utilities, food, and transportation (not

[8] No evidence supports Division I's gratuitous and mean-spirited remark, A-13, "Indeed, Kohls' assertion of a severe economic hardship is based on her mistaken belief that the child support payments are intended for *her* benefit, not the benefit of her children."

including clothes and healthcare) are at least $1,792 (1/2 of Kohls' monthly expenses of $3,584 for these same items, CP 235-238).[9]

Since the transfer payment of $750 per month in the 2010 support order does not cover Kaplan's proportionate share of these expenses (based on his 76.9% share of the parties' combined net monthly incomes in the 2010 order of support, CP 201), it is not adequate to meet I.K.'s basic needs, CP 857, 235, and thus creates a "severe economic hardship" on both the mother and the child.

Third, if, as Division I opined at A-13, "it is evident that Judge O'Donnell concluded that it was not proved that I.K.'s basic needs were not being met by the 2010 order" [even though he never expressed such a conclusion], the formula which the Court used in *Marriage of Krieger and Walker, supra,* proves otherwise.[10]

4. When Can and Should Child Support Be Set Above The Maximum Advisory Level?

Division I held that this Court's decision in *In re Marriage of*

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[9] In her motion for reconsideration, Kohls inadvertently used all of her monthly expenses, rather than just her monthly expenses for her daughter's basic needs identified in *Marriage of Krieger and Walker, supra.* But the principle and the result are unchanged.

[10] Although not necessarily relevant here, there is no authority for Division I's implicit holding that one must show that "basic needs" are not being met to constitute "a severe economic hardship on either party or the child", as required by RCW 26.19.170(6). Thus, for example, in *Schumacher v. Watson,* 100 Wash.App. at 211-212, the Court found that an "unwieldy and unpredictable" method of calculating the support itself created a severe economic hardship merely because it "denied Schumacher an opportunity to budget their child's financial needs", without any consideration as to whether the support payment itself met the child's basic needs.

McCausland, 159 Wash.2d 607, 617,152 P.2d 1013 (2007) did not permit the court to set Kaplan's child support obligation above the maximum advisory level. A-13-14.

Its holding is in conflict with *Marriage of Krieger and Walker*, 147 Wash.App. at 963-965, where the Court held that the trial court had abused its discretion in its mistaken belief that *McCausland*, *supra,* required a "showing of extraordinary need'" to support an award above the advisory amount:

> Neither the statute nor the case law limits support awards above the advisory amount to those based on "extraordinary" needs, as the trial court here applied that term.

The Court held that "expenses for school-related costs and trips, extra-curricular activities, cultural experiences, and computers were appropriate bases for additional support." *Id.* at 964.

Using the identical formula this Court used in *Marriage of Krieger and Walker*, 147 Wash. App. at 964-965, Kaplan's 94.6% proportional share of I.K.'s monthly expenses of at least $1,792 for her basic needs of housing, utilities, food, and transportation is $1,695.23. Yet, Kaplan's adjusted transfer payment of $1,352 covers less than his proportionate share of those costs, not

including her basic needs for clothes and health care. It does not cover any of her expenses for "participating in various extra-curricular activities". It should.

The Court's ability to set support in excess of the maximum advisory level is particularly important where there is a great disparity between the parents' incomes to lessen the disparity between the standard of living of the child and the wealthy parent. *In re Marriage of Scanlon and Witrak,* 109 Wn. App. at 179.[11]

As this Court held in *Marriage of McCausland,* 159 Wash.2d at 617, "the intent of the [child support] statute is to ensure that awards of child support meet the child's or children's basic needs and to provide additional support 'commensurate with the parents' income, resources, and standard of living.' RCW 26.19.001."

The present child support order does neither.

This Court should accept review.

5. In What Kind Of Proceeding May A Parent Obtain Post-Secondary Support?

Kohls filed her Petition for Modification, in part, to obtain post-secondary support, CP 213-214. Since the children's post-

[11] Contrary to Division I's assertion, p. 14, Kohls agrees with *Scanlon*, 109 Wash.App. at 180, that "Child support is designed to meet the needs of the children at issue; its sufficiency is not measured by whether it financially strains the *obligor* parent". Kohls is the *obligee* parent.

secondary support for college tuition, and room and board, is funded through a trust established by their paternal grandparents, CP 269, but their expenses when they are not attending college during the summer months are not, the Court Commissioner awarded Kohls post-secondary support for Z.K., if and when he resided with his mother during the summer. CP 1209.

Kaplan did not identify the Commissioner's order to pay post-secondary support for Z.K., as an error in his motion for revision, as required by KCLR 7(b)(8)(A).

Yet, even though no substantial change of circumstances is required to support a petition for modification to obtain post-secondary support(the preferred proceeding for obtaining post-secondary support), *In Re Marriage of Morris*, 176 Wash. App. 893, 901-902, 309 P.3d 767 (2013), post-secondary support may also be obtained in a proceeding to adjust support, *Id.* at 902-904, Division I upheld the lower court's *sua sponte* ruling to convert Kohls' petition for modification into an adjustment proceeding, and then used that as an excuse to strike her post-secondary support award, A-14, and other claims for affirmative relief. A-21-22.

Its decision creates a "Catch-22" which precluded Kohls from

obtaining post-secondary support in either proceeding.

6. What Are Reasonable Attorney Fees To Be Awarded, Pursuant To RCW 26.09.140?

In *In re Marriage of Burke*, 96 Wash. App. 474, 479, 980 P.2d 265 (1999), the Court held:

> The policy of this state regarding attorney fees in domestic relation matters is stated in RCW 26.09.140:
>
> The court ... after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith[.]
>
> "The purpose of the statutory authority is to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage." [citations omitted].

This is particularly true where those disputes involve children and their support. *Id.* at 478; RCW 26.09.002. Parents are trustees with regard to the support of their children, *Hartman v. Smith,* 100 Wash.2d 766, 768, 674 P.2d 176 (1984); *Hammack v. Hammack*, 114 Wash.App. 805, 808, 60 P.3d 663 (2003).

Kaplan thus owed a fiduciary duty to be honest when he disclosed his income for the purpose of determining his child

support obligation. But he breached his fiduciary duty and lied.

In his Response to Kohls' Petition, Kaplan attested that "his income has *decreased* by approximately $1,024 per month since the last Order of Child Support was entered," CP 248, to a net monthly income of $7,112.74. CP 250, CP 241. Yet, the court found that Kaplan's net monthly income had *nearly quadrupled* from $8,137, CP 205, to $31,713.72. CP 1796; Decision, fn. 12.

A comparison of hours and rates charged by opposing counsel is probative of the reasonableness of the requesting party's request. *Fiore v. PPG Industries, Inc.*, 169 Wash.App. 325, 354, 279 P.3d 972 (2012). Yet, Commissioner Jeske awarded Kohls little more than half of the attorney fees requested, CP 1499, or what Kaplan had incurred. CP 1092-1109, 1159-1171, 1188-1205.

No legal authority supports the revision court's reasoning that this award was "appropriate" because "the time counsel spent on research and briefing is disproportionate to the time he spent on reviewing documents (his argument on high costs)". CP 1799-1800.

Without providing any reason, the revision court refused to even consider, much less, compensate Kohls for the time her attorney spent rendering other legal services, including but not

limited to, drafting discovery requests and declarations; reviewing Kaplan's pleadings; communications with her, the court, and/or opposing counsel; preparation for or attendance at court hearings; or any paralegal work. These legal services were just disregarded.

Division I affirmed.

It's assertion, A-26, that "the issues in this case amounted to simple mathematical adjustments in the child support order" is not supported by the evidence, and is belied by the revision court's and the commissioner's findings regarding "the degree of difficulty in ascertaining Mr. Kaplan's true income," CP 1698-1701; See also, 11/22/13 RP 36-45, including his dishonesty in reporting it. But the court's award does not reflect "the fees and costs incurred in the process", in conflict with *In re Marriage of Morrow*, 53 Wash. App. 579, 591, 770 P.2d 197(1989); *Friedlander v. Friedlander,* 58 Wash.2d 288, 290, 297, 362 P.2d 352 (1961); *In re Marriage of Mattson*, 95 Wash.App. 592, 606, 976 P.2d 157 (1999).

It has long been the policy in this State, legislatively and judicially, that if a spouse is without funds and the other spouse has the ability to pay, denial of fees is an abuse of discretion. *Valley v. Selfridge*, 30 Wash. App. 908, 918, 639 P.2d 225 (1982). Arbitrary

reductions in fees likewise make it impossible for attorneys to represent indigent clients---and leave clients in a worse financial situation than when they began, regardless of the outcome.

Whatever a court does not award must be made up by the court's awards for support, or goes unpaid, thereby defeating the fundamental purpose of both RCW 26.19.001 and RCW 26.09.140.

This is not a problem unique to this case.

And this problem is particularly acute, in cases like this one, where an impoverished custodial parent is fighting a well-heeled vindictive former spouse, who lies about his income to avoid paying his proportionate share of support. Division I's holding rewards the obstructionist and deceptive tactics which Kaplan employed here.

CONCLUSION

This Court should accept review, and hold:

1. Uncontemplated, non-routine, substantial changes of income constitute a substantial change of circumstances, regardless of whether the parties' incomes have "historically been disparate";

2. When calculating a parent's net income, the court may not deduct items which do not actually reduce that parent's income;

3. When the obligor parent's transfer payment does not cover

his or her proportionate share of the child's basic needs, the order of child support works a severe economic hardship on the custodial parent and the child, pursuant to RCW 26.09.170(6)(a);

4. Support should be set above the maximum advisory level when the obligor parent's transfer payment does not cover his or her proportionate share of the child's basic needs, and/or when additional support would be "commensurate with the parents' income, resources, and standard of living", RCW 26.19.001."

5. A parent should be able to obtain post-secondary support in either a modification or an adjustment proceeding;

6. An award of reasonable attorney fees, pursuant to RCW 26.09.140, must reflect "the fees and costs incurred in the process", particularly where the other spouse has lied about his/her income;

7. Address the other issues raised in Kohls' Motion for Reconsideration which could not be fully addressed in this Petition.

Do justice.

Respectfully submitted this 21st day of July, 2016.

C. Nelson Berry III
WSBA #8851
Attorney for Sheila Kohls
Petitioner

Certificate of Service

I certify that on the 21st day of July, 2016, I caused a copy of the foregoing Petition for Review to be hand-delivered by ABC Legal Messenger Service to the attorney for the Respondent at the following address:

Karen D. Moore
Brewe Layman P.S.
3525 Colby Ave #333
Everett, WA 98201

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of July, 2016, at Seattle, Washington.

C. Nelson Berry III
WSBA #8851
Attorney for Sheila Kohls
Petitioner

Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of: KENNETH B. KAPLAN, Respondent/Cross-Appellant, v. SHEILA KOHLS, f/k/a SHEILA KOHLS-KAPLAN, Appellant/Cross-Respondent.	)	DIVISION ONE No. 73119-0-I (consol. with No. 73492-0-I) UNPUBLISHED OPINION FILED: June 13, 2016

DWYER, J. — The disharmony between Kenneth Kaplan and Sheila Kohls continues. No strangers to this—or the superior—court, the former spouses bring to us the latest iteration of their seemingly continuous, acrimonious litigation. Each party asserts numerous claims for relief from the trial court's orders. None have merit. We affirm.

I

Kohls and Kaplan married in 1992. They have two children together, a daughter, I.K., age 17, and a son, Z.K., age 20.[1] Throughout their marriage, Kaplan was employed as an attorney and Kohls was a stay-at-home mother.

[1] These were the ages of the children at the time of the 2015 court proceedings.

In March 2005, the superior court dissolved their marriage. As part of the dissolution, Kohls and Kaplan entered into an agreed child support order. They also agreed that the children's postsecondary education would be funded through a trust established by the children's paternal grandparents.

In June 2013, Kohls—initially appearing pro se and later represented by counsel—filed a petition seeking modification of the child support order, which had been previously modified in 2010.[2] Therein, Kohls contended that the child support order should be modified because, among other reasons, "[a] parties' [sic] income may have changed substantially," and because "[t]he previous order work[ed] a severe economic hardship" on both her and I.K.

Kaplan contested Kohls' petition. Both parties submitted documentation in support of their arguments, including affidavits and financial worksheets. Discovery was also conducted.

On November 22, the parties appeared before a court commissioner, the Honorable Jacqueline Jeske, for trial by affidavit. After hearing from counsel, Commissioner Jeske set forth a detailed oral ruling. Therein, Commissioner Jeske ordered, among other things, (1) that Kaplan be granted a deduction in his income for the cost of certain insurance premiums, (2) that both Kohls and Kaplan were entitled to be reimbursed for the cost of certain unpaid health care

[2] At the time of the 2010 modification, Kohls had returned to work as an elementary school nurse and Kaplan had resigned from the Washington State Bar to work full-time in his own company, Kaplan Real Estate Services (KRES).

expenses for I.K. and Z.K,[3] and (3) that Kohls was entitled to an award of attorney fees and costs.[4] She denied Kohls' request to be reimbursed for paying more than her share of health insurance premiums for I.K. and Z.K.

On January 8, 2014, Commissioner Jeske entered a written "Order on Modification of Child Support," a written "Order on Presentation," a written "Order of Child Support," and written "Findings/Conclusions on Petition for Modification of Child Support". In these documents, the commissioner granted Kohls' petition for modification. In doing so, she imputed to Kaplan a monthly net income of $34,871.85. She also ordered that, during the summer months, Kaplan would pay an additional $300 monthly transfer payment to cover postsecondary support for Z.K.[5] Finally, she awarded attorney fees and costs to Kohls in the amount of $29,500 in fees and $5,360.31 in costs. Kaplan was required to pay this amount on her behalf.

Thereafter, Kohls moved for revision of Commissioner Jeske's ruling. Kaplan moved for reconsideration and also later moved for revision. Kohls' motion for revision was stayed pending a decision on Kaplan's motion for reconsideration.

On May 13, Commissioner Jeske set forth a detailed written "Order on Reconsideration." Therein, the commissioner made several changes to her initial

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[3] Commissioner Jeske ordered that the amount of unpaid health care expenses would be set at a later date, after Kohls and Kaplan provided the superior court with receipts setting forth the amount that was claimed to be owed.

[4] Commissioner Jeske ordered that the amount of the award would be set at a later date, after Kohls' counsel provided the court with an accounting of the fees and costs.

[5] Commissioner Jeske ordered that this amount would be prorated if Z.K. resided with Kohls for more than half but less than a full month.

order. First, she granted Kaplan a deduction in his income for the depreciation of certain equipment and furnishings. Second, she corrected an error in the imputation of Kaplan's income by removing the double inclusion of his rental income.

Following reconsideration, Commissioner Jeske ordered Kohls' counsel to prepare a revised order for later entry. Kohls' counsel thereafter drafted a revised order that was inconsistent with Commissioner Jeske's ruling and more favorable to his client.

After reviewing the proposed order, Kaplan moved for CR 11 sanctions to be imposed on both Kohls and her counsel. Commissioner Jeske granted the request.

On June 16, Commissioner Jeske entered a written "Final Order of Child Support Following Reconsideration." Therein, she confirmed her written "Order on Reconsideration." She imputed to Kaplan a monthly net income of $31,713.72.

On August 8, the Honorable Sean O'Donnell heard argument on the competing motions for revision. After hearing argument, he deferred ruling.

On August 11, Kohls filed a "Post-Hearing Memorandum Regarding Motions for Revision." The next day, Kaplan moved for the court to strike Kohls' posthearing memorandum and impose CR 11 sanctions on both Kohls and her counsel. Judge O'Donnell granted each request.

On September 19, Judge O'Donnell filed a written "Order on Revision." Therein, Judge O'Donnell concluded that modification of the child support order

was not warranted because Kohls had not met her burden of demonstrating either a sufficient change in circumstances or a severe economic hardship. Instead, the judge converted Kohls' petition for modification to a motion for adjustment. Judge O'Donnell then adjusted the child support order. In doing so, he adopted Commissioner Jeske's calculation of both Kohls' and Kaplan's incomes,[6] her "ruling and analysis with respect to attorneys' fees and costs," and her "ruling and analysis with respect to sanctions imposed against" Kohls and her attorney.

Thereafter, Kohls moved for Judge O'Donnell to revise or clarify his "Order on Revision." Judge O'Donnell granted Kohls' request, both revising and clarifying the order. Judge O'Donnell clarified his order by correcting a scrivener's error pertaining to the imputation of Kaplan's income. He revised his order by granting Kohls an additional $8,750 in attorney fees, payable by Kaplan.

On January 20, 2015, Judge O'Donnell entered a written "Order re Adjustment of Child Support." Therein, the judge denied Kohls' petition for modification, instead ruling that an adjustment was warranted. That same day, he entered a written "Adjusted Order of Child Support on Revision." Therein, Judge O'Donnell ordered, among other things, that Kaplan was granted a 22.2 percent downward deviation from the standard support schedule in his monthly child support obligation for I.K.

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[6] Judge O'Donnell's calculation of Kohls' income departed from Commissioner Jeske's calculation in one respect. He permitted Kohls to include what he deemed to be "deductions for her mandatory pension plan payments and her voluntary retirement contributions," which were previously not included.

On February 19, after Kaplan paid the amount of the attorney fee award, Kohls' counsel filed a partial satisfaction of judgment with regard to the award.

On April 3, Kaplan moved for the superior court to strike the February 19 partial satisfaction of judgment, enter a full satisfaction of judgment, and impose CR 11 sanctions on both Kohls and her counsel. Judge O'Donnell struck the partial satisfaction of judgment, ordered the entry of a full satisfaction of judgment, but denied Kaplan's request for CR 11 sanctions.

Kohls and Kaplan both now appeal.

II

Kohls first contends that the superior court erred by denying her petition for modification of the child support order. This is so, she asserts, both because she met her burden of demonstrating that a substantial change in circumstances had occurred since the 2010 order was entered and because she met her burden of demonstrating that the 2010 order works a severe economic hardship on both her and I.K. We disagree.

"We review child support modifications and adjustments for abuse of discretion." In re Marriage of Ayyad, 110 Wn. App. 462, 467, 38 P.3d 1033 (2002). In doing so, "[g]enerally, we review the superior court's ruling, not the commissioner's." State ex rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 423, 154 P.3d 243 (2007). But, "[t]he superior court may adopt the commissioner's findings of fact as its own." In re Dependency of B.S.S., 56 Wn. App. 169, 171, 782 P.2d 1100 (1989). We will not substitute our judgment for that of the trial court unless the trial court's decision rests on unreasonable or untenable

grounds. In re Marriage of Leslie, 90 Wn. App. 796, 802-03, 954 P.2d 330 (1998). "A trial court does not abuse its discretion where the record shows that it considered all the relevant factors and the child support award is not unreasonable under the circumstances." Van Guilder, 137 Wn. App. at 423. "Findings of fact supported by substantial evidence, i.e., evidence sufficient to persuade a rational person of the truth of the premise, will not be disturbed on appeal." Van Guilder, 137 Wn. App. at 423.

RCW 26.09.170 sets forth two methods for requesting a change in a child support order from the superior court: a petition for modification or a motion for adjustment. RCW 26.09.170(5)(a), (6)(a), (7)(a).

A petition for modification commences with filing a petition and worksheets and serving those documents on the parties. RCW 26.09.175(1), (2)(a). After responsive pleadings have been filed, any party may schedule the matter for a hearing. RCW 26.09.175(5). Unless otherwise agreed or permitted by the court, the court confines its review to the affidavits, petition, answer, and worksheets. RCW 26.09.175(6).

Upon reviewing these documents, the court may order modification of the child support order "based upon a showing of substantially changed circumstances at any time." RCW 26.09.170(5)(a). A substantial change of circumstances must be something that was not contemplated at the time that the last child support order was entered. In re Marriage of Moore, 49 Wn. App. 863, 865, 746 P.2d 844 (1987). This is so because the court views a petition as "'significant in nature and anticipates making substantial changes and/or

additions to the original order of support.'" In re Marriage of Morris, 176 Wn. App. 893, 901, 309 P.3d 767 (2013) (quoting In re Marriage of Scanlon, 109 Wn. App. 167, 173, 34 P.3d 877 (2001)). In the absence of a substantial change in circumstances, a modification may be ordered if one or more years has passed since the last child support order was entered and "the order in practice works a severe economic hardship on either party or the child." RCW 26.09.170(6)(a).

An adjustment, in contrast, "is a streamlined process that is commenced by filing a motion for a hearing and is used to conform the existing provisions of a child support order to the parties' current circumstances." Morris, 176 Wn. App. at 901 (citing Scanlon, 109 Wn. App. at 173). It may be ordered in certain, listed situations, which do not require demonstrating a substantial change in circumstances, RCW 26.09.170(7)(a), such as "[c]hanges in the income of the parents" if 24 months have passed since the date of entry of the last order, adjustment, or modification, whichever is later. RCW 26.09.170(7)(a)(i).

A

Kohls first argues that the "near quadrupling" of Kaplan's income between 2010 and 2013 constituted a substantial change in circumstances. In doing so, she challenges the superior court's finding that "the disparity between Mr. Kaplan's and Ms. Kohls' earnings has remained constant and was predicted to do so at the time the 2010 order was entered," contending that this finding is not supported by substantial evidence. The record indicates otherwise.

"[W]hether a change in circumstances is substantial depends on its effect on a parent's monthly net income." In re Marriage of Bucklin, 70 Wn. App. 837,

840, 855 P.2d 1197 (1993). This is "a decision that rests almost exclusively with the trial court." Hume v. Hume, 74 Wn.2d 319, 320, 444 P.2d 804 (1968). A change in income constitutes a substantial change in circumstances if the change was one that was not contemplated at the time that the last child support order was entered. Scanlon, 109 Wn. App. at 173. But mere passage of time or routine changes in income are insufficient to warrant relief. Scanlon, 109 Wn. App. at 173-74 (a substantial change of circumstances may exist where a mother's income unexpectedly increased to more than $270,000 per year, her assets exceeded $5 million, her gross annual household income was more than $800,000, and she had remarried since the last child support order was entered); cf. In re Marriage of Arvey, 77 Wn. App. 817, 821-22, 894 P.2d 1346 (1995) ($962 decrease in monthly net income insufficient to warrant relief).

Judge O'Donnell concluded that Kohls did not meet her burden of demonstrating that a substantial change in circumstances had occurred since the 2010 order had been entered.

> [T]he Court has compared Ms. Kohls' financial declarations from 2010 and 2014 as well as the child support worksheets from both of those years.[7] As identified by the parties, a number of things have remained consistent. The first is that Ms. [Kohls]' income has remained largely the same (her net monthly income is slightly less in 2014 compared to 2010).[8] Her expenses have been significantly reduced, based in part on her refinancing her home.[9] But other

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[7] The record reflects that the financial declarations are actually comparisons for the years 2010 and 2013. We find this variance of no significance.

[8] In an August 2010 financial declaration, Kohls attested that her net monthly income was $2,523. In September 2010, she attested that her net monthly income was $2,021. In June 2013, she attested that her net monthly income was $2,293.

[9] In the August 2010 financial declaration, Kohls attested that her total monthly expenses were $6,335. She stated that they were $7,832 in September 2010, and that they were $5,356 in June 2013.

expenses have been reduced as well, including costs for the children ($700 in 2014 vs. $800 in 2010), transportation ($415 in 2010 vs. $390 in 2014) and personal expenses ($500 in 2010 vs. $205 in 2014). Some expense[s] have increased marginally, e.g., health care and utilities.[10] Food expenses have, perhaps, jumped the most significantly ($900 in 2010 to $1200 in 2014), but in 2014 Ms. [Kohls] has accounted for three people in the residence when, in fact, her oldest son is at college for most of the year.

The Court cannot find that an increase in expenses for [I.K.] is a sufficient basis to support a modification. Neither can the Court find that a substantial change in circumstances results from Mr. Kaplan now not paying for his son's private school tuition, given that the parties and the Court which entered the order would surely had contemplated [Z.K.] graduating from high school. While this may free additional funds for Mr. Kaplan, that would have been apparent back in 2010.

With respect to the credit for health care premiums, the parties currently agree that the premiums are $118.00 per child. However, this change in and of itself is not a substantial one as contemplated either under the statute or case law.

. . . .

The final basis for this modification would be Mr. Kaplan's increased income since 2010. In 2005, Mr. Kaplan's gross monthly income was $29,370.00. In 2010, the Court imputed his gross monthly income at $21,779.00. Commissioner Jeske found that Mr. Kaplan's current gross monthly income is $32,129.72.[11] Setting aside momentarily [ ] how the Courts arrived at these income calculations, the disparity between Mr. Kaplan's and Ms. Kohls' earnings has remained constant and was predicted to do so at the time the 2010 order was entered.[12] The increase, however, is not akin to the changes found, for example, in the Scanlon case, noted by both parties in their briefing. It does not rise to a substantial change in circumstances.

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[10] The financial declarations indicate that Kohls attested that her health care expenses were $200 in August 2010, $250 in September 2010, and $220 in June 2013. The financial declarations also indicate that Kohls attested that her utility expenses were $600 in August 2010, $612 in September 2010, and $630 in June 2013.

[11] The record indicates that this number was later corrected to reflect that "Mr. Kaplan's *net* monthly income was $31,713.72." Accordingly, we consider it nothing more than a scrivener's error.

[12] In 2010, the court found Kohls' actual monthly net income was $2,444 and imputed Kaplan's monthly net income at $8,137. In 2015, the court found that Kohls' actual monthly net income was $1,812.53 and imputed Kaplan's monthly net income at $31,713.72.

Based on Judge O'Donnell's explanation of his ruling, it is evident that he concluded that the relatively small variances in both Kohls' income and expenses between 2010 and 2013, when coupled with the fact that Kohls' and Kaplan's income had historically been disparate, evidenced that a substantial change in circumstances had not occurred. Judge O'Donnell was in the best position to make this determination. He did so thoroughly, thoughtfully, and based on the substantial evidence in the record before him. There was no error.

B

Kohls next challenges Judge O'Donnell's factual finding (and his ultimate conclusion) that the 2010 order of child support did not work a severe economic hardship on either Kohls or I.K. because Kohls' economic situation was contemplated at the time that the 2010 order was entered. Kohls contends that this finding is not supported by substantial evidence. Again, the record indicates otherwise.

The existence of a severe economic hardship is a factual determination that is within the discretion of the trial judge. See In re Marriage of Schumacher, 100 Wn. App. 208, 211, 997 P.2d 399 (2000). When making this determination, the court recognizes that there is no formal legal test for a severe economic hardship because none could adequately encompass the wide range of factual situations that might arise. Rather, the court looks to the actual effect of a child support order. Schumacher, 100 Wn. App. at 212 (finding that an "unwieldy and unpredictable" method for calculating a parent's child support obligation created a severe economic hardship where it "denied [the parent] an opportunity to

budget their child's financial needs"). The party seeking the modification bears the burden of proving that a severe economic hardship exists. See, e.g., Arvey, 77 Wn. App. at 820-22; see also RCW 26.09.170(6)(a).

On revision, Judge O'Donnell concluded that the 2010 child support order did not work a severe economic hardship on either Kohls or I.K.

> With respect to the current order working a "severe economic hardship," Ms. Kohls provides limited information on this topic. Her overall expenses have actually decreased since the 2010 order. She alleges that because her son has moved out of the house and support payments for him have stopped, her economic situation is bleak. But that surely was contemplated at the time the 2010 order was entered. Moreover, since he is at college (paid for by a scholarship/trust put into place by his grandparents) her expenses for [Z.K.] are reduced.
>
> Ms. Kohls similarly states in her responsive pleadings that [I.K.'s] increased residential time with her increases her expenses. Her financial declarations from 2010 and 2014 contradict this assertion as her overall expenses have decreased.
>
> Ms. [Kohls] finally claims that the current order is "cheating our daughter out of the opportunities she would have otherwise enjoyed and can still enjoy, including the opportunities to take the guitar and voice lessons she so desires and to participate in ski bus trips at her school and attend summer camps."
>
> . . . .
>
> Here, Ms. Kohls points to the disparity in her income versus her monthly obligations. But these circumstances were more acute in 2010 than it is in 2014. The assertions regarding an inability for their daughter to attend things like voice lessons and summer camp do not rise to a severe economic hardship. On this ground, the evidence does not support her claim of economic hardship.

Based on Judge O'Donnell's explanation of his ruling, there are three identifiable bases for his conclusion that the 2010 child support order did not work a severe economic hardship on either Kohls or I.K. First, Judge O'Donnell found that Kohls' economic situation in 2015 was contemplated at the time that the 2010 order was entered given that, at that time, child support payments for

Z.K. were envisioned to end as a natural and probable consequence of his reaching the age of majority. Second, Judge O'Donnell found that Kohls' assertions regarding the disparity in her monthly income and expenses (when the record reflected the contrary), the ending of the child support payments for Z.K., and the fact that I.K. was hampered in participating in various extra-curricular activities were all insufficient grounds upon which to find a severe economic hardship. (Indeed, Kohls' assertion of a severe economic hardship is based on her mistaken belief that the child support payments are intended for *her* benefit, not the benefit of her children). Third, it is evident that Judge O'Donnell concluded that it was not proved that I.K.'s basic needs were not being met by the 2010 order. Thus, he found that a severe economic hardship did not exist. Judge O'Donnell was in the best position to make this determination. He did so thoroughly, thoughtfully, and based on the substantial evidence in the record before him. There was no error.[13]

III

Kohls next contends that the superior court erred by declining to address whether child support should be set above the maximum advisory level. We disagree.

First, Kohls asserted to the superior court that it should utilize "extrapolation" to set Kaplan's child support obligation above the maximum

[13] In her appellate brief, Kohls also contends that the superior court abused its discretion by converting her petition for modification to a motion for adjustment. We disagree. RCW 26.09.170(7)(a)(i) permitted the trial court to make an adjustment based on "[c]hanges in the income of the parents." Thus, there was no error.

advisory level. The superior court was not permitted to do so. See In re Marriage of McCausland, 159 Wn.2d 607, 617, 152 P.3d 1013 (2007). Second, Kohls asserted to the superior court, and persists in asserting on appeal, that the child support should be set above the maximum advisory level given the disparity between Kohls' and Kaplan's financial resources. In such a circumstance, Kohls does not establish a claim for appellate relief. See Scanlon, 109 Wn. App. at 180 ("Child support is designed to meet the needs of the children at issue; its sufficiency is not measured by whether it financially strains the obligor parent.").

IV

Kohls next contends that the superior court erred by not adopting Commissioner Jeske's ruling regarding Z.K.'s postsecondary support. Given that Judge O'Donnell properly converted Kohls' petition for modification to a motion for adjustment, Kohls does not establish a claim for appellate relief. See In re Marriage of Sprute, 186 Wn. App. 342, 349, 344 P.3d 730 (2015); see also Morris, 176 Wn. App. at 902.[14]

V

Kohls next contends that the superior court erred in calculating Kaplan's income. This is so, she asserts, both because the superior court improperly permitted Kaplan to take a deduction for the depreciation of certain equipment and furniture and because the superior court improperly permitted Kaplan to take

[14] Kohls also contends that the superior court's ruling should have addressed postsecondary support for I.K. The request for postsecondary support for I.K., however, is precluded for the same reasons.

a deduction for the cost of certain insurance premiums. Each contention is unavailing.

In Washington, child support obligations are calculated according to the statutory support schedule. See RCW 26.19.020. The schedule was enacted in order "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." RCW 26.19.001; Leslie, 90 Wn. App. at 803. In enacting the schedule, the legislature also "intended to equitably apportion the child support obligation between both parents." Ayyad, 110 Wn. App. at 467; RCW 26.19.001. The schedule sets forth support obligations for each child based on the combined monthly net income of both parents, the number of children in the family, and the age of each child. See RCW 26.19.020.

"When assessing the income and resources of each household, the court must impute income to a parent when that parent is voluntarily unemployed or voluntarily underemployed. . . . The court determines whether to impute income by evaluating the parent's work history, education, health, age and any other relevant factor." In re Marriage of Pollard, 99 Wn. App. 48, 52-53, 991 P.2d 1201 (2000); see also RCW 26.19.071(6). In doing so, the court makes an equitable determination. See MARIAN F. DOBBS, DETERMINING CHILD & SPOUSAL SUPPORT, § 4.37, at 884-91 (2015) ("[S]tates recognize that proceedings governing the dissolution of marriage, support, and custody are equitable in nature and thus governed by basic rules of fairness . . . . When a court determines that a parent is voluntarily impoverished, it may consider any admissible evidence to ascertain

potential income. Potential income is not the type of fact that is capable of being verified through documentation or otherwise." (footnote omitted)); see also In re Marriage of Gainey, 89 Wn. App. 269, 275, 948 P.2d 865 (1997) (no abuse of discretion where the trial court estimated a father's income "using a reasonable method not dependent on the information [the father] was failing to produce"); see also, e.g., In re Marriage of Clark, 13 Wn. App. 805, 810, 538 P.2d 145 (1975) ("The key to an equitable distribution of property is not mathematical preciseness, but fairness.").

In the "Order on Reconsideration," Commissioner Jeske set forth how she imputed Kaplan's income.

> Several errors are claimed in the request for reconsideration. The Court denies the request on reconsideration to alter the depreciation figures and credit as to the credit related to loan payments. . . . However[,] the Court will grant the request as to the depreciation related to equipment and furnishings ($10,397). While the record is less than specific as to this disputed deduction resulting in an out of pocket loss, there is sufficient evidence in the record that this smaller amount relates to an actual expenditure[ ] associated with Mr. Kaplan's interest in the LLC's. . . . Mr. Kaplan's submissions and presentation at trial did not clearly trace, document and explain his actual out of pocket expenses in the form of depreciation rather than his paper losses. It is unclear which amounts (depreciation) were attributable to his share of each individual property and by what amount it reduced his personal income (e.g. from his proportionate share of each LLC). While the court did not doubt at trial that some portion of these expenses were legitimate, he did not clearly demonstrate and adequately separate these out from other losses. He did not meet his burden of proof as to the other depreciation expenditures. . . .
>
> The Court grants the request to correct an error as to the double inclusion of his rental income calculation. The income figure is a net figure, imputed for purposes of support. Clearly it is not consistent with his reported income for purposes of his income tax return. Nor does the Court have confidence in Mr. Kaplan's personal tax returns as a basis for determination of income for

purposes of child support. The Court imputed income as a net amount and substantial evidence supports this amount.

. . . .

. . .Despite providing copious financial records, neither party presented a clear, credible and accurate presentation of Mr. Kaplan's income (gross or net), legitimate deductions for child support purposes vs. business or tax purposes (from KRES or any other business interest), or a financial declaration that comported with LR 10[15] and offered a complete understanding of his income, assets and debts (personal vs. business). Mr. Kaplan's real income is unknown to this Court both at trial and on reconsideration due to the complexity of his business interests and his own lack of adequate explanation and financial documentation to this Court. Despite his regular employment of both a certified public accountant and a bookkeeper, his presentation at trial appeared to be focused more on the lack of credibility of [Kohls] than on a credible explanation of his income, supported by financial evidence. His significant and consistent use of legitimate business deductions from a variety of sources to reduce personal expenses or fund significant personal expenses (private school tuition, use of a vehicle, travel, entertainment and the like) through his business is amply supported in the record. The Court thus elected to impute income to him absent his presenting the Court with adequate explanation supported by financial evidence.

The Court considered both parents' total household resources, incomes and ability to maximize deductions along with their reported assets and liabilities. Mr. Kaplan's lifestyle includes frequent dining at expensive establishments including Wild Ginger, El Gaucho, Palominos, Daniel's Broiler and Dukes. His household expenses include a gardener, maid and massages. His travel habits, with or without his children, reflect recent trips to New York, South America, Palm Springs, and the like. His more recent annual credit card expenditures for personal expenses ($80,000 + . . .) all reflect a wealthy lifestyle. . . . [T]his court was not able to determine his actual real income so it imputed it on the basis of his expenses, lifestyle and standard of living. A prior declaration by Mr. Kaplan self-reported a total monthly net income of $7[,]112 and listed total monthly expenses of $12,176. How he paid the private school expenses, credit card personal expenses, child support and his household expenses and lifestyle on this amount was never

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[15] Commissioner Jeske was referencing Local Family Law Rule (LFLR) 10. LFLR 10 governs "Financial Provisions." This rule sets forth the circumstances in which financial information is required, the type of supporting documentation that may be filed with a financial declaration, and the type of documents that are to be filed under seal.

> explained. Little to no explanation was provided as to the separation or inclusion of business expenses paid by KRES which operated to minimize his personal expenses or how he managed to fund his lifestyle solely based on the net income he reported on either his financial declaration or his tax return. . . .
>
> . . . .
>
> The cumulative record here reflects that Mr. Kaplan's expenditures, lifestyle, payment of business and personal expenses, legitimate tax deductions and capital accretion are simply not reflective of his income as reported on his LR 10, bank statements or past personal tax returns. There is no doubt that the evidence he adduced at trial through his CPA and bookkeeper presented the Court with his legitimate tax deductions and some personal expenses taken as distributions. But he nevertheless failed to explain that where his tax returns, bank statements and self-reported income are largely and dramatically inconsistent with his actual lifestyle, RCW 26.09 et seq. does not require the Court to find this evidence controlling as to an imputation of his income and determination of his resources.

On revision, Judge O'Donnell adopted Commissioner Jeske's imputation of Kaplan's income.

> As a threshold matter, the Court notes that Commissioner Jeske[ ] conducted a careful analysis, both oral and written, concerning the degree of difficulty in ascertaining Mr. Kaplan's true income. Having read Mr. Kaplan's responses to questions posed to him during his deposition, it is difficult to reach a different conclusion.
>
> . . . .
>
> In her oral ruling on November 22, 2013, Commissioner Jeske noted that each party had an obligation to provide a holistic picture of their respective assets. Given this statutory obligation, the Commissioner was mystified by Kaplan's lack of clarity and level of obfuscation. Commissioner Jeske found it reasonable to assume that "if a party controls an LLC, has a CPA, has a bookkeeper, and has a juris doctorate and the level of history of expertise in this area of management of properties, he should be able to explain to a judicial officer his legitimate business income and his legitimate expenses and parse those out in a clear record from personal [expenses] . . ." Oral Ruling of Commissioner Jeske 15.15-22
>
> This Court agrees.

> The Commissioner also found it obvious that Mr. Kaplan's business and personal expenses were comingled and that Mr. Kaplan's self-reported income was inaccurate, as shown by his high standard of living and lack of debt.
>
> Accordingly, to calculate Mr. Kaplan's monthly child support transfer payment, the Commissioner added several of Mr. Kaplan's untraceable expenditures to his reported income. This resulted in an imputed monthly income of $31,713.72, and a $1,712.84 monthly transfer payment for [I.K.].
>
> For purposes of determining his gross monthly income, this Court finds that Mr. Kaplan is voluntarily under-employed. Indeed, Mr. Kaplan's claimed income is divorced from the reality of monies (or personal benefits) he is actually receiving each month, however he may wish to characterize these expended funds. The Court therefore imputes gross monthly income to him in the amount of $32,129.72.[16]
>
> This amount takes into consideration Mr. Kaplan's standard of living, his lack of debt, and the expenditures from which he personally benefitted as a result of payments by KRES and which are difficult, if not impossible, to untangle from his wholly owned business.

Here, Commissioner Jeske was provided with declarations from both Marianne Pangallo, Kaplan's Certified Public Accountant, and Richard Sobie, Kaplan's bookkeeper, in order to assist in calculating his income. Pangallo attested that Kaplan's income should include deductions for the cost of certain insurance premiums and for the depreciation of various equipment and furnishings. When imputing Kaplan's income, Commissioner Jeske chose to credit Pangallo's testimony by granting Kaplan both of these deductions. On revision, Judge O'Donnell agreed with Commissioner Jeske's calculation and, thus, adopted her imputation of Kaplan's income. On appeal, given that imputation of income is an equitable determination, not an arithmetically exact

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[16] Again, the record indicates that the trial court subsequently corrected this to reflect that "Mr. Kaplan's *net* monthly income was $31,713.72."

determination, we look to the final imputed figure, instead of its component parts, to determine if the imputed amount is within the range of the evidence presented. It is. The trial court did not abuse its discretion in making this equitable determination.

VI

Kohls next contends that the superior court erred by granting Kaplan a deviation from the standard child support obligation. This is so, she asserts, both because Judge O'Donnell erred by stating that the 22.2 percent downward deviation ordered in 2010 was the "the law of the case" in 2015, and because the 22.2 percent downward deviation was not supported by substantial evidence. While Kohls is correct that Judge O'Donnell misspoke by stating that such deviation was the "law of the case," there is no error because the deviation is supported by substantial evidence.

A deviation is "a child support amount that differs from the standard calculation." RCW 26.19.011(4). The trial court "has discretion to decide the extent of any deviation." In re Marriage of Trichak, 72 Wn. App. 21, 23, 863 P.2d 585 (1993).

In the "Adjusted Order of Child Support On Revision," Judge O'Donnell set forth the reasons for granting Kaplan a downward deviation from the standard child support schedule.

> Per the Order of Child Support entered herein on December 17, 2010, the father was required to pay 100% of both children's tuition at University Prep and accordingly was granted a 22.2% downward deviation from the standard transfer payment. (The standard calculation of $1,928 for two children was reduced to $1,500, a

> difference of $428 or 22%). As the law of the case, this 22.2% downward deviation is required to be applied to the present standard calculation of $1,738.05 for one child. The present child support transfer payment should therefore be $1,352. ($1,738.05 X 22.2% = $386; $1,738 minus $386 = $1,352).
>
> A transfer payment of $1,352 per month, along with a payment of 100% of the child's private school tuition, provides for the child's needs.
>
> The father is ordered to pay the full school tuition for the child. This provision may be reviewed if tuition increases by $1,250 or more over the 2010 tuition of $26,000 per child.

Here, Judge O'Donnell granted an adjustment. The *propriety* of a deviation was a legal issue previously decided. Thus, it was so that a deviation in some amount might be considered to be required by the law of the case doctrine. However, because an adjustment took place, the judge retained the authority to adjust the amount of the deviation. Thus, Judge O'Donnell misspoke by stating that the 22.2 percent downward deviation ordered in 2010 was the "law of the case." However, the 22.2 percent deviation is within the range of the evidence presented. The court was free to adjust it or not, as it saw equitable. No prejudicial error is established. No appellate relief is warranted.

VII

Kohls next contends that the superior court erred by not ordering Kaplan to reimburse Kohls for paying more than her share of the cost of health insurance premiums for I.K. and Z.K. Kohls cites no authority to support her position that

Judge O'Donnell was required to address this issue in an adjustment proceeding. He declined to do so. We will not disturb this decision on appeal.[17]

VIII

Kohls next contends that the superior court erred by imposing CR 11 sanctions on both her and her counsel based on findings that Kohls acted improperly by presenting for entry an order that did not fully conform to the commissioner's oral ruling and by filing an unpermitted memorandum. We disagree.

"The purpose of [CR 11] is to deter baseless filings and curb abuses of the judicial system." Skimming v. Boxer, 119 Wn. App. 748, 754, 82 P.3d 707 (2004) (citing Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994)). CR 11 provides that the trial court may impose sanctions against a party or his attorney if a pleading, motion, or legal memorandum is submitted that is (1) not well grounded in fact, (2) not well grounded in law, (3) filed for an improper purpose, and (4) when viewed objectively, the culpable party or attorney failed to make a reasonable inquiry into the factual or legal basis for the action. Madden v. Foley, 83 Wn. App. 385, 389, 922 P.2d 1364 (1996). We apply an objective standard to determine whether a reasonable person in like circumstances could believe his actions to be factually and legally justified. Bryant v. Joseph Tree, Inc., 119

[17] In her appellate brief, Kohls also contends that the superior court erred by refusing to order Kaplan to reimburse her for the cost of certain unpaid health care expenses for I.K. and Z.K. The parties agree that a settlement has been reached on this issue. Thus, the issue is moot.

Wn.2d 210, 220, 829 P.2d 1099 (1992). "The burden is on the movant to justify the request for sanctions." Biggs, 124 Wn.2d at 202.

A

Kohls first asserts that the imposition of CR 11 sanctions on both her and her attorney for presenting the superior court with an order that did not fully conform with the commissioner's ruling was improper. Specifically, she avers that the only change on the proposed order which varied from the commissioner's ruling was the inclusion of Kohls' monthly pension plan payments (which she claims the commissioner was statutorily mandated to include when calculating her income) and voluntary retirement contributions. Her argument does not persuade us.

The proposed order contained two crucial modifications that did not conform to the commissioner's ruling. First, Kohls' attorney included an additional $900 in child support to be paid by Kaplan that the commissioner did not order. Second, Kohls' attorney drafted a provision to state that Kaplan would pay 100 percent of college preparatory fees for I.K. when the commissioner had, in fact, ordered that Kaplan and Kohls would each pay a pro rata share of these fees. Thus, Commissioner Jeske found that these revisions were improper insofar as they "exceeded the scope of presentation." Her ruling was correct. No abuse of discretion is established.

B

Kohls next asserts that the imposition of CR 11 sanctions on both her and her attorney for filing an unpermitted memorandum was improper. Specifically,

she avers both that the trial judge applied the wrong subsection of a local civil rule when he ruled on the request and that he did not make the required finding that her memorandum was either not grounded in fact, not grounded in law, filed for an improper purpose, or that her attorney failed to make a reasonable inquiry into the factual or legal basis of the action. Each contention is unavailing.

The record indicates that Judge O'Donnell applied the appropriate subsection of the applicable local civil rule and that he made the required factual finding prior to imposing sanctions. In fact, an examination of his ruling indicates that he concluded that Kohls' memorandum was improper for two reasons. First, even had the pleading addressed permissible issues, Judge O'Donnell found that the memorandum was improper insofar as it was "late-filed and not permitted by any court rule or statutory authority." Second, the contents of the memorandum amounted to a reiteration by Kohls of the same arguments that she had asserted at the initial trial by affidavit and throughout the hearing on revision. Thus, Judge O'Donnell found that the memorandum was improper because "despite this court's admonishment to counsel to address only this motion for CR 11 sanctions, counsel decided to relitigate Commissioner Jeske's prior ruling on separate sanctions." In this regard, the memorandum did not appropriately respond to the court's request or provide the court with any new information. Judge O'Donnell's ruling was correct. No abuse of discretion is established.

IX

Kohls next contends that the superior court abused its discretion by ordering interest to run on Commissioner Jeske's award of sanctions, but not on

Kohls' award of attorney fees and costs, from the dates of those orders. We disagree.

> Washington law has historically treated prejudgment interest as a matter of right when a claim is liquidated. A liquidated claim is one "'where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.'" If the fact finder must exercise discretion to determine the amount of damages, the claim is unliquidated. The fact that a dispute exists over all or part of a claim does not make the claim unliquidated.
>
> An award of prejudgment interest is based on the principle that when a defendant retains money that is owed to another, he should be charged interest upon it. Nevertheless, a defendant is not required to pay prejudgment interest in cases where it is not possible to ascertain the amount owed to the plaintiff until the court has exercised its discretion in determining that amount. The amount owed must be ascertainable without the aid of a discretionary court ruling concerning the amount due before the obligor can be liable for prejudgment interest.

Dautel v. Heritage Home Ctr., Inc., 89 Wn. App. 148, 153-54, 948 P.2d 397 (1997) (footnotes omitted).

By seeking revision of Commissioner Jeske's ruling, Kohls nullified the commissioner's award of attorney fees and costs. In this regard, the award was neither final nor liquidated. There was no amount upon which interest could accrue until an amount of fees and costs was awarded on revision.

The CR 11 sanctions, on the other hand, were awarded as a penalty. The at-fault party should not be rewarded for resisting the imposition of the penalty. Not granting an award of prejudgment interest on the CR 11 sanctions would wrongly reward the at-fault party for seeking revision. An at-fault party should not benefit by delaying the sanction. Consistent with the principles underlying CR

11, the superior court acted within its discretion by imposing prejudgment interest on the sanction amount, retroactive to the date of the commissioner's order.

There was no error.

X

Kohls next contends that the superior court erred by not awarding her the full amount of the attorney fees and costs that she requested pursuant to RCW 26.09.140.[18] In doing so, she challenges Judge O'Donnell's finding on reconsideration that "a 25 hour investment of attorney time is reasonable considering the fact that much of the research and briefing had previously been conducted," contending that this finding is not supported by substantial evidence. We disagree.

Here, Kohls' argument that the superior court's award of attorney fees and costs was improper is based on her assertion that "the factual and legal questions involved were difficult and complex," that "[t]he time necessary for preparation and presentation of the case was substantial," and that "[t]he amount and character of the property involved was substantial." Contrary to her present intimation, however, the issues in this case amounted to simple mathematical adjustments in the child support order. The issue on reconsideration was the same issue that was presented to the trial court during the initial trial by affidavit. Thus, both the superior court's finding and its award of attorney fees and costs is supported by substantial evidence. See Dilley v. Dilley, 4 Wn. App. 270, 272,

[18] In total, Kohls' award of attorney fees and costs was $43,610.31.

481 P.2d 584 (1971) (award of attorney fees affirmed when supported by substantial evidence). There was no error.

XI

In a cross appeal, Kaplan contends that the superior court erred by not imposing CR 11 sanctions on both Kohls and her counsel for filing a partial satisfaction of judgment once Kaplan paid the amount of attorney fees and costs awarded. We disagree.

In support of his request for CR 11 sanctions, Kaplan argued that by filing a partial satisfaction of judgment on the award of attorney fees and costs, Kohls and her attorney "put [him] in the position of having to either pay interest that without question was not owed, or pay a far greater sum in attorney's fees and costs necessitated by having to file a motion to defeat their claims. Such conduct is pure blackmail and bad faith. It violates Civil Rule 11."

Both the commissioner and the superior court judge were well acquainted with the jurisprudence of CR 11 by the time that they finishing dealing with the parties herein. We are confident that the judge was informed on the law when he denied the request at issue. No abuse of discretion has been established.

XII

Each party requests an award of attorney fees and costs (payable by the opposing party) on appeal.

"A party to a dissolution is not entitled to attorney fees as a matter of right." In re Marriage of Terry, 79 Wn. App. 866, 871, 905 P.2d 935 (1995). Our

decision can be guided by our view of "the merit of the issues raised on appeal." In re Marriage of Davison, 112 Wn. App. 251, 260, 48 P.3d 358 (2002).

Kohls seeks fees based on the law of "need and ability to pay." Kaplan seeks fees based on the law of frivolous appeals.

We exercise our discretion and deny both requests. The parties shall bear their own fees and costs on appeal.

Affirmed.

We concur:

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

SHEILA KOHLS, F/K/A SHEILA KOHLS-KAPLAN, Appellant/ Cross-Respondent	)	Appeal No. 73119-0-I
and,	)	SHEILA KOHLS' MOTION FOR RECONSIDERATION
KENNETH B. KAPLAN, Respondent/ Cross-Appellant	)	

1. IDENTITY OF MOVING PARTY. Sheila Kohls, the Appellant/Cross-Respondent, asks for the relief sought in Part 2.

2. STATEMENT OF RELIEF SOUGHT. Sheila Kohls, the Appellant/Cross-Respondent, asks this Court to reconsider its decision terminating review issued on June 13, 2016.

3. FACTS RELEVANT TO MOTION. The facts relevant to this motion are set forth in the Grounds for Relief and Argument

4. GROUNDS FOR RELIEF AND ARGUMENT.

Sheila Kohls, the Appellant/Cross-Respondent, asks this Court to

reconsider its decision terminating review, pursuant to RAP 12.4:

1. In Ruling That Kohls Had Failed To Show A Substantial Change of Circumstances, This Court Overlooked The Following Facts and Law:

First, this Court overlooked the fact that the disparity between Kaplan's and Kohls' earnings did not "remain constant", as it "was predicted to do so at the time the 2010 order was entered." CP 1698. Contrary to Judge O'Donnell's conclusion that Kohls' income "had remained largely the same", Kohls' net monthly income *decreased* 26% from $2,444 in 2010 to $1,812.53, CP 1842. Kaplan's net monthly income *nearly quadrupled* from $8,137, CP 205, to $31,713.72", CP 1796; Decision, fn. 12.

Secondly, contrary to Judge O'Donnell's conclusion that "the increase" in Kaplan's earnings were "not akin to the changes found in" *In re Marriage of Scanlon and Witrak*, 109 Wash. App. 167, 173-174, 34 P.3d 877 (2001), they were actually far greater.

In *Scanlon*, this Court found that there had been a substantial change of circumstances when Witrak's *gross* income increased to more than $270,000 per year in the 11 years since the entry of the original decree. In this case, Kaplan's *net* income increased by $282,920.64 in just two and half years.

This Court's decision overrules *In re Marriage of Scanlon and Witrak*, *supra*, in which this Court held that a substantial change of circumstances was established if the change in incomes was not a "routine change" and was uncontemplated when the previous order was entered. The quadrupling of Kaplan's net monthly income from $8,137 in December of 2010 to $31,713.72 by June of 2013, barely two and a half years later, was **not** a "routine change in incomes", and was **not** contemplated when the Order of Child Support was entered in 2010.

This Court should reconsider.

2. In Ruling That Kohls Had Failed To Show That The 2010 Order of Child Support Worked A Severe Economic Hardship, This Court Overlooked The Following Facts and Law:

Contrary to this Court's decision, *Schumacher v. Watson,* 100 Wn.App. 208, 211-212, 997 P.2d 399(2000), does not hold, as this Court now holds, that the "existence of a severe economic hardship is a factual determination that is within the discretion of the trial judge." Rather, *Schumacher* held that the existence of a severe economic hardship is a factual determination which must be supported by substantial evidence. *Id.*

By providing no criteria as to how a court might exercise such discretion---and indeed, by stating "that there is no legal test for a severe economic hardship"---the lower court's discretion in determining the existence of a severe economic hardship is unfettered, which means that the "existence of a severe economic hardship" is whatever a court might say it is. In such a situation, there can be no meaningful appellate review.

The three bases which this Court identifies for Judge O'Donnell's conclusion are contrary to both the facts and the law:

First, Judge O'Donnell's finding that "Kohls' economic situation in 2015 was contemplated at the time the 2010 order was entered" is immaterial. RCW 26.09.170(6)(a) does not require "showing a substantial change of circumstances...if the order in practice works a severe economic hardship on either party or the child." See also, *In re Marriage of Sievers*, 78 Wn.App. 287, 304, 897 P.2d 388 (1995).

Secondly, this Court misapprehended the basis of Kohl's claim of economic hardship. It was not based simply on the fact that "child support payments ended for Z.K. and the fact that I.K. was hampered in participating in various extra-curricular activities".

It was based on the fact that I.K.'s basic needs were not being met by the $750 Kohls received from the 2010 Order of Child Support.[1]

In holding "that there is no legal test for a severe economic hardship", this Court overlooked the formula it used in *In re Marriage of Krieger and Walker*, 147 Wn.App. 952, 963-965, 199 P.3d 450(2009), to determine whether a child support order is adequate to meet a child's basic needs, and where this Court found that Krieger's "transfer payment barely covers his share of the children's *basic* food, shelter, and transportation expenses...".

According to the identical formula used by this Court in *Marriage of Krieger and Walker, supra*, I.K.'s monthly expenses for her *basic needs* for housing, utilities, food, and transportation are at least $2,678 (1/2 of Kohls' monthly expenses of $5,356, CP 235). Kohl's net monthly income of $1,812.53, CP 1842, coupled with the transfer payment of $750 per month in the 2010 support order, is thus not adequate to meet I.K.'s basic needs, CP 857, 235.

Since the 2010 Order of Child Support is not "adequate to meet [this] child's basis needs", RCW 26.19.001, it created a "severe economic hardship" on both the mother and the child.

[1] There is no evidence to support this Court's gratuitous remark that "Indeed, Kohls' assertion of a severe economic hardship is based on her mistaken belief that the child support payments are intended for *her* benefit, not the benefit of her children."

Third, if., as this Court ruled, "it is evident that Judge O'Donnell concluded that it was not proved that I.K.'s basic needs were not being met by the 2010 order" [even though he never expressed such a conclusion], the formula which this Court used in *Marriage of Krieger and Walker, supra,* proves otherwise.[2]

This Court should reconsider.

3. In Ruling That Child Support Should Not Be Set Above The Maximum Advisory Level, This Court Overlooked The Following Facts and Law:

This Court's holding that *In re Marriage of McCausland*, 159 Wash.2d 607, 617,152 P.2d 1013 (2007) did not permit the court to set Kaplan's child support obligation above the maximum advisory level is plain error. In *Marriage of Krieger and Walker*, 147 Wn. App. at 963, this Court held that the court had abused its discretion and applied the wrong legal standard in its mistaken belief that *McCausland, supra,* required a "showing of 'extraordinary need'" to support an award above the advisory amount:

Neither the statute nor the case law limits

[2] Although not necessarily relevant here, there is no legal authority for this Court's implicit holding that one must show that "basic needs" are not being met to constitute "a severe economic hardship on either party or the child", as required by RCW 26.09.170(6). Thus, in *Schumacher v. Watson,* 100 Wn.App. 208, 211-212, 997 P.2d 399(2000), this Court found that an "unwieldy and unpredictable" method of calculating the support itself created a severe economic hardship merely because it "denied Schumacher an opportunity to budget their child's financial needs", without any consideration as to whether the support payment itself met the child's basic needs.

> support awards above the advisory amount to those based on "extraordinary" needs, as the trial court here applied that term.

See also, *In Marriage of Leslie,* 90 Wn.App. 796, 804, 954 P.2d 330 (1988). Citing *Marriage of Daubert and Johnson*, 124 Wn.App. 483, 497, 99 P.3d 401(2004), with approval, this Court also held that "expenses for school-related costs and trips, extra-curricular activities, cultural experiences, and computers were appropriate bases for additional support." *Id.* at 964.

Using the identical formula this Court used in *Marriage of Krieger and Walker*, 147 Wash. App. at 964-965, I.K.'s monthly expenses for basic needs of housing, utilities, food, and transportation are at least $2,678 (1/2 of Kohls' monthly expenses of $5,356). Kaplan's proportional share of those expenses (based on his 94.6% share of the parties' combined net monthly incomes), is $2,533.39. Yet, Kaplan's adjusted transfer payment of $1,352 covers little more than half the costs of I.K's basic needs. It does not cover any of her expenses for "participating in various extra-curricular activities". It should. RCW 26.19.001 states in part:

> 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 present child support order does neither. [3]

This Court should reconsider.

4. In Ruling That Kohls Could Not Obtain Post-Secondary Support Because Her Petition for Modification Was Converted To A Motion For Adjustment , This Court Overlooked The Following Facts and Law:

Kohls filed her Petition for Modification, in part, to obtain post-secondary support, CP 213-214, thereby properly exercising "her right to obtain post-secondary support". *In re Marriage of Sprute*, 186 Wn.App. 342, 349, 344 P.3d. 730(2015).

No substantial change of circumstances is required. *In Re Marriage of Morris*, 176 Wn. App. 893, 901-902, 309 P.3d 767 (2013). Accordingly, even in the absence of a showing of a substantial change of circumstances, the court below had no basis for converting Kohls' petition for modification, *sua sponte*, into a motion for an adjustment proceeding, at least insofar as it related to post-secondary support.

In any event, post-secondary support may also be

[3] Contrary to this Court's assertion, Kohls agrees with *Scanlon*, 109 Wash. App. at 180, that "Child support is designed to meet the needs of the children at issue; its sufficiency is not measured by whether it financially strains the *obligor* parent". Kohls is the *obligee* parent.

determined in a motion for adjustment. *Id.* at 902-904.

But in spite of and contrary to this Court's prior holdings in *Marriage of Morris*, *supra*, its present decision creates a "Catch-22" which precluded Kohls from obtaining post-secondary support in any proceeding, contrary to *In Re Marriage of Morris*, *supra; and In re Marriage of Sprute, supra.* .

This Court also overlooked the fact that Kaplan did not identify the Commissioner's order to pay post-secondary support for Z.K., as an error in his motion for revision, as required by KCLR 7(b)(8)(A)[4]. It thus became an order subject to appellate review, but not revision. RCW 2.24.050; *Robertson v. Robertson,* 113 Wn. App. 711, 714-715, 54 P.3d 708 (2002).

This Court should reconsider.

5. In Ruling That The Lower Court Properly Calculated Kaplan's Income, This Court Overlooked The Following Facts and Law:

Contrary to this Court's holding, for which it cites no legal authority, the amount of income to be imputed is not *equitably* determined, but rather must be calculated according to RCW 26.09.071. A parent's actual income may not be calculated in

[4] KCLR 7(b)(8)(A) requires that "The motion [for revision] shall identify the error claimed." [emphasis added].

disregard of the evidence in the record or by guesswork. *State ex rel. Stout v. Stout*, 89 Wn.App. 118, 125, 948 P.2d 968 (1996).

In *In re Marriage of Stenshoel*, 72 Wn.App. 800, 806, 86 P.3d 635 (1993), this Court held:

> [D]epreciation and depletion expenses should be deducted from gross income *only* where they reflect an actual reduction in the personal income of the party claiming the deductions, such as where, *e.g.*, he or she actually expends funds to replace worn equipment or purchase new reserves.

Accordingly, the court abused its discretion by permitting Kaplan to deduct for the depreciation of certain equipment and furniture purchased by LLCs owned in part by KRES, LLC, because the evidence established that this depreciation did not reflect "an actual reduction in the personal income of" Kaplan.

For the same reason, it was an abuse of the court's discretion to permit Kaplan to deduct the $2,921 KRES paid for his professional liability insurance, and the $2,665 KRES paid for his Key Man insurance. Kaplan did not make these payments. There was no evidence that these payments actually reduced Kaplan's personal income, as required by *In re Marriage of Stenshoel*, *supra*.

Nonetheless, according to this Court's decision, since the

"imputation of income is an equitable determination", the lower court can simply disregard these well-established legal principles, and impute any amount it wants, so long as "the imputed amount is within the range of evidence presented." Yet, in making this ruling, this Court did not identify "the range of evidence". There was no "range of evidence" here. This Court overlooked the fact that the lower court imputed income to Kaplan because it found that his financial records substantially underreported his actual income. See Decision, pp. 16-19.

This Court should reconsider.

6. This Court's Decision That The Lower Court Properly Granted Kaplan A 22.2 Percent Deviation In His Transfer Payment, Overlooked The Following Facts and Law:

In his motion for revision, Kaplan claimed that the Commissioner's refusal to grant him this deviation was error. CP 1358. The court denied Kaplan's request to revise this ruling. CP 1702. Yet, when Kaplan presented proposed final orders, he gave himself this deviation. Over Kohls' objections, CP 1824, the court included it, because it erroneously believed it was bound by the 2010 Order of Child Support to give a deviation (CP 1843). Judge O'Donnell stated that as "the law of the case, this 22.2% downward

deviation *is required* to be applied to the present standard calculation of $1,738.05 for one child." But, it wasn't required.

This Court admitted that Judge O'Donnell committed error by "stating that the 22.2 percent downward deviation ordered in 2010 was the 'law of the case'", but passed it off as Judge O'Donnell merely misspeaking.

But a lower court's application of an incorrect legal standard constitutes an abuse of discretion. *In re Marriage of Krieger and Walker,* 147 Wash. App. at 963.This record shows that Judge O'Donnell only granted this deviation because he mistakenly thought he was bound by the "law of the case" doctrine.

Also, contrary to this Court's holding, the 22.2 percent downward deviation was not "within the range of the evidence presented", because **no** evidence was presented on this issue.

This Court should reconsider.

7. In Ruling That Kohls Required Authority To Support Her Position That Judge O'Donnell Was Required To Address Her Request To Be Reimbursed For Overpaying Her Share Of The Children's Health Insurance Premiums, This Court Overlooked The Following Facts And Law:

There is no legal authority which holds that a request to be

reimbursed for overpaying one's share of her children's health insurance proceedings must be addressed in any particular sort of proceeding, and/or cannot be addressed in an adjustment proceeding. Generally all claims arising out of the same subject matter are joined in one proceeding. See CR 1, 13, and 18.

Moreover, since Kaplan did not identify the commissioner's award as error, as required by KCLR 7(b)(8)(A), it became an order of the superior court subject to appellate review, but not revision. The court thus lacked statutory authority or any inherent power to revise this unclaimed error when Kaplan raised it for the first time by failing to include the Commissioner's award in his proposed final orders. RCW 2.24.050; *Robertson v. Robertson, supra.*

8. In Ruling That Commissioner Jeske Properly Imposed CR 11 Sanctions for Presenting It With An Order Which Did Not Conform With Her Rulings, This Court Overlooked The Following Facts And Law:

When Kohls presented her proposed Child Support Worksheets with her proposed Final Order of Child Support Following Reconsideration, CP 1382, the inclusion of her pension plan payments was mandatory. RCW 26.19.071(5)(c) and (g). This was the *only* basis of Kaplan's Motion for CR 11 sanctions, CP

1387-1484, and the Commissioner's ruling for CR 11 sanctions, including her refusal to permit those deductions, CP 1500, which was reversed on revision.

On revision, the court revised the commissioner's ruling to permit these *mandatory* deductions, but adopted her "ruling and analysis" regarding her imposition of CR 11 sanctions, CP 1702, even though Commissioner Jeske had made no analysis.

These two rulings are not reconcilable.

In holding that "Kohls' attorney included an additional $900 in child support to be paid by Kaplan that the commissioner did not order", this Court overlooked the fact that the Commissioner had ordered it. In particular, the proposed judgment was within "the scope of presentation" because the Commissioner ruled that Kaplan pay Kohls $300 per month during those summer months when Zachary was residing with her, 11/22/13 RP 51-52, CP 1217, and made her modified support ruling effective June 1, 2013, 11/22/13 RP 45, CP 1215, when Zachary was continuing to reside with his mother for three months before leaving for college.

Although this proposed judgment had been included in Kohls' proposed Order of Child Support Final Order, CP 1086, it

was then stricken by the Commissioner without explanation, CP 1209, and was **not** included in Kohls' proposed Final Order of Child Support Following Reconsideration, CP 1371-1386, which was the subject of the CR 11 sanctions. CP 1489-1490.

This Court also overlooked the fact that the proposed Final Order of Child Support Following Reconsideration did **not**, as this Court mistakenly reported, "state that Kaplan would pay 100 percent of college preparatory fees for I.K.", but rather indicated that the parties would each pay their pro rata share of these expenses, just as the Commissioner had ordered. CP 1376.

This Court just got its facts wrong.

In addition, in *Biggs v. Vail,* 124 Wash.2d 193, 201, 876 P.2d 448 (1994), the Supreme Court held:

> Finally, in imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order. The court must make a finding that that either the claim is *not* grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose. CR 11. *See also Bryant,* at 219-20, 829 P.2d 1099. In this case, there were no such findings.

Nor were there any such findings here. In *Biggs v. Vail,* 124

Wash.2d at 197, the Supreme Court also held:

> CR 11 is not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings.

This Court should reconsider.

9. In Ruling That Judge O'Donnell Properly Imposed CR 11 Sanctions for Submitting A Post-Hearing Memorandum, This Court Overlooked The Following Facts And Law:

Neither KCLR 7(b)(8) nor KCLR 7(b)(4), expressly permit or prohibit the submission of post-hearing memoranda. Kohls did not violate any rule by submitting a post-hearing memorandum.

Contrary to this Court's reasoning, the post-hearing memorandum submitted here addressed only those issues which had not been addressed in the pre-hearing memoranda. CP 1644-1658. She did not raise any new issues, or proffer any new evidence.

In footnote 2 of the Respondent's Response, CP 1678, Kohls did nothing more than respond to the statements in the Petitioner's Motion to Strike concerning the amount of Commissioner Jeske's CR 11 sanctions and the reasons she entered them, CP 1675-1676. Kohls did not seek to re-litigate that

ruling. This was consistent with the court's "admonishment".

This Court's ruling is contrary to *Spokane Airports v. RMA, Inc.,*149 Wn. App. 930, 935-936, 206 P.3d 364(2009)(motion to strike supplemental brief denied, even though not authorized by rules, where brief "merely formalizes and clarifies what was already before us."), and the other cases cited in Kohls' briefs.

Finally, there was **no** finding that Kohls' Post-Hearing Memorandum was "*not* grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or acts, *or* the paper was filed for an improper purpose," as required by *Biggs v. Vail,* 124 Wash.2d at 201. While the court had complete discretion to use or to not use that "Post-Hearing Memorandum", as it saw fit, its service and filing is not a basis for finding a violation of CR 11 and imposing sanctions.

This Court should reconsider.

10. In Ruling That By Seeking Revision Of The Commissioner's Award Of Attorney Fees And Costs, The Award Was Neither Final Nor Liquidated, This Court Overlooked The Following Law And Facts:

The Court's decision creates a distinction between liquidated

claims for attorney fees and liquidated claims for sanctions which has no legal precedent or supporting authority. Whether interest runs on a liquidated claim does not turn on whether the claim is a penalty or not.

There is no legal support for this Court's ruling that Kohls nullified the commissioner's award of attorney fees by seeking revision. It is contrary to KCLCR 7(8)(iv) which states in part:

> The commissioner's written order shall remain in effect pending the hearing on revision unless ordered otherwise....

It wasn't ordered otherwise.

A dispute over a claim, in whole or in part, does not change the character of a liquidated claim to unliquidated. *Hansen v. Rothaus*, 107 Wash.2d 468, 472, 730 P.2d 662(1986).

Finally, the court "adopted" Commissioner Jeske's "ruling and analysis with respect to attorneys' fees and costs". CP 1702.

Statutory interest on attorney fee awards is mandatory. *In re Marriage of Knight,* 75 Wn.App. 721,731, 880 P.2d 71 (1994).

This Court's ruling that filing a motion for revision rendered this liquidated claim unliquidated is plain error.

11. In Ruling That The Lower Court Did Not Abuse Its Discretion In The Amount Of the Reasonable Attorney

Fees Awarded To Kohl, This Court Overlooked The Following Law And Facts:

The proper analysis for determining a reasonable fee in a marital dissolution proceeding is set forth in *Matter of Marriage of VanCamp*, 82 Wn.App. 339, 342, 918 P.2d 509 (1996).

Yet, without explanation, Commissioner Jeske awarded Kohls little more than half of the attorney fees requested, or what Kaplan had incurred. CP 1092-1109, 1159-1171, 1188-1205.

No legal authority supports the revision court's reasoning that this award was "appropriate" because "the time counsel spent on research and briefing is disproportionate to the time he spent on reviewing documents (his argument on high costs)". CP 1799-1800.

Without providing any reason, the revision court refused to even consider, much less, reimburse Kohls for the time her attorney spent rendering any other legal services, including but not limited to, drafting discovery requests and declarations; reviewing Kaplan's pleadings; communications with her, the court, or opposing counsel; his preparation for or attendance at court hearings; or any paralegal work. These legal services were just disregarded.

This Court's assertion that "the issues in this case amounted

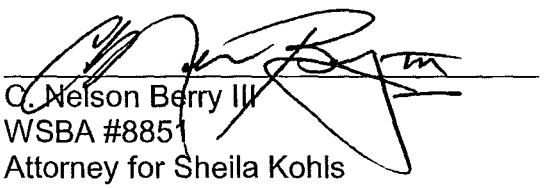
to simple mathematical adjustments in the child support order" is not supported by the evidence, and is contrary to the court's and the Commissioner's findings regarding "the degree of difficulty in ascertaining Mr. Kaplan's true income," CP 1698-1701; See also, 11/22/13 RP 36-45, including his dishonesty in reporting it.

This Court's holding defeats the very purpose of both the child support statutes and RCW 26.09.140. It rewards the obstructionist and deceptive tactics which Kaplan employed here.

It should reconsider.

For the same reasons, this Court should reconsider its refusal to award Kohls the attorney fees she incurred on appeal. *Marriage of Rideout,* 150 Wn.2d 337, 357-358, 77 P.3d1174 (2003) (whether a party should be awarded attorney fees "has nothing to do with prevailing parties...[but rather with] the relative financial circumstances of the parties").

Respectfully submitted this 24th day of June, 2016.



C. Nelson Berry III
WSBA #8851
Attorney for Sheila Kohls
Appellant/Cross-Appellant

Certificate of Service

I certify that on the 24th day of June, 2016, I caused a copy of the foregoing Sheila Kohls' Motion for Reconsideration to be hand-delivered by ABC Legal Messenger Service to the attorney for the Respondent at the following address:

Karen D. Moore
Brewe Layman P.S.
3525 Colby Ave #333
Everett, WA 98201

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 24th day of June, 2016, at Seattle, Washington.

C. Nelson Berry III
WSBA #8851
Attorney for Sheila Kohls
Appellant/Cross-Respondent

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

SHEILA KOHLS, F/K/A SHEILA KOHLS-KAPLAN, Appellant/ Cross-Respondent	Appeal No. 73119-0-I
and,	SHEILA KOHLS' MOTION TO PUBLISH
KENNETH B. KAPLAN, Respondent/ Cross-Appellant	

1. IDENTITY OF MOVING PARTY. Sheila Kohls, the Appellant/Cross-Respondent, asks for the relief sought in Part 2.

2. STATEMENT OF RELIEF SOUGHT. Sheila Kohls, the Appellant/Cross-Respondent, asks this Court to publish its decision terminating review issued on June 13, 2016.

3. FACTS RELEVANT TO MOTION. The facts relevant to this motion are set forth in the Grounds for Relief and Argument, and in Sheila Kohl's Motion for Reconsideration which is incorporated herein by reference.

4. GROUNDS FOR RELIEF AND ARGUMENT.

If this Court does not grant her Motion for Reconsideration, Sheila Kohls, the Appellant/Cross-Respondent, asks this Court to publish its decision terminating review, pursuant to RAP 12.3(e), because publication is necessary, RAP 12.3(e)(2), and is of general public interest or importance, RAP 12.3(e)(5), for each of the following reasons:

1. This Court's Decision Regarding Whether There Has Been A Substantial Change of Circumstances Modifies, Clarifies, or Reverses An Established Principle of Law, RAP 12.3(e)(4); and Is In Conflict With A Prior Opinion Of the Court of Appeals, RAP 12.3(e)(6).

According to this Court's decision, so long as a court predicts that the disparity between the parents' earnings will continue, there can never be a "substantial change of circumstances" even if that disparity does not "remain constant", as it "was predicted to do so [in this case] at the time the 2010 order was entered", CP 1698.

This Court's decision overrules *In re Marriage of Scanlon and Witrak*, 109 Wash. App. 167, 173-174, 34 P.3d 877 (2001), in which this Court held that a substantial change of circumstances was established if the change in incomes was not a "routine change

in incomes", which was not contemplated when the previous order was entered. The undisputed evidence in this case was that the quadrupling of Kaplan's net monthly income from $8,137 in December of 2010 to $31,713.72 by June of 2013, barely two and a half years later, was **not** a "routine change in incomes", and was **not** contemplated when the Order of Child Support was entered in 2010. But, according to this Court's decision, that analysis is no longer applicable.

This Court should publish its decision.

2. This Court's Decision Regarding Whether The 2010 Order of Child Support Worked A Severe Economic Hardship Modifies, Clarifies, or Reverses An Established Principle of Law, RAP 12.3(e)(4); Determines An Unsettled or New Question of Law, RAP 12.3(e)(3); and Is In Conflict With A Prior Opinion Of the Court of Appeals, RAP 12.3(e)(6).

This Court's decision creates new law, and reverses *Schumacher v. Watson,* 100 Wn.App. 208, 211-212, 997 P.2d 399(2000), by holding that the "existence of a severe economic hardship is a factual determination that is within the discretion of the trial judge", rather than a factual determination which must be supported by substantial evidence. *Id.* There is no prior legal authority which supports this holding.

Since this Court provides no criteria or other guidance as to how a court should exercise this discretion, its discretion is unfettered, which means that the "existence of a severe economic hardship" is whatever a court might say it is. In such a situation, there can be no meaningful appellate review.

By holding that "there is no formal legal test for a severe economic hardship", this Court abandons and effectively overrules the formula it used in *In re Marriage of Krieger and Walker*, 147 Wn.App. 952, 963-965, 199 P.3d 450 (2009) to determine whether a child support order is adequate to meet a child's basic needs, as required by RCW 26.19.001.

Since, the "existence of a severe economic hardship" is now a "factual determination that is within the [unfettered] discretion of the trial judge", it no longer matters that Judge O'Donnell based his finding of no severe economic hardship, on his finding that "Kohls' economic situation in 2015 was contemplated at the time the 2010 order was entered"---even though that ruling is in direct conflict with RCW 26.09.170(6), and *In re Marriage of Sievers*, 78 Wn. App. 287, 304, 897 P.2d 388 (1995).

This Court should publish its decision.

3. Its Decision Regarding Whether Child Support Should Be Set Above The Maximum Advisory Level Modifies, Clarifies, or Reverses An Established Principle of Law, RAP 12.3(e)(4); and Is In Conflict With A Prior Opinion Of the Court of Appeals, RAP 12.3(e)(6).

This Court's decision that *In re Marriage of McCausland*, 159 Wn.2d 607, 617,152 P.2d 1013 (2007) did not permit the superior court "to set Kaplan's child support amount above the maximum advisory level" is in conflict with and reverses its previous opinion in *In re Marriage of Krieger and Walker,* 147 Wash. App. at 963, holding that the trial court had abused its discretion and applied the wrong legal standard in its mistaken belief that *In re Marriage of McCausland, supra,* required a "showing of 'extraordinary need'" to support an award above the advisory amount. For the same reason, it is in conflict with *In Marriage of Leslie,* 90 Wn.App. 796, 804, 954 P.2d 330 (1988).

It is also in conflict with and reverses its prior holding in *In re Marriage of Krieger and Walker,* 147 Wn. App. at 964, where this Court held that "expenses for school-related costs and trips, extra-curricular activities, cultural experiences, and computers were appropriate bases for additional support."

The Court's decision is also in conflict with RCW 26.19.001

which states in pertinent part:

> 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 present child support order does neither.

This Court should publish its decision.

4. Its Decision Regarding Post-Secondary Support Modifies, Clarifies, or Reverses An Established Principle of Law, RAP 12.3(e)(4); and Is In Conflict With A Prior Opinion Of the Court of Appeals, RAP 12.3(e)(6).

This Court's decision regarding whether Kohls could obtain post-secondary support is in conflict with this Court's opinion in *In Re Marriage of Morris,* 176 Wn.App. 893, 901-902, 309 P.3d 767 (2013), in which this Court held that while post-secondary relief should be obtained with a petition for modification and no substantial change of circumstances was required, such relief could also be obtained with a motion for adjustment.

In addition, this Court's decision eliminated the requirement in KCLR 7(b)(8)(A)[1], that motions for revision "shall identify the

[1] KCLR 7(b)(8)(A) requires that "The motion [for revision] shall identify the error claimed." [emphasis added].

error claimed." Kaplan did not identify the Commissioner's award of post- secondary support as such an error. Accordingly, this Court's decision is contrary to RCW 2.24.050; *Robertson v. Robertson,* 113 Wn. App. 711, 714-715, 54 P.3d 708 (2002), which hold that if a commissioner's order is not the subject of a motion for revision, it becomes an order subject to appellate review, but not revision.

This Court should publish its decision.

5. This Court's Decision That The Lower Court Properly Calculated Kaplan's Income Determines A New Question of Law RAP 12.3(e)(3); Modifies, Clarifies, or Reverses An Established Principle of Law, RAP 12.3(e)(4); and Is In Conflict With A Prior Opinion Of the Court of Appeals, RAP 12.3(e)(6).

Without any supporting legal authority, this Court holds that the amount of income which a court imputes is an *equitable* determination, which apparently gives the court license to disregard statute and case law applicable to determining child support.

According to this Court's decision, at least when the lower court is imputing income, deductions, like depreciation, do not need to "reflect an actual reduction in the personal income of the party claiming the deductions". As a result, this Court's decision is in conflict with the established principle of law and this Court's prior

holding in *In re Marriage of Stenshoel*, 72 Wn.App. 800, 806, 86 P.3d 635 (1993). In this case, Kaplan admitted that he did not personally make the expenditures to purchase this equipment, but rather they were paid for by KRES, LLC. (Brief, p. 31).

According to this Court's decision, a parent seeking those deductions need not verify those expenditures or depreciation with documentary evidence, as required by *In Marriage of Gainey*, 89 Wn.App. 269, 274-275, 948 P.2d 865 (1997), *reversed on other grounds, In re Marriage of Moody,* 137 Wash.2d 979, 93, 976 P.2d 1240 (1999); *In re Marriage of Bucklin,* 70 Wn. App. 837, 841, 855 P.2d 1197(1993), so long as the parent's CPA and bookkeeper testify that the parent should be entitled to take such deductions--- even though the evidence showed that they did not "reflect an actual reduction in the personal income of the party claiming the deductions".

Indeed, in this case, Kaplan was permitted to deduct the cost for Key Man insurance. He did not pay the premium. KRES could not a tax deduction since his children are the beneficiaries of that policy, IRC Code Section 264(a)(1). He was also permitted to deduct the alleged cost for professional liability insurance, for which

there was no evidence that he paid anything, even though he resigned from WSBA on November 17, 2009 and discontinued his malpractice insurance at that time.

Nonetheless, according to this Court's decision, since the "imputation of income is an equitable determination", the lower court can simply disregard these well-established legal principles, that deductions must "reflect an actual reduction in the personal income of the party claiming the deductions".

According to this Court's decision, a court can impute any amount it wants, so long as "the imputed amount is within the range of evidence presented," without disclosing what that "range of evidence" is. There was no "range of evidence" here. The court imputed income to Kaplan because it found that his financial records substantially underreported his actual income. See Decision, pp. 16-19.

This Court should publish its decision.

6. This Court's Decision That The Lower Court Properly Granted Kaplan A 22.2 Percent Deviation In His Transfer Payment Modifies, Clarifies, or Reverses An Established Principle of Law, RAP 12.3(e)(4); and Is In Conflict With A Prior Opinion Of the Court of Appeals, RAP 12.3(e)(6).

Although this Court passed it off as the judge merely

misspeaking, it acknowledged that Judge O'Donnell erred by believing that *In re Marriage of Trichek,* 72 Wn.App. 21, 23, 863 P.2d 585 (1993) "required" him to grant a 22.2% downward deviation from the standard transfer payment.

But this Court has long recognized that a lower court's use of an incorrect legal standard constitutes an abuse of discretion. See eg. *In re Marriage of Krieger and Walker,* 147 Wash. App. at 963. According to this Court's decision, that well-established legal principle does not apply, if it concludes that the judge merely "misspoke", in spite of the fact that the record shows that the judge would not have granted this deviation, but for the fact that he mistakenly believed he was bound by that incorrect standard.

This Court should publish its decision.

7. This Court's Decision That Kohls Required Authority To Support Her Position That Judge O'Donnell Was Required To Address Her Request To Be Reimbursed For Overpaying Her Share Of The Children's Health Insurance Premiums, Determines An Unsettled Or new Question of Law, RAP 12.3(e)(3); Modifies, Clarifies, or Reverses An Established Principle of Law, RAP 12.3(e)(4); and Is In Conflict With A Prior Opinion Of the Court of Appeals, RAP 12.3(e)(6).

There is no legal authority which holds that a request to be reimbursed for overpaying one's share of her children's health

insurance proceedings cannot be addressed in an adjustment proceeding, or that such a request must be filed in some other type of proceeding. This is new law.

Moreover, since Kaplan did not identify the commissioner's award as error, as required by KCLR 7(b)(8)(A), it became an order of the superior court subject to appellate review, but not revision. The court thus lacked statutory authority or any inherent power to revise this unclaimed error when Kaplan raised it for the first time by failing to include this award in his proposed final orders. This Court's decision is thus in conflict with RCW 2.24.050; and *Robertson v. Robertson, supra.*

This Court should publish its decision.

8. This Court's Decision That Commissioner Jeske Properly Imposed CR 11 Sanctions for Presenting It With An Order Which Did Not Conform With Her Rulings Modifies, Clarifies, or Reverses An Established Principle of Law, RAP 12.3(e)(4); and Is In Conflict With A Prior Opinion Of the Court of Appeals, RAP 12.3(e)(6).

In her Motion for Reconsideration, Kohls explained how this Court simply got its facts wrong. The *only* basis upon which Kaplan sought CR 11 sanctions was the fact that Kohls included her mandatory pension deductions in her proposed Final Order of Child

Support Following Reconsideration. CP 1387-1484. And this was the only basis upon which Commissioner Jeske imposed CR 11 sanctions. CR 1489-1490.

On revision, the court revised the commissioner's ruling to permit these *mandatory* deductions, but adopted her "ruling and analysis" regarding her imposition of CR 11 sanctions, CP 1702, even though Commissioner Jeske had made no analysis.

These two rulings are not reconcilable.

But the Court's decision also reverses an established principle of law. In *Biggs v. Vail,* 124 Wash.2d 193, 201, 876 P.2d 448 (1994), the Washington Supreme Court held:

> Finally, in imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order. The court must make a finding that that either the claim is *not* grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed foran improper purpose. CR 11. *See also Bryant,* at 219-20, 829 P.2d 1099. In this case, there were no such findings.

Nor were there any such findings here. This Court's decision also is also in conflict with *Just Dirt, Inc. v. Knight Excavating, Inc.,* 138 Wn.App. 409, 417–418, 157 P.3d 431 (2007), and *Lee v.*

Kennard, 176 Wn.App. 678, 690-691, 310 P.3d 845(2013).

This Court should publish its Decision.

9. This Court's Decision That That Judge O'Donnell Properly Imposed CR 11 Sanctions for Submitting A Post-Hearing Memorandum Modifies, Clarifies, or Reverses An Established Principle of Law, RAP 12.3(e)(4); and Is In Conflict With A Prior Opinion Of the Court of Appeals, RAP 12.3(e)(6).

Once again, the Court's decision reverses an established principle of law by upholding CR 11 sanctions, where the lower court failed to make the findings required by *Biggs v. Vail,* 124 Wash.2d at 201. "CR 11 is not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings." *Id.* at 193. The post-hearing memorandum was not frivolous.

This Court's decision is also contrary to *Spokane Airports v. RMA, Inc.,*149 Wash. App. 930, 935-936, 206 P.3d 364(2009) (motion to strike supplemental brief denied, even though not authorized by rules, where brief "merely formalizes and clarifies what was already before us."); *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wash. App. 17, 29, 252 P.3d 382 (2011); *W.A. Botting Plumbing and Heating Co. v. Constructors-Pamco*, 47 Wash.App. 681, 736 P.2d 1100 (1987); *ML Park Place*

Corp. v. Hedreen, 71 Wash.App. 727, 862 P.2d 602 (1993).

This Court should publish its decision.

10. This Court's Decision That By Seeking Revision Of The Commissioner's Award Of Attorney Fees And Costs, The Award Was Neither Final Nor Liquidated Modifies, Clarifies, or Reverses An Established Principle of Law, RAP 12.3(e)(4); Determines A New Question of Law, RAP 12.3(e)(3); and Is In Conflict With A Prior Opinion Of the Court of Appeals, RAP 12.3(e)(6).

The Court's decision creates a distinction between how liquidated claims for attorney fees and liquidated claims for sanctions are treated with respect to motions for revision which has no legal precedent or supporting authority.

This Court's decision reverses established principles of law that "a dispute over the claim, in whole or in part, does not change the character of a liquidated claim to unliquidated." *Hansen v. Rothaus*, 107 Wash.2d 468, 472, 730 P.2d 662(1986).

It is also in conflict with KCLCR 7(8)(iv); RCW 4.56.110(4); *In re Marriage of Knight,* 75 Wn.App. 721,731, 880 P.2d 71 (1994); *In re Marriage of Harrington*, 85 Wn.App. 613, 630-631, 935 P.2d 1357 (1997); and *Hadley v. Maxwell*, 120 Wash.App. 137, 84 P.3d 286, *amended on denial of reconsideration, review denied*, 152 Wash.2d 1030, 103 P.3d 200(2004).

This Court should publish its decision.

11. This Court's Decision That The Lower Court Did Not Abuse Its Discretion In The Amount Of the Reasonable Attorney Fees Awarded To Kohl Modifies, Clarifies, or Reverses An Established Principle of Law, RAP 12.3(e)(4); Determines A New Question of Law, RAP 12.3(e)(3); and Is In Conflict With A Prior Opinion Of the Court of Appeals, RAP 12.3(e)(6).

This Court's decision is in conflict with *Matter of Marriage of VanCamp*, 82 Wn.App. 339, 342, 918 P.2d 509 (1996) which sets forth how a court is to determine reasonable attorney fees in the context of a marital dissolution proceeding.

It creates new law by holding that the court can reduce the amount of fees requested, not because the work was duplicative or unnecessary, but rather because the court concludes, without explanation, that "the time counsel spent on research and briefing is disproportionate to the time he spent on reviewing documents". There is no legal precedent to support this reduction.

It is in conflict with *Taliesen Corp. v. Razore Land Co.*, 135 Wash.App. 106, 146, 144 P.3d 1185 (2006); *Absher Constr. Co. v. Kent Sch. Dist. 415,* 79 Wash. App. 841, 848, 917 P.2d 1086 (1995) which hold that when the court makes an award of substantially less than the amount of fees requested, it should

indicate at least approximately how it arrived at the final numbers, and explain why discounts were applied.

It is in conflict with *Wheeler v. Catholic Archdiocese of Seattle,* 65 Wash. App. 552, 575, 829 P.2d 196, *rev'd on other grounds*, 124 Wash.2d 634, 880 P.2d 29 (1994) which holds that a reduction of fees, without explanation, is arbitrary and an abuse of discretion. In this case, the revision court, without providing any reason, refused to even consider, much less, compensate Kohls for the time her attorney spent rendering any other legal services, including but not limited to, drafting discovery requests and declarations; reviewing Kaplan's pleadings; communications with her, the court, or opposing counsel; his preparation for or attendance at court hearings; or any paralegal work. These legal services were just disregarded.

This Court's decision is in conflict with *Fiore. v. PPG Industries, Inc.*, 169 Wn.App. 325, 354, 279 P.3d 972 (2012) which holds that a comparison of hours and rates charged by opposing counsel is probative of the reasonableness of the requesting party's request.

It is in conflict with *In re Marriage of Burke*, 96 Wash. App.

474, 479, 980 P.2d 265 (1999) which holds that the fundamental purpose of RCW 26.09.140 is "to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage," especially in disputes involving children and their support.

It is contrary to the well-established principal of law in this State, legislatively and judicially, that if a spouse is without funds and the other spouse has the ability to pay, denial of fees is an abuse of discretion. *Valley v. Selfridge*, 30 Wn. App. 908, 918, 639 P.2d 225 (1982); *Krieger v. Krieger*, 133 Wash. 183, 185, 233 P. 306 (1925).

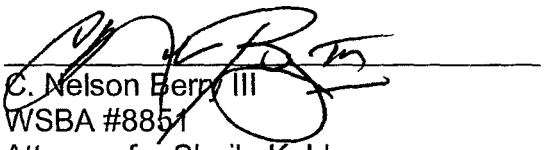
For the same reasons, this Court's refusal to award Kohls the attorney fees she incurred on appeal is contrary to the well-established principal of law that an award of attorney fees, pursuant to RCW 26.09.140, "has nothing to do with prevailing parties...[but rather with] the relative financial circumstances of the parties". *Marriage of Rideout,* 150 Wn.2d 337, 357-358, 77 P.3d1174 (2003).

This Court should publish its decision.

CONCLUSION

If this Court does not reconsider its decision, it should publish it. Its decision reverses well-established principles of law, contravenes statutes, makes new law, and is in conflict with prior opinions of both the Courts of Appeal and the Supreme Court. RAP 12.3(e)(3), (4),(6). Accordingly, its decision is of general public interest and importance. RAP 12.3(e)(5).

Respectfully submitted this 24th day of June, 2016.



C. Nelson Berry III
WSBA #8851
Attorney for Sheila Kohls
Appellant/Cross-Appellant

Certificate of Service

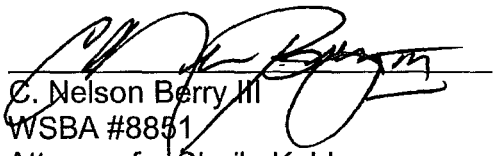
I certify that on the 24th day of June, 2016, I caused a copy of the foregoing Sheila Kohls' Motion To Publish to be hand-delivered by ABC Legal Messenger Service to the attorney for the Respondent at the following address:

Karen D. Moore
Brewe Layman P.S.
3525 Colby Ave #333
Everett, WA 98201

I declare under penalty of perjury under the laws of the State

of Washington that the foregoing is true and correct.

Dated this 24th day of June, 2016, at Seattle, Washington.



C. Nelson Berry III
WSBA #8851
Attorney for Sheila Kohls
Appellant/Cross-Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

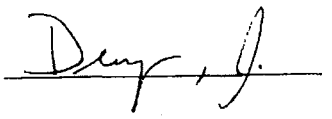
In re the Marriage of:	)	
	)	DIVISION ONE
KENNETH B. KAPLAN,	)	
	)	No. 73119-0-I
Respondent/Cross-Appellant,	)	(consol. with No. 73492-0-I)
	)	
v.	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
SHEILA KOHLS, f/k/a	)	
SHEILA KOHLS-KAPLAN,	)	
	)	
Appellant/Cross-Respondent.	)	
	)	

The appellant/cross-respondent having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

DATED this 28th day of June, 2016.

For the Court:



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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	)	DIVISION ONE
KENNETH B. KAPLAN,	)	
	)	No. 73119-0-I
Respondent/Cross-Appellant,	)	(consol. with No. 73492-0-I)
	)	
v.	)	ORDER DENYING MOTION
	)	TO PUBLISH OPINION
SHEILA KOHLS, f/k/a	)	
SHEILA KOHLS-KAPLAN,	)	
	)	
Appellant/Cross-Respondent.	)	
	)	

The appellant/cross-respondent, having filed a motion to publish opinion, and the hearing panel having considered its prior determination and finding that the opinion will not be of precedential value; now, therefore it is hereby:

ORDERED that the unpublished opinion filed June 13, 2016, shall remain unpublished.

DATED this 28th day of June, 2016.

For the Court: