

72427-4

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No. 72427-4-I

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

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SCOTT J. McGOWAN

Appellant,

vs.

YELENA V. McGOWAN

Respondent.

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

Table of Authorities ..... ii

I. Argument ..... 1

    1. Summary..... 1

    2. Correct Standard Calculation Does Not Cure Denial of Deviation..... 1

    3. Denomination of “Insufficient Funds” Language Not Material..... 7

    4. Unrelated Findings of Fact Do Not Support Denial ..... 8

    5. Other Reasons for Denial Unsupported by the Record/Authority..... 9

    6. *Schnurman* Inapposite..... 11

    7. No Deviation To Support Disproportionate Share of Special Child Rearing Expenses.....

    8. Child Support Must Be Allocated Between the Children.....

    9. Attorney Fees Should Be Denied.....

II. Conclusion.....

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>State v. Braham</i> , 67 Wn. App. 930, 939, 841 P.2d 785 (1992)	3
<i>Willener v. Sweeting</i> , 107 Wn.2d 388, 394, 730 P.2d 45 (1986) .....	7
<i>In re Marriage of Schnurman</i> , 178 Wn. App 634, 316 P.3d 514 (2013) .....	11, 12
<i>In re Marriage of Casey</i> , 88 Wn. App. 662, 667, 967 P.2d 982 (1997) .....	12, 13
<i>In re Marriage of Pollard</i> , 99 Wn. App. 48, 56-57, 991 P.2d 1201 (2000) .....	14
 <u>Statutes</u>	
RCW 26.19.071 .....	1
RCW 26.19.080 .....	2, 12
RCW 26.19.011 .....	2
RCW 26.19.075 .....	2, 7, 8, 10
RCW 26.09.006 .....	13
RCW 26.18.220 .....	13
RCW 26.19.020 .....	13

## I. ARGUMENT

1. **Summary.** Yelena defends the denial of deviation in substantial part by asserting that a) the child support worksheets overstate her income and understate Scott's income; and b) that her expenses are more and Scott's are less than the record reflects. She also argues that Scott does not have authority for his positions. Finally, she misstates Scott's positions on appeal and selects out of context portions of the record about the parties' parenting dispute in an attempt to color the Court's view of Scott. As set forth below, Yelena misstates the record, leaving no bases for her positions. She did not cite authority that would cure the trial court's errors. Finally, the parties' mutual allegations and parenting disputes are not relevant to the financial issues on appeal.

2. **Correct Standard Calculation Does Not Cure Denial of Deviation.** Yelena argues that because the standard calculation of child support is correct, there is no error regarding deviation. Brief of Respondent at 7. But the standard calculation is only the first step in determining an award of child support in the context of a request for deviation. The standard calculation is determined under Chapter 26.19 RCW, where a trial court sets presumptive child support by first determining the parents' monthly net incomes. RCW 26.19.071. Then, it combines the two net incomes and looks to the economic table to

determine what the basic child support obligation is for each child. RCW 26.19 Appendix (Economic Table). Each parent's respective child support obligation is allocated based upon that parent's *pro rata* share of the combined net incomes. RCW 26.19.080. The standard calculation is the presumptive amount of child support owed as determined by the child support schedule before any consideration of a deviation. RCW 26.19.011(8). As Yelena argues, the standard calculation was correctly determined in this case. But that does not end the question.

When parents share a 50/50 residential schedule, there is no primary residential parent. Both parents must provide a home, utilities, food, transportation, etc. for the children. In that case, among others, the legislature has provided for a deviation from the standard calculation to more equitably apportion the support obligation between the parents. RCW 26.19.075(1)(d). When a parent seeks a deviation based upon the residential schedule, the court must consider evidence of increased expenses of one parent, and decreased expenses, if any, to the other parent. RCW 26.19.075(1)(d). The only limitation on the court is that it may not deviate if it would result in insufficient funds in the receiving parent's household. RCW 26.19.075(1)(d).

In this case, the trial court accepted the stipulation of the parties regarding their respective incomes. II RP 8 at lines 19-20; CP 892. There is no dispute that the standard calculation is \$1,533 per month for two

children. But where the court erred was in its treatment of the request for deviation. The trial court entered an erroneously low income for Yelena. CP 883. Then, it concluded that a deviation would result in insufficient funds in her household and denied it. CP 884.

Yelena claims that such an error is merely typographical and constitutes harmless error. Brief of Respondent at 8. An error is not harmless if, within reasonable probabilities, the outcome of a trial would have been materially affected if the error had not occurred. *State v. Braham*, 67 Wn. App. 930, 939, 841 P.2d 785 (1992). In this case, taking the evidence in a light most favorable to Yelena, the trial court's error goes directly to the outcome of its decision regarding a deviation.

Regarding incomes, the parties agreed and the trial court accepted that Yelena's net income was \$4,928 per month and Scott's net income was \$7,522 per month. CP 892. Although Yelena tries to argue that her income is actually less, her attempts to reduce it now rely on misstatements of the record. Specifically, her counsel did not stipulate to a higher income because it fluctuated based upon when clients needed care. Brief of Respondent at 4. Instead, Yelena testified that she was earning more income than her older paystubs showed at Exhibit 9 because she had more hours and her current company paid \$38/hr versus the \$23.50/hr she had made earlier. II RP 76, lines 19-24. Moreover, she specifically stated that since she was hired by this company, work had

been steady and the company had often given her overtime. II RP 76, lines 24-25; 77, lines 1. Her income was greater because it had, in fact, increased.

Contrary to Yelena's assertion in her brief, Scott did not acknowledge that her income was less than she stipulated it to be. Yelena's citation refers to closing argument, which is not evidence. Substantively, the portion of the argument she cites shows counsel for Scott referring first to outdated paystubs Yelena had provided prior to trial and then to the updated income figure she stipulated to after producing her most current paystubs. II RP 160, lines 14-25. Her assertion that the trial court's error in her income was "invited" by Scott lacks any citation to authority or any evidence in the record. Brief of Respondent at 9.

Ultimately, Yelena did not challenge the trial court's acceptance of her net income of \$4,928 per month and it is a verity on appeal.

As to Scott's income, Yelena incorrectly asserts that her trial counsel noted that his income was higher than the stipulated figure. What her counsel actually said was that his income on the worksheets was "slightly off" and "not accurate" but that it made such a "*de minimus* difference" there was no reason not to stipulate to it. II RP 7, lines 2-3; II RP 8, lines 13-15. She did not allege that it was higher and Yelena stipulated to the income as set forth on the worksheets. Scott's income

was not challenged and it is a verity on appeal. Defending the denial of deviation based upon incomes not set forth in the record is not supported.

As to expenses, Yelena describes in great length her increased expenses to justify denial of a deviation. Once again, there is no disagreement of the parties regarding her increased expenses. Yelena offered a financial declaration at trial that listed her monthly expenses at \$3,943 per month. Exhibit 100, p. 1. When counsel for Scott objected at the beginning of trial that she had not provided an updated financial declaration in compliance with the Order on Pretrial Conference, counsel for Yelena stated, “As far as the financial declaration, the reason it’s not been updated is because there’s been no change in circumstances. Her expenses are the same; her income is the same.” I RP 14, lines 7-10. She made this statement knowing that the parties had already agreed to a 50/50 residential schedule. Thus, going into trial, Yelena’s expenses were as set forth in Exhibit 100: \$3,943 per month.

One day later, after producing an updated paystub and stipulating to a higher income, she then testified to increased expenses as well. II RP 87-91. As Yelena asserts in her brief, the trial court tallied those increased expenses to be, including increased rent, \$1,620 per month. II RP 161, p. 12-13. Scott accounted for this in his opening brief.<sup>1</sup> Opening Brief at 5.

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<sup>1</sup> Scott actually tallied her increased expenses at a higher figure of \$1,635 per month and set it forth in his opening brief.

Thus, the evidence of her monthly living expenses, viewed in a light most favorable to Yelena, are \$3,943 plus \$1,635 or \$5,578 per month. The monthly shortfall between her net income of \$4,928 and her expenses of \$5,578 is \$650 per month. Yet the trial court ordered child support of \$1,533 on the finding that if she received less than that, she would have insufficient funds in her household.

Under the order, after payment of \$1,533 in child support, Yelena is left with \$6,455 in net income and Scott is left with \$5,989 in net income to support himself and the children in his household. CP 892. Yelena has more income than Scott despite the fact that the parties equally share the care of their children and Scott's expenses are greater than Yelena's. The effect of the trial court's order is that it leaves Scott with insufficient funds for himself and the children in his household.

Yelena claims that any error is harmless on the allegation that Scott's expenses decreased. Brief of Respondent at 15. But her citation to the record in support of her assertion, is actually her own testimony where she testified to her increased expenses. II RP 87-91. She did not challenge Scott's household living expenses. Scott's monthly expenses are set forth in the financial declaration he prepared in compliance with the Order on Pretrial Conference, based upon the 50/50 parenting plan the parties had agreed to. CP 1093-1099. Those expenses include the mortgage payment for the family home in which the children reside and do not include any

maintenance payment to Yelena. CP 1090-97. His expenses total \$7,600 per month before payment of attorney fees. CP 1097. Yet, after payment of \$1,533 per month in child support, Scott has only \$5,989 to meet those expenses. The shortfall with the children in his household and the trial court's error in failing to make any deviation is not harmless.

**3. Denomination of “Insufficient Funds” Language Not Material.** Yelena mistakenly claims that Scott assigned error to whether the “insufficient funds” language in the order of child support is a conclusion of law versus a finding of fact. Brief of Respondent at 10. There is no error of the trial court on this issue. Rather, the difference is in how the appellate court treats the language on review. A conclusion of law erroneously described as a finding of fact is reviewed *de novo* as a conclusion of law. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). The corollary is also true: a finding of fact erroneously described as a conclusion of law is reviewed as a finding of fact and a court will look to evidence in the record to support the finding. *Willener*, 107 Wn.2d at 394. The language of “insufficient funds” in an obligee's household functions more appropriately as a statutorily based conclusion of law, which would be supported by findings regarding income and expenses of the parties. *See* RCW 26.19.075(d).

Regardless of the name the Court gives the language at issue, there is neither evidence in the record to support it as a finding of fact nor

findings of fact regarding income and expenses that would support it as a conclusion of law. The undisputed evidence in the record is that a) the award of child support without deviation provides greater income to Yelena than to Scott; b) it provides an excess of income to Yelena over her expenses; and c) it leaves a shortfall of income to Scott to meet the expenses of the children in his home.

**4. Unrelated Findings of Fact Do Not Support Denial.** Yelena argues that denial of deviation is appropriate because the trial court found that the children were in need of support. Brief of Respondent at 14. But that finding isn't relevant to the issue of deviation. Both parents owe a duty of support to their children, which must be equitably apportioned between them. RCW 26.19.001. The trial court's finding in this case that the minor children are in need of support simply goes to the requirement that both parents must provide support to their dependent children. CP 901. It does not support an order that denies deviation.

Similarly, Yelena's argument that the trial court made findings about the equitable division of property and liabilities does not support denial of a deviation. Brief of Respondent at 14. When a parent seeks a deviation based upon residential schedule, the court must consider evidence of the increased expenses of one parent, and decreased expenses, if any, to the other parent. RCW 26.19.075(1)(d). There is no reference to the relative net worth of the parties unless a deviation is sought

specifically on that ground. In this case, no deviation was sought on the basis of wealth and indeed, there is none. A division of property and liabilities does not support denial of a child support deviation on the basis of residential schedule.

**5. Other Reasons for Denial Unsupported by the Record/Authority.** Yelena renews her argument that denial of deviation was appropriate on the basis that Scott allegedly won't have a housing cost. Brief of Respondent at 15. Once again, she misstates the record. She claims that Scott testified that he had been living in the family home without paying the mortgage since November 2008. Brief of Respondent at 15. Her cite to the record is Scott's testimony wherein he describes how the family owned two homes; the extent of the damage to one of the houses; that they stopped making payments on the second house in 2008; that the house was eventually foreclosed upon; and that there was a resulting deficiency judgment. I RP 71-79. The failure of the mortgage payment since 2008 related to the house in foreclosure, not the family home. Scott went on to testify that he hoped that the children would continue to reside in the family home with him; but that if he could not negotiate with Bank of America on the family home, then he would have to move and rent someplace locally. II RP 44, at lines 17-23. Yelena cannot justify denial of any deviation on her assertion that Scott will have no housing expense.

Yelena next claims that denial of deviation is supported because Scott contributes to his pension plan. Brief of Respondent at 16. RCW 26.19.071(5)(c) requires that mandatory pension plan payments be deducted from a parent's gross income. In this case, Scott must make mandatory pension contributions. He has no control over it. CP 892. It reduces his net income. The legislature recognized that a mandatory payment decreases a parent's net income and ability to pay support. Scott's mandatory contributions are not a rational basis to deny a deviation and any denial on that basis runs contrary to statute.

Yelena repeats throughout her brief that increased support is necessary to meet the basic needs of the children and to purchase beds for them. *See e.g.* Brief of Respondent at 12. As discussed earlier, the increased housing, food and other basic costs of the children are accounted for in the \$1,620 in increased expenses that make up her total expenses. As to beds, nowhere at trial did she allege that she had not provided beds for the children during the pendency of the proceedings. She did not testify that she needed to purchase beds. II RP 78-79. Dr. Wendy Hutchins-Cook, the parenting plan evaluator, made a home visit to Yelena's home during the pendency of the action as part of her evaluation. CP 1048. She completed a thorough investigation. CP 1046-72. There was no notation that the boys did not have beds to sleep in. CP 1048, 1058.

Even if Yelena had needed to purchase beds, there is no justification for ordering \$900 per month in extra support for that one time purchase.

At most, Yelena asserted what Scott has already conceded: that she needed to move into a two bedroom apartment at a cost of \$1,500 per month. II RP 78, lines 15-17; 79, lines 20-21. As Yelena pointed out in her brief, the trial court included that increased rent into the total increased expenses of \$1,620 per month. II RP 161, p. 12-13. Her increased expenses are already part of the record and, taken in the light most favorable to Yelena, are \$5,578 per month. Where Yelena's income is \$4,928 per month, child support of \$1,533 is not supported where it will leave Scott with less income than Yelena and unable to meet the expenses of the children and him in his household.

**6. *Schnurman* Inapposite.** Yelena argues that this case replicates *In re Marriage of Schnurman*, 178 Wn. App 634, 316 P.3d 514 (2013) and thus demands the same result. She is mistaken. In *In re Marriage of Schnurman*, the parents did share equal residential time and the issue of child support was before this Court. *Schnurman*, 178 Wn. App. at 636-37. But in *Schnurman*, the issue on appeal was different. That is, in *Schnurman*, the father argued that where parents share equal residential time, child support should not be based upon a standard calculation because there is no primary residential parent. *Schnurman*, 178 Wn. App at 638. This Court disagreed and affirmed the trial court's method of

determining support based upon the standard calculation and consideration of deviation. *Schnurman*, 178 Wn. App. at 643. In *Schnurman*, the father did not challenge the trial court's findings that a) his expenses were not significantly increased; and b) that a deviation would result in insufficient funds in the mother's household. 178 Wn. App. at 637. Thus, this Court affirmed the standard calculation.

The facts of this case are very different. Here, the trial court awarded support that left Yelena with more income than Scott under circumstances where her monthly household expenses were less than his. It gave her a \$900 per month surplus, and left Scott with a significant shortfall. The failure of the trial court to make any deviation was an abuse of discretion and it should be reversed.

**7. No Deviation to Support Disproportionate Share of Special Child Rearing Expenses.** Yelena complains that Scott did not support his assignment of error regarding the allocation of special expenses with citation to case law. Brief of Respondent at 18. RCW 26.19.080 expressly provides that health care costs, day care, and other special child rearing expenses "shall be shared by the parents in the same proportion as the basic child support obligation." 26.19.080(2) and (3). That was the statute Scott cited in his opening brief and that is proper citation to authority.

Yelena argues that *In re Marriage of Casey*, interprets the statute to allow a disproportionate sharing of expenses in this case. In *Casey*,

Division Two held that where a trial court deviates from the standard calculation, it may also deviate from the mandatory language of *pro rata* sharing of special child rearing expenses under the statute. *In re Marriage of Casey*, 88 Wn. App. 662, 667, 967 P.2d 982 (1997). But in *In re Yeamans*, this Court made clear that a deviation from *pro rata* sharing of special expenses may only occur where the trial court has also deviated from the standard calculation. *In re Yeamans*, 117 Wn. App. 593, 601, 72 P.3d 775 (2003) (Disproportionate sharing of travel expenses reversed where trial court did not deviate from standard calculation).

In this case, the trial court denied any deviation. It ordered the standard calculation, and then deviated upward to require Scott to pay 62% of special expenses where he was left with less net income after payment of support than Yelena had. This was error and must be reversed.

**8. Child Support Must be Allocated Between the Children.**

Yelena contends that no statute or case requires support to be allocated between children in an Order of Child Support. RCW 26.09.006 requires parties to use mandatory forms developed by the Administrator for the Courts. *See also*, RCW 26.18.220. The mandatory forms are developed to comply with the statutes to which they apply. RCW 26.19.020 sets forth the economic table of support on a per child basis. The resulting mandatory form order of child support sets forth the amount of support to be paid on a per child basis and then totals that support into an aggregate

amount. CP 883. The trial court's failure to properly use the mandatory form was error.

Yelena argues that this is just about the convenience of Scott, but in substance, the issue is material. Absent segregation of the child support amount, any circumstance that would affect the support of one child would require the parties to return to court on a petition for modification. This unnecessarily increases the congestion of the courts and the costs of litigation to the parties. On remand, the amounts of support should be separately allocated to each child and then totaled.

**9. Attorney Fees Should Be Denied.** Yelena's request for fees should be denied. In considering whether to award or deny fees on appeal, a court "must consider the parties' financial resources and the arguable merit of the issues." *In re Marriage of Pollard*, 99 Wn. App. 48, 56-57, 991 P.2d 1201, 1205 (2000).

In this case, Scott has shown with consistent citation to authority and to the record, the errors of the trial court. He has shown that the errors are material. Despite Yelena's motion to strike, he supported his factual statements with ample citation to the record.

By contrast, Yelena consistently misstated the record in her brief. For instance, Yelena claimed in her statement of facts that Scott had wrongly accused her of not providing financial records when she had. Brief of Respondent at 2. But as of the first day of trial, Yelena

acknowledged that she had not complied with the Order on Pretrial Conference that required her to produce updated income information and bank statements. I RP 18, lines 16-22. The only information that was available was older paystubs from December through March that did not show her current income. *Exhibit 9*. The trial court ordered her to update her financial records before she testified. I RP 20, lines 2-6. Then, based on the income information she provided after the first day of trial, new worksheets were prepared based upon Yelena's actual income. II RP 6, lines 13-17. The parties stipulated to the incomes to be used for purposes of child support and the trial court accepted the stipulation. II RP 8 at lines 19-20.

Yelena claims that Scott argued for reduced child support at trial on the basis that it would affect the amount of income he will have when he retires. Brief of Respondent at 15. But her cite to the record shows clearly that in closing argument, Scott's counsel properly argued Scott's age of 59 in support of his proposed property division. II RP 163 at 22-25. Her statement in her brief that Scott seeks to avoid support for his own gain is inflammatory and unsupported by the record or any argument he makes on appeal.

In her statement of facts to this Court, Yelena made irrelevant and inflammatory statements regarding the parties' parenting dispute designed to color the Court's view of Scott. Brief of Respondent at 1. Parenting is

not at issue on appeal and is not relevant here. Scott avoided recitation of those facts in his brief.

But Yelena commenced her brief with a description of Scott that appears to have him falsely gaining parenting advantage over her, with her as the victim. She does not advise the Court that she made her own allegations and that after temporary orders awarding primary care of the children to Scott, she retaliated by filing a petition for order of protection from domestic violence. CP 133, 163-175. She omits the parenting plan evaluator's impressions that both parents were mired in allegations of past misdeeds. CP 1068 (Rpt at p. 21). She does not acknowledge that both parties' respective allegations against each other ultimately were not applicable. CP 1070 (Rpt at p. 23). None of this is relevant to the appeal, but to the extent that it colors the Court's view of Scott on appeal, her statements had to be carefully vetted and rebutted in reply.

At her brief at 19, Yelena stated that her trial attorney noted that Scott's income was higher than the worksheets, but it wasn't worth the attorney fees to fight. II RP 7. There was no mention of the relative attorney fees to dispute the issue. The record reflects no allegation of higher income.

Yelena repeats the unsupported contention that her income was actually less than the child support worksheets indicate (brief of

Respondent at 19), but she has cited no place in the record to support such a position.

Yelena repeats throughout her brief that she needed to purchase beds for the children and uses that as a basis for an additional \$900 per month in child support. But there was no testimony that the boys did not have beds or that she had to purchase any.

In sum, Yelena's brief required significant time to check citations to the record, rebut them, and to provide the Court with the actual context of the record and the case law. Where she increased fees of Scott in the process, she should not be granted fees on appeal.

As to the relative financial resources of the parties, Scott does not have the ability to pay fees. His expenses exceed his income. And under the present orders, Yelena has a greater net income than Scott. She has the greater ability to pay. Her request for fees should be denied.

## **II. CONCLUSION**

The Order of Child Support should be reversed and the matter remanded for further proceedings consistent with the Court's opinion. Yelena's request for fees should be denied.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of August, 2015.

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**CERTIFICATE OF SERVICE**

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

I am employed at Olson & Olson, PLLC. On August 31, 2015, I caused to be delivered the original Reply Brief of Appellant and Certificate of Service to:

Clerk of the Court, Court of Appeals, Division I  
*Via Personal service*

And a true and correct copy of the same to:

Yasmeeen Abdullah  
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9500 Roosevelt Way NE, Suite 301  
Seattle, Washington 98115  
*Via ABC Legal Messenger Service*

Signed at Seattle, Washington this 31<sup>st</sup> day of August, 2015.

A handwritten signature in black ink, appearing to read 'GREG HARDGRAVE', written over a horizontal line.

GREG HARDGRAVE