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COURT OF APPEALS, DIVISION I
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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re Marriage of:

TAMI S. REMICK

Appellant,

and

ENOCH THIJS REMICK,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE BRUCE HILYER

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal serves only to unnecessarily continue, at great expense to both parties, acrimonious litigation that is harmful to the family. The wife does not substantively challenge the amount or duration of the maintenance she was awarded after less than nine years of marriage, nor does she challenge the amount of child support awarded for the parties' two children. Instead, her appeal is based on alleged technical errors that were either harmless, invited by the wife, or premised on a misinterpretation of the final orders that could have been resolved without the expense of appeal. This court should affirm the trial court and deny the wife's request for attorney fees. If any fees are awarded, they should be to the husband, for having to respond to this appeal raising largely academic complaints from which the wife could be afforded no relief.

II. RESTATEMENT OF FACTS

A. **The Parties Separated After Less Than 9 Years Of Marriage. They Have Two Young Children.**

Respondent Enoch Remick and appellant Tami Remick, both age 44, were married on August 4, 2001. (RP 73; CP 15) They have two children: Janneke (DOB 5/29/2005) and Greyson (DOB

1/09/2007). (RP 73, 88, 99) The parties separated on July 24, 2010, when Tami filed a petition to dissolve their marriage. (RP 73)

A family law court commissioner entered temporary orders, including a mutual restraining order, on September 1, 2010. (CP 595-99) The commissioner designated Tami as the primary residential parent under the temporary parenting plan and ordered Enoch to pay temporary monthly maintenance of \$4,000, temporary monthly child support of \$1,737.85, the monthly mortgage of approximately \$2,800 on the family home where Tami and the children were residing, and the parties' credit card debts. (CP 595-99; Supp. CP ___, Sub no. 42; RP 103-04, 521) After trial, the trial court noted that these orders created an "extraordinary burden" on Enoch, and granted a partial credit to him for some of the payments made while the dissolution action was pending. (RP 833-34; CP 142)

B. The Husband Worked For Microsoft. Before The Children Were Born, The Wife Worked As A Therapist, And Had Been A Stay At Home Mother For Six Years At The Time of Separation.

Enoch, who has a bachelors' degree from American University in business administration and economics, worked for Microsoft from 1990 to 1996, left for other employment, and

returned to Microsoft in 2001, where he currently holds the position of Worldwide Academic Licensing Director. (RP 103, 482-83, 484-85) When final orders were entered, Enoch was earning a gross annual base salary of \$137,285. (See CP 431)

In addition to his base salary, Enoch is eligible to receive a Revenue Based Incentive (RBI) bonus. (RP 488) The RBI bonus is paid quarterly as an “advance.” (RP 489) Enoch receives between \$4,000 and \$5,500 per quarter for the RBI bonus. (RP 621) Enoch described the RBI bonus as “objective,” as it is based on his sales quota. (RP 488)

Enoch is also eligible to receive a Commitment Based Incentive (CBI) bonus that is awarded on a “subjective” basis. (RP 488) Unlike the RBI bonus, which is paid as an advance, the CBI bonus, *if* paid, is paid as a lump sum once a year. (RP 488, 489) Enoch does not, and cannot, rely on this bonus for his monthly expenses. (RP 489) Enoch has not always met his commitments to be eligible for the CBI bonus, and there is no guarantee that he will receive a CBI bonus every year. (RP 489, 619) Enoch received a CBI bonus of approximately \$62,000 in 2010 while the dissolution action was pending. (RP 620)

In addition to his eligibility for bonuses, Enoch participates in Microsoft's ESPP plan, which entitles him to purchase Microsoft stock at a discount on a quarterly basis. (RP 622) Enoch is also awarded stock grants. (RP 737-38)

Tami earned a Masters degree in psychology in 1995. (RP 76) Tami has worked as a school therapist and as a social worker with DSHS. (RP 76-78) After leaving DSHS, because it was "high conflict," Tami started a career in marketing, working for a travel agency and later a high tech startup. (RP 79-80) After the parties married in 2001, and after she was laid off from the high tech start up, Tami returned to her career as a therapist. (RP 84)

Tami stopped working outside of the home in approximately 2004 when the parties decided to start a family. (RP 87-88) Their first child was born in May 2005 and their younger child was born in January 2007. (RP 88, 99) After the children were born, Tami never resumed outside employment (RP 89), nor did she pursue employment after the parties separated. (RP 569)

At trial, Tami testified that it would take six to nine months to reactivate her license if she were to return to a career in counseling. (RP 89-90) However, Tami did not want to return to that field. (RP 91) Instead, Tami testified she wanted to obtain an

MBA in marketing, which would take approximately eighteen to twenty-one months to complete. (RP 91-92) Tami testified that she hoped to start school in Fall 2011. (RP 93)

Cloie Johnson, who performed a vocational assessment of Tami, testified that after Tami graduates with her MBA, she could earn \$75,000 as an “entry level salary,” and within three to five years she could earn between \$92,000 and \$120,000. (RP 648) Ms. Johnson also testified that without any further education, Tami could work in entry-level sales or as an entry-level marketing assistant and earn between \$35,000 and \$40,000 annually. (RP 644)

C. After A 4-Day Trial, The Trial Court Awarded The Wife 3.5 Years Of Maintenance, A Disproportionate Share Of The Community Property, And Child Support Above The Standard Calculation.

The parties participated in a four-day trial before King County Superior Court Judge Bruce Hilyer beginning July 18, 2011 and concluding with the trial court’s oral ruling on July 22, 2011. (See CP 127, 389) A portion of the trial was spent addressing Tami’s request to relocate with the children to California and her allegation that Enoch was domestically violent. The trial court found that the benefits of the relocation did not outweigh the harm

to the children, and expressed its “real concern” over Tami’s “lack of insight” as to the children’s needs with respect to the relocation. (CP 136; Supp. CP ___, Sub no. 145) The trial court also “found there [was] no domestic violence in this case and there is no basis for either a restraining order or a Section 191 restriction.” (CP 132; Supp. CP ___, Sub no. 145) The trial court denied Tami’s request to relocate with the children and designated her as the primary residential parent for the children. (CP 257; Supp. CP ___, Sub no. 145) Tami has not appealed these decisions.

The trial court awarded Tami 60% of the community property. (CP 142) The trial court recognized that the division is a “little bit strong for [Tami], but there isn’t a whole lot to split here.” (CP 142) The parties’ most significant assets were the family residence, with a net value of approximately \$61,000, and Enoch’s 401(k) through Microsoft, which had a value of over \$240,000. (See CP 8, 12) The trial court awarded the family residence to Tami. (CP 140) The trial court ordered that \$157,000 of the 401(k) be liquidated to retire the parties’ debts and pay the parties’ attorney fees. (CP 140-41) Tami was awarded \$30,000 from the 401(k) towards her attorney fees; Enoch was awarded \$18,000 toward his attorney fees. (CP 15) Before final orders were entered, Tami

declined the award of the family residence, and was instead awarded the remaining 401(k), after adjustments, of approximately \$84,000. (CP 8, 429-30)

Based in part on a proposal made by Tami, the trial court awarded Tami an initial year of “undifferentiated family support.” (CP 144) The trial court ordered that this “undifferentiated support” equal one-half of Enoch’s net income, including his quarterly RBI bonus but not including the “subjective” lump sum CBI bonus or any stock income. (CP 144) This “undifferentiated support” was intended to be tax-free to the wife and was designated as child support for that purpose. (CP 11)

In years two and three, the trial court awarded Tami monthly spousal maintenance of \$4,000 and monthly child support of \$2,000 – an amount above the standard calculation. (CP 11, 16, 17, 144-45) The trial court awarded an additional six months of maintenance at \$2,000 per month, and ordered that child support continue at \$2,000 per month in year four. (CP 16, 145)

The trial court acknowledged that regardless whether the husband’s “subjective” CBI bonus and stock awards were included as income for purposes of child support, the parties’ combined income was “beyond this child support schedule,” and that the

income figure “doesn’t drive a number because [the amount of the transfer payment] is up to the court.” (RP 891)¹

The trial court retained jurisdiction to consider any post-decree issues. (CP 145) The trial court also directed trial counsel to propose final orders encompassing its decision. (CP 129)

Over a month after the trial court’s oral ruling, Tami’s counsel (who also represents her on appeal) presented proposed final orders to the court. (See CP 181) While adopting some of the provisions in Tami’s proposed final orders, including that “maintenance shall be non-modifiable in amount or duration” (CP 485), Enoch responded with his own proposed final orders. (CP 543-594) The trial court entered Enoch’s proposed final orders with some handwritten interlineations, and without oral argument from counsel. (CP 1-32) Neither party moved for reconsideration of the final orders under CR 59.

¹ In fact, without the CBI bonus income, the parties’ combined monthly net income was \$10,000. (See CP 24) However, the trial court’s mistaken understanding was of no consequence because the trial court awarded support above the child support schedule for parties with combined monthly net income over \$12,000. (CP 16-17)

D. The Trial Court Retained Jurisdiction To Consider Post-Decree Issues. The Husband Moved To Clarify The Final Orders Before The Wife Filed Her Notice Of Appeal.

After final orders were entered, issues arose requiring the trial court to clarify its intent and enforce the decree. Specifically, the Decree of Dissolution entered by the trial court on September 16, 2011, stated that “undifferentiated support” for the wife and children is awarded to the wife “in the amount of one-half of [Enoch’s] *gross* salary and RBI bonus immediately when received for one (1) year beginning September 1, 2011 through August 31, 2012, but not less than \$6,000 per month.” (CP 11, emphasis added) However, the Order of Child Support described the wife’s undifferentiated support as “50% of the husband’s *net* income, including his regular quarterly bonus (RBI), but not less than \$6,000/mo.” (CP 16, emphasis added)

The orders thus were inconsistent. If the trial court intended for the wife to receive one-half of the husband’s *gross* income and RBI, Enoch would be required to pay Tami \$6,673.36 – even though he only nets \$10,400 per month, and even though he would be required to bear all of the tax burden, since the trial court ordered that the entire transfer payment be considered child

support for tax purposes. (CP 34, 52) But if the trial court intended for Tami to receive one-half of Enoch's *net* income, he would pay her \$6,000, based on the "floor" set forth in the decree, since one-half of his monthly net income, including the RBI bonus, is \$5,200. (CP 35, 52) In either event, Enoch would have to pay Tami more than half his net income. The issue that the trial court needed to address was how much more.

Another issue arose when Tami refused to immediately vacate the family residence, which was awarded to Enoch in the decree after Tami declined the award. (CP 36-37) Unclear as to what to do for the months of September and October while Tami was still occupying the house, Enoch continued to pay the mortgage of \$2,598.50 on the family residence, while also still paying \$5,735.85 to Tami for child support and maintenance under the temporary order, plus his own living expenses (since he did not have the benefit of the home that he was awarded). (CP 36-37) The question that the trial court needed to resolve was whether Tami should be responsible for the mortgage while she remained in the family residence that at her request had been awarded to Enoch.

On October 6, 2011, Enoch filed a motion to clarify the final orders pursuant to the trial court's retention of "jurisdiction to hear

all disputes in this matter” to address these post-decree issues. (CP 13, 33) On October 17, 2011, while this motion was pending, Tami filed a Notice of Appeal of the final orders. (CP 82) On November 2, 2011, the trial court entered its order clarifying the final orders. (CP 178) The trial court ordered that Enoch pay Tami “\$6,000 per month [] as undifferentiated support. This includes one-half his net pay including his RBI beginning November 2011 through September 2012.” (CP 179) The trial court did not change its ruling that this payment be designated as “child support” – a non-taxable event to Tami. The trial court also ordered Tami to pay \$3,750 to Enoch as “reasonable rent” for September and one-half of October while she resided in the family residence awarded to Enoch. (CP 179) Recognizing the appeal was pending, the trial court ordered that “the parties shall jointly move the Court of Appeals for jurisdiction to enter this order.” (CP 179)

Tami filed a Notice of Appeal of the order clarifying the final orders on November 8, 2011. (CP 383) This court granted a RAP 7.2 motion to allow the trial court to enter its November 2, 2011 order, and consolidated review.

III. ARGUMENT

A. The Wife Does Not Complain That The Amount Of Child Support Awarded To Her Is Insufficient To Meet The Needs Of The Children. Instead, She Raises A Series Of Technical Arguments Alleging Errors That Are Ultimately Harmless And That Do Not Warrant Reversal.

The trial court in this case deviated upward to award child support that is greater than the presumptive amount in the child support schedule. On appeal, the wife does not complain that the child support awarded to her is inadequate or contrary to the legislative intent 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. Instead, the wife’s challenge to the trial court’s child support order is based on technical arguments alleging errors that are ultimately harmless, because she is not prejudiced. “Error without prejudice [] is not grounds for reversal.” *Welfare of Ferguson*, 41 Wn. App. 1, 5, 701 P.2d 513, *rev. denied*, 104 Wn.2d 1008 (1985); *Ford v. Chaplin*, 61 Wn. App. 896, 899, 812 P.2d 532 (1991) (appellant must show that her case was materially prejudiced by a claimed error. Absent such proof, the error is harmless), *rev. denied*, 117 Wn.2d 1026.

1. **Whether The Trial Court Erred In Failing To Attach A Child Support Worksheet For The First Year To Its Order Is Both Harmless And Moot.** (Response to App. Br. 27-28)

RCW 26.19.035 (3) requires that child support worksheets be “filed in every proceeding in which child support is determined.” It is undisputed that worksheets are attached to the child support order entered in this case. (See CP 23-32) However, the wife complains that the trial court failed to attach child support worksheets for the *first* year of child support, which ended August 31, 2012. (CP 16) Even if the trial court’s failure to include a specific worksheet for the first year of child support was error, the issue is moot. The failure is in any event harmless when the wife does not claim that trial court improperly calculated child support when it awarded her undifferentiated support of \$6,000 per month for the first year following divorce.

“It is a general rule that, where only moot questions or abstract propositions are involved, the appeal should be dismissed.” ***Hart v. Dep’t of Social and Health Services***, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988) (quoting ***Sorenson v. City of Bellingham***, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)); see also ***State ex rel. Layton v. Robinson***, 2 Wn.2d 614, 616, 99 P.2d

402 (1940) (the court will not pass upon a “purely academic” question). “A case is moot when a court can no longer provide effective relief.” **State v. Enlow**, 143 Wn. App. 463, 470, ¶ 22, 178 P.3d 366 (2008); see also **Burd v. Clarke**, 152 Wn. App. 970, 974, ¶¶ 7, 8, 219 P.3d 950 (2009), *rev. denied*, 168 Wn.2d 1028 (2010).

An exception to the “mootness” rule, which the wife has not asserted, is that a court may consider a moot question if “matters of continuing and substantial public interest are involved.” **Hart**, 111 Wn.2d at 447; see **Abbs v. Georgie Boy Mfg., Inc.**, 60 Wn. App. 157, 162, 803 P.2d 14 (1991) (an issue not raised by appellant in briefing will not be considered). In this case, whether the trial court failed to include a child support worksheet to these parties’ individual child support order is not a “matter of continuing and substantial public interest” that would warrant review.

Further, the fact that no worksheets were appended to the child support order did not prejudice the wife. The purpose of the worksheet is to show the trial court’s calculation of child support. **Marriage of Wilson**, 165 Wn. App. 333, 341, ¶ 18, 267 P.3d 485 (2011). But the wife does not claim that the trial court erred in calculating a child support award of \$6,000 per month for the first year. This child support award clearly exceeds the amount of child

support that would be awarded under the child support schedule. See RCW 26.19.020. Thus, any error in failing to include worksheets for the first year is harmless.

2. The Trial Court's Order Of Child Support Made Child Support "Reviewable" After Maintenance Ends, But Did Not Otherwise Prohibit Either Party From Pursuing A Statutory Modification Or Adjustment.
(Response to App. Br. 25)

The child support order entered on September 16, 2011, provides that "beginning March, 2015 the child support shall be reviewed." (CP 19) Based on a narrow reading of this provision, the wife complains that the trial court "attempted to prohibit child support adjustments" beyond the time allowed under the statute. RCW 26.09.170(7)(a) (child support orders may be adjusted once every twenty-four months based upon changes in the income of the parents without a showing of substantially changed circumstances); see also RCW 26.09.100(2) (the court may "require periodic adjustments or modifications of support more frequently than the time periods established pursuant to RCW 26.09.170"). But the order does not purport to limit either party's ability to pursue adjustment or modification of child support if circumstances warranted it under the statute. RCW 26.09.170(7)(a) (changes in

income); RCW 26.09.170(5)(a) (substantially changed circumstances). Instead, the “review” period was established consistent with the end of the wife’s spousal maintenance award, when the parties’ incomes would change (CP 11) warranting an adjustment under RCW 26.09.170(7)(a).

A trial court is presumed to know the law and to apply it correctly. See *Douglas Northwest, Inc. v. Bill O'Brien & Sons Const., Inc.*, 64 Wn. App. 661, 681, 828 P.2d 565 (1992). The wife points to nothing in the record to support her argument that the trial court “attempted” to trump the provisions of RCW 26.09.170 or RCW 26.09.100 by requiring that child support be reviewed upon the termination of the wife’s spousal maintenance. To the extent that the trial court’s inclusion of this review period made the order ambiguous as to its intention, the order should be construed to effect a proper application of the law. See *Callan v. Callan*, 2 Wn. App. 446, 449, 468 P.2d 456 (1970) (in interpreting an ambiguous judgment “it is not to be assumed that a court intended to enter a judgment with contradictory provisions and thus impair the legal operation and effect of so formal a document”).

3. The Trial Court's Award Of "Undifferentiated Support" Was Designated As "Child Support" For "Tax Planning Purposes" And Was Not Taxable To The Wife. (Response to App. Br. 31-33)

The wife complains that the undifferentiated support awarded to her was taxable to her, and the trial court erred because "the tax effect was not calculated as a deduction into her net income for child support purposes." (App. Br. 33) It was not necessary to deduct taxes from her support award because the award was in fact not taxable to her. For the first year after final orders were entered, the trial court awarded the wife \$6,000 per month in "undifferentiated support" that "shall be considered child support for tax planning purposes." (CP 11, 16, 17) In other words, the wife was not required to pay taxes on the amount received, and the husband could not deduct the payment from his income. 26 U.S.C.A. § 71 (c)(1) ("any payment which the terms of the divorce or separation instrument fix (in terms of an amount of money or a part of the payment) as a sum which is payable for the support of children of the payor spouse" is not included in the payee's gross taxable income).

The trial court made its intention clear that the wife not pay taxes on the first year of support by stating that only the amounts

paid to the wife as maintenance “after the final undifferentiated family support payment has been made” is “fully taxable to her and full[y] deductible to husband beginning September 1, 2012.” (CP 11) The trial court’s order clarifying the Decree of Dissolution did not change the character of the support awarded to her in the first year. (See CP 179)² Instead, the trial court merely recognized that because the husband would bear the full tax obligation during the first year, then the wife’s support obligation should be based on his “net” income after taxes. (See CP 179)

The wife’s argument on appeal appears to be based on the fact that the trial court described the support awarded to her as “undifferentiated support.” Citing **Bay v. C.I.R.**, 68 T.C.M. (CCH) 396 (1994), the wife states that “in the case of unallocated or undifferentiated support for a child and children, all of the support is taxable to the wife and deductible by the husband.” (App. Br. 32) But **Bay** also states that if a monthly payment is “specifically earmarked as child support, the payment does not constitute deductible alimony.” **Bay v. C.I.R.**, 68 T.C.M. (CCH) 396 * 4

² Because the trial court’s order clarifying the decree did not make the support taxable to the wife, the wife’s complaint that the trial court “modified” rather than “clarified” the decree fails. (App. Br. 34)

(1994) (citing *Grummer v. C.I.R.*, 46 T.C. 674 (1966)). Here, the undifferentiated support payments are “specifically earmarked” as child support, and thus not taxable to the wife. (See CP 11: “the entire amount shall be considered child support for tax planning purposes”; CP 16: “the wife will not receive a separate maintenance transfer payment during the first 12 months” when undifferentiated support is paid)

As with the review provision in the Order of Child Support (*supra* § III A(2)), the wife’s challenge on appeal is based not on the actions of the trial court but on her incorrect interpretation of the decree.

4. The Wife’s Challenges To The Trial Court’s Calculation Of The Parties’ Incomes Are Harmless When The Trial Court Deviated Above The Child Support Schedule To Award Support Greater Than The Presumptive Amount Regardless Of The Parties’ Incomes.

The trial court determines child support based on the “standard calculation,” a figure that is the “presumptive amount of child support owed as determined from the child support schedule.” RCW 26.19.011 (8). The trial court has discretion to deviate from the “presumptive amount” to order a parent to pay more or less than the standard calculation. See RCW 26.19.075; *Marriage of*

Wayt, 63 Wn. App. 510, 512-13, 820 P.2d 519 (1991). And in cases where the parents' combined monthly net income exceeds \$12,000, the court may exceed the presumptive amount of support set for combined monthly net incomes of \$12,000. RCW 26.19.065(3).

On appeal, the wife makes several arguments regarding the trial court's calculation of the parties' incomes, complaining that the trial court allocated "too much" income to her and "too little" income to the husband. However, what the wife does not complain about is the actual amount of child support awarded to her - nor can she, since it is greater than the presumptive amount that the husband would have been required to pay regardless how the trial court calculated income. Therefore, any alleged errors in the trial court's calculation of the parties' incomes are harmless.

Here, the trial court found that the parties' combined monthly net income for purposes of child support was \$9,989.72. (CP 24) The total "basic child support obligation"³ for the parties' two children is \$2,042 (CP 24) – this is the total amount owed by *both* parents for the support of the children; each parent's

³ The "basic child support obligation" is the monthly child support obligation as determined from the child support schedule based on the parties' combined monthly net income and the number of children for whom support is owed. RCW 26.19.011(1).

obligation is based on their proportionate share of the combined net income. If the trial court had found that the parties' combined monthly net income was \$12,000 or greater, the total "basic child support" for both children is \$2,330. *See* RCW 26.19.020.

For the first year, the wife was awarded \$6,000 per month as "undifferentiated support," which for tax planning purposes was designated entirely as child support and tax-free to the mother. (CP 11, 16, 17) Thus, regardless of the trial court's determination of the parties' incomes, the transfer payment exceeded the standard calculation.

After the first year, the wife was awarded \$4,000 as spousal maintenance, plus child support. Once the wife receives spousal maintenance, the presumptive transfer payment for the husband's child support obligation is \$1,296.67 – his proportionate share of the basic child support obligation based on the income found by the trial court. (CP 25) And had the trial court found that the parties' combined monthly net income was \$12,000 or greater, then the husband's child support obligation would be \$1,675.27. (CP 500)⁴

⁴ This figure is based on the wife's proposal that the husband's monthly net income should have been determined to be \$9,444.14. (*See* CP 500)

In either event, the trial court awarded the wife \$2,000 in child support – an increase over the standard calculation. (CP 16)

a. The Trial Court Did Not Include Child Support Received By The Wife As Income For Purposes Of Calculating Child Support. (Response to App. Br. 25-27, 28-29)

The wife complains that the trial court “erred by including child support Tami was to receive as income when calculating child support.” (App. Br. 28) As a preliminary matter, this argument only relates to the first year of child support, because it is evident from the worksheets attached to the child support order that child support is not included as income to the mother for the following years. (CP 24) But since the wife does not challenge the \$6,000 per month support award, any error in calculating her income for the first year is harmless.

To the extent that the wife complains that allocating the child support awarded to her as income impacted her proportionate share of the cost of extraordinary expenses (*See* App. Br. 25-27), it was within the trial court’s discretion to deviate and order the wife to pay one-half of the children’s expenses during the first year while she is receiving \$6,000 per month as support. (CP 18) The trial court deviated from the standard calculation for “tax planning

purposes” to allow the wife to receive what might otherwise be maintenance, tax-free, while leaving the husband with the entire tax obligation. (CP 16-17) When a trial court deviates from the standard calculation it has discretion to also re-apportion the percentage that each parent pays for extraordinary expenses. ***Marriage of Casey***, 88 Wn. App. 662, 668, 967 P.2d 982 (1997) (“Where, as here, the court finds grounds to deviate from the basic obligation, it follows that the court can also allocate transportation costs differently”). The trial court thus did not abuse its discretion in requiring the wife to pay one-half of the children’s extraordinary expenses for the first year or in a different proportionate than her share of the combined monthly net income in the later years because regardless of the parties’ incomes, the trial court deviated above the standard calculation.

b. The Trial Court Did Not Abuse Its Discretion In Calculating Child Support By Allocating Spousal Maintenance Awarded To The Wife As Income.
(Response to App. Br. 29-31)

The wife cannot complain that the trial court included spousal maintenance awarded to her as income for purposes of child support when she proposed the same. The wife argues that “at the time the trial court entered the Child Support Order, Tami had

not received the support that was intended for her. The trial court should have, therefore, not included that amount in her income.” (App. Br. 29) But the wife’s own proposed child support order included the wife’s award of spousal maintenance as income. (CP 490, 500) In her proposed worksheets, the wife lists “Maintenance Received” of \$4,000 as part of her gross income. (CP 500) And in the body of her proposed child support order, the wife lists \$3,692 as her “Actual Monthly Net Income,” which is her maintenance award less taxes. (CP 490, 500) The wife cannot complain about an alleged error at trial that she set up herself. ***Dependency of K.R.***, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). To the same effect, this court should reject the wife’s argument when she never presented it to the trial court. RAP 2.5(a); ***Lindblad v. Boeing Co.***, 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (declining to review issue, theory, argument, or claim of error not presented at the trial court level).

In any event, the trial court did not abuse its discretion in including maintenance awarded to the wife as “income” for purposes of calculating child support. The wife relies entirely on Division Two’s decision in ***Marriage of Wilson***, 165 Wn. App. 333, 267 P.3d 485 (2011), which was decided two months after the

trial court entered its final orders, for her argument that spousal maintenance “ordered, but which Tami did not receive” cannot be included as income. (App. Br. 29, 30-31) In **Wilson**, Division Two held that it was within the trial court’s discretion to not include maintenance awarded as income for purposes of calculating child support. 165 Wn. App. 342, ¶ 20. Division Two noted that there was an ambiguity between RCW 26.19.090, which directs the trial court to calculate the need for spousal maintenance “only *after* it has determined the parties’ child support obligations” and RCW 26.19.001, which states that child support orders “provide additional child support *commensurate with the parents’ incomes.*” **Wilson**, 165 Wn. App. at 342-43, ¶ 22, 23 (emphasis in original).

The “conflict” noted by Division Two was that RCW 26.09.090 required the court to calculate maintenance after child support is determined, whereas RCW 26.19.001 required the court to calculate child support after the parties’ incomes (including spousal maintenance) are established. In order to affirm the trial court’s decision, Division Two stated, “*in this instance*, we resolve the ambiguity to hold that the trial court did not abuse its discretion in not including the maintenance in the child support worksheets.” **Wilson**, 165 Wn. App. at 343, ¶ 23 (emphasis added).

“In *this* instance,” however, any ambiguity in the statutes should be resolved to affirm the trial court’s discretion to *include* maintenance awarded to the wife as income. First, there is no dispute that the wife in fact “received” temporary spousal maintenance of \$4,000 when the child support order was entered. Second, there is no dispute that some portion of the \$6,000 support payment awarded to her in the first year after the order was entered was in fact for her support, although termed “child support” for tax purposes. Finally, the wife does not claim that she would have received more child support had the trial court not included maintenance as part of her income – nor can she. Even if the wife had zero income allocated to her, she would still be responsible for \$100 of the basic child support obligation⁵, leaving the father with a support obligation of \$1,942 – still less than he is already ordered to pay.

c. The Trial Court Did Not Abuse Its Discretion In Determining The Father’s Income And Excluding A Bonus That Was Not Guaranteed From That Calculation. (Response to App. Br. 22-24)

Regardless whether the trial court included the husband’s CBI bonus and stock awards in his income for purposes of

⁵ RCW 26.19.065(2) (a parent has a presumptive minimum support obligation of \$50 per child).

calculating child support, it had discretion to deviate from the standard calculation if the husband had “nonrecurring income.” RCW 26.19.075(1)(b). In fact, the trial court deviated upwards to award the wife greater child support than the standard calculation. This is true even if the CBI bonus and stock awards were included in the husband’s income. This is evidenced by the temporary order of child support, which included both the CBI bonus and stock awards in the husband’s gross income, and which resulted in a presumptive transfer payment of \$1,735.85. (Sub no. 42, Supp. CP ____; See RP 568) The wife’s own proposed order of child support, which also included the CBI bonus and stock awards in the husband’s proposed income, established a presumptive transfer payment of \$1,675.27. (CP 500) Thus, regardless whether the trial court included these additional potential sources of income, the trial court’s award still exceeded the amount that he would have otherwise been ordered to pay.

Even if the trial court erred in calculating the husband’s income, remand is not necessary to re-determine the transfer payment because it is evident that the trial court had already considered the parties’ resources and the children’s needs when calculating child support. See *Marriage of Ayyad*, 110 Wn. App.

462, 470-71, 38 P.3d 1033 (2002) (holding that the trial court need not reconsider the transfer payment on remand when it miscalculated the father's income because the wife failed to show that the transfer payment did not meet the children's needs), *rev. denied*, 147 Wn.2d 1016. Here, the trial court acknowledged that even if it considered the CBI bonus and stock awards that child support would be "off the schedule," and that the amount of child support would fall within its discretion – which it then exercised to award more than the presumptive amount for parents' combined monthly net income. (RP 890-91) The trial court was well aware of the parties' incomes and resources, and found that \$2,000 for child support was appropriate because "it's what's required" for the children. (CP 144)

B. Any Error By The Trial Court In Making Maintenance Non-Modifiable Was Invited By The Wife When She Included This Provision In Her Proposed Final Orders. (Response to App. Br. 19-22)

The wife cannot complain that the trial court made maintenance non-modifiable when it was she who initially proposed this provision when she presented her proposed final orders. (*See* CP 485) The husband agreed with this provision by incorporating it into his own proposed final documents, which was

ultimately accepted by the trial court. (See CP 11, 485, 553) Under the doctrine of invited error, a party cannot complain about an alleged error at trial that she set up herself. **Dependency of K.R.**, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995).

Further, the wife made no substantive attempt to bring this purported error to the attention of the trial court. The wife raised this issue for the first time in her reply in support of her proposed final papers, buried in an 8-page table purporting to “show[] the difference” between her proposed final orders and the husband’s proposed orders. (CP 206-13) In it, she claims that one “difference” is the inclusion of the non-modifiable provision for maintenance. (CP 208) But in fact, there was no “difference,” as it was the wife who originally proposed the provision, and the husband’s proposed final documents reflected his acceptance of that provision. (See CP 485, 553) There was no hearing on the presentation of the final documents, and the wife did not file a motion for reconsideration to draw the trial court’s attention to this purported error.

Absent any indication in the record that appellant advanced this particular claim in any substantive fashion at trial, it cannot be considered on appeal. RAP 2.5(a); **Lindblad v. Boeing Co.**, 108

Wn. App. 198, 207, 31 P.3d 1 (2001) (declining to review issue, theory, argument, or claim of error not presented at the trial court level). The purpose of this rule is to give the trial court an opportunity to correct alleged errors, thereby avoiding unnecessary appeals and retrials. ***Demelash v. Ross Stores, Inc.***, 105 Wn. App. 508, 527, 20 P.3d 447, *rev. denied*, 145 Wn.2d 1004 (2001). Had the wife made any substantive attempt to advance this argument that she now makes on appeal, the trial court very well may have eliminated the non-modifiable provision, if indeed the wife did not “agree” to this provision. Instead, the parties are now forced to litigate this issue in this court at great expense.

Even if the trial court erred in making the maintenance award non-modifiable, reconsideration of the maintenance award on remand is not necessary. (App. Br. 21-22) The wife’s reliance on ***Marriage of Short***, 71 Wn. App. 426, 859 P.2d 636 (1993), *aff’d in part, and reversed on other grounds*, 125 Wn.2d 865, 890 P.2d 12 (1995), for the proposition that remand *must* include reconsideration of the amount and duration of the maintenance award is misplaced. In ***Short***, the wife challenged not only the fact that maintenance was made non-modifiable, but also the

maintenance award itself.⁶ The trial court had awarded the wife maintenance of \$750 per month for a year, with the option of the husband paying maintenance in one lump sum and ordered that the “maintenance award would be nonmodifiable by either party for any reason.” *Short*, 71 Wn. App. at 433. On remand, the trial court was directed to “reconsider the amount and duration of the maintenance award.” *Short*, 125 Wn.2d at 876.

Here, the wife does not challenge the amount or duration of the maintenance award. Further, as she points out, when the trial court established its maintenance award in its oral ruling, it did not order that it be non-modifiable. (App. Br. 21) In other words, the trial court did not establish the amount and duration of the maintenance award based on it being non-modifiable. Therefore, in the event of remand, the trial court should only be directed to vacate the provision that maintenance be non-modifiable. The amount and duration of the award should remain as originally awarded.

⁶ The wife’s challenge to the maintenance award itself was addressed in the unpublished portion of the opinion, but was referenced in the published decision. See *Short*, 71 Wn. App. at 426, fn. 1.

C. The Trial Court Had Jurisdiction To Impose A Rental Obligation On The Wife Post-Decree When She Refused To Timely Vacate The Residence Awarded To The Husband. (Response to App. Br. 33-34)

The trial court retained jurisdiction to consider post-decree issues (CP 13), and it did not abuse its discretion in ordering the wife to pay “reasonable rent” to the husband for the 1 ½ months that she remained in the family residence after it was awarded to the husband. *See Lindemann v. Lindemann*, 92 Wn. App. 64, 78, 960 P.2d 966 (1998) (it is within the court’s discretion to determine whether rent should be paid for one party’s use of real property after the relationship has ended), *rev. denied*, 137 Wn.2d 1016 (1999); *but see Marriage of Nuss*, 65 Wn. App. 334, 338, 828 P.2d 627 (1992) (it was an abuse of discretion to retroactively order a rental contribution by the wife as an offset against other property for the time that she occupied the community property while the dissolution was pending when both parties lived on the property). Under the circumstances, it was well within the trial court’s discretion to order the wife to pay rent when during this period the husband paid the mortgage, spousal maintenance and child support to the wife, and was responsible for his own rental housing expenses incurred because the wife refused to vacate the

premises she affirmatively chose not to accept as part of the property distributed to her.

The trial court's order requiring the wife to pay reasonable rent to the husband did not "modify" the decree as the wife claims. (App. Br. 34) The trial court did not offset the wife's award for the rent owed to the husband, and thus did not "alter[] the 60/40 property division originally ordered by the trial court" as argued by the wife. The trial court's decision simply enforced its decree, which awarded the residence to the husband when the wife opted not to take it. See *Marriage of Burrill*, 113 Wn. App. 863, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003).

In *Burrill*, the husband was awarded the family residence in the decree. After the decree was entered, the wife vacated the home but removed furniture, appliances, and left it in a "state of filth." The trial court awarded the husband a judgment against the wife for the damage. This court affirmed the court's discretion in entering its "postjudgment award" because "these problems with the home upon transfer to [the husband] is an enforcement of the decree, over which the trial court had jurisdiction." *Burrill*, 113 Wn. App. at 873-74. Likewise here, the trial court's order awarding the husband post-decree rent is merely enforcing the decree.

D. The Trial Court Had Jurisdiction To Enter Its Order Clarifying The Decree Even Though The Appeal Of The Decree Was Pending Because The Parties Obtained This Court's Permission Under RAP 7.2.
(Response to App. Br. 35)

The wife's complaint that the trial court could not enter its order clarifying the decree is meritless. When the trial court initially ruled on the Motion to Clarify, it recognized its limited jurisdiction because of the pending appeal and ordered that the "parties shall jointly move the Court of Appeals for jurisdiction to enter this order." (CP 179) On January 30, 2012, the wife moved in the Court of Appeals for relief under RAP 7.2(e) to allow the trial court to determine personal property issues that were also left pending under the November 2, 2011 Order. In responding to that motion, the husband agreed that RAP 7.2(e) relief should be granted to "resolve the remaining issues under its September 16, 2011 Decree of Dissolution, *including formal entry of its November 2, 2011 ruling clarifying the decree.*" (February 21, 2012 Response) On March 23, 2012, Commissioner Mary Neel of this court granted the motion under RAP 7.2(e).

Further, no prejudice arose even if the order was entered prematurely. The trial court retained jurisdiction to resolve any post-dissolution disputes (CP 13), and the husband filed his Motion

to Clarify over one week before the wife filed her Notice of Appeal. (See CP 33, 82) Almost immediately after the clarifying order was entered, the wife filed a separate Notice of Appeal of that order. (CP 383) The record for the original appeal had not yet been perfected, and the two appeals were consolidated without objection by the husband.

The policy behind RAP 7.2(e) is that “the appellate court must decide matters based upon the record before the trial court, the consideration of events occurring during the pendency of an appeal would interfere with its ability to conduct a fair and orderly review.” *Inman v. Netteland*, 95 Wn. App. 83, 89, 974 P.2d 365 (1999); see *Marriage of Grimsley-LaVergne and LaVergne*, 156 Wn. App. 735, 742, 236 P.3d 208 (2010) (because the entered findings and judgment did not prejudice the issues in this appeal, the trial court did not violate RAP 7.2(e) when it entered its order and judgment), *rev. denied*, 170 Wn.2d 1030 (2011). The trial court’s order both clarifying an ambiguity in the decree and the child support order, and enforcing the decree, did not “interfere with [this court’s] ability to conduct a fair and orderly review.” The wife’s complaint based on RAP 7.2 is utterly meritless, and

reflective of the “so what?” consequence of virtually every issue she raises on appeal.

E. This Court Should Deny The Wife’s Request For Attorney Fees. If Any Fees Are Awarded It Should Be To The Husband For Having To Respond To This Appeal. (Response to App. Br. 35-36)

The wife does not have any need for an award of attorney fees. After a less than nine-year marriage, she was awarded 60% of the community property, maintenance for 4.5 years⁷ – more than one-half of the term of the marriage – and child support above the standard calculation. The wife can pay her own attorney fees for bringing this appeal, which raises a multitude of technical and largely academic issues based on alleged errors that are either harmless or that she invited herself. If any party should be awarded attorney fees, it should be the husband, who is forced to respond to this appeal that unnecessarily continues the litigation at great expense. *Marriage of Greenlee*, 65 Wn. App. 703, 711, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992).

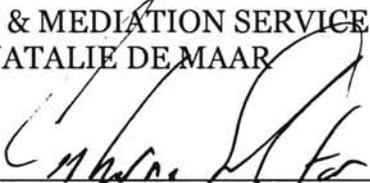
⁷ This includes the one year of temporary maintenance she received while the dissolution was pending, while she made no effort to find employment.

IV. CONCLUSION

This court should affirm the trial court's orders and deny the wife's request for attorney fees.

Dated this 15th day of October, 2012.

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DECLARATION OF SERVICE

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

That on October 15, 2012, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 15th day of October, 2012.



Tara D. Friesen