

73257-9

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Court of Appeals  
Division I  
State of Washington

73257-9

No. 73257-9

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

ANDREW J. AIKEN,

Appellant,

and

TINA M. AIKEN,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE SUZANNE PARISIEN

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Appellant Andrew Aiken is an employee-owner of Sellen Construction. From his ownership interest in Sellen, Andrew receives business income reported on Schedule K-1s in addition to his W-2 wages. To maintain his ownership interest, Andrew must make mandatory promissory note payments to Sellen that reduce the funds available to him from the business income that he receives. The trial court's conclusion that these note payments were not "normal business expenses" under RCW 26.19.071(5)(h), even though they are required "to maintain his source of income," is contrary to this Court's decision in *Marriage of Mull*, 61 Wn. App. 715, 722, 812 P.2d 125 (1991). The trial court erred in refusing to deduct the note payments in calculating Andrew's net income for purposes of child support. As a result, the trial court improperly inflated both Andrew's transfer payment and his proportionate share of extraordinary expenses.

The trial court also erred by requiring the parents to pay for the cost of any activities recommended by the son's school or healthcare providers because their parenting plan grants the parents the right to jointly decide issues related to the son's education and health, including in which activities to enroll him. Finally, the trial

court erred in ordering the parents to share in the cost of “respite care” in each parent’s home. A parent should not be required to subsidize the other parent’s choice to utilize a babysitter to give the parent “time off” during her residential time.

This Court should reverse, and remand with directions to the trial court to deduct Andrew’s mandatory note payments from his gross income in calculating child support and to vacate the provisions of the child support order requiring the parents to share in the cost of activities recommended by the son’s school or healthcare providers absent the parents’ agreement and to pay a portion of the cost for respite care in the other parent’s home. This Court should also deny respondent Tina Aiken’s request for attorney fees.

## II. REPLY TO ARGUMENT

### A. **The trial court erred as a matter of law in concluding that the father’s note payments were not “normal business expenses” under RCW 26.19.071.**

The interpretation of a statute is a question of law that is reviewed de novo. *Parentage of Fairbanks*, 142 Wn. App. 950, 955, ¶ 15, 176 P.3d 611 (2008). RCW 26.19.071(5)(h) mandates that the trial court deduct normal business expenses: “the following expenses *shall* be disclosed and deducted from gross monthly income to

calculate net monthly income: [ ] normal business expenses.” (*emphasis added*) Although the Legislature has not defined “normal business expense,” this Court has: “When a parent is required to make capital contributions in order to maintain his or her income and when such contributions are not made to evade greater support obligations, those contributions qualify as ‘normal business expenses.’” *Marriage of Mull*, 61 Wn. App. 715, 722, 812 P.2d 125 (1991).

The question in this case is whether promissory notes that Andrew must pay to maintain his income from his ownership interest in Sellen Construction (“Sellen”), where he is employed as Chief Financial Officer, are “normal business expenses” under RCW 26.19.071 that the trial court was required to deduct. This is a question of law that this Court reviews *de novo*.

The trial court’s decision to deny Andrew’s request to deduct the note payments from his income was not one in which it had discretion. (Resp. Br. 15) This was not a case where the parties disputed whether the deduction of certain normal business expenses was justified. *See* RCW 26.19.071(5)(h) (“Justification shall be required for any business expense deduction about which there is disagreement”). Nor has Tina ever claimed that Andrew’s note

payments were made to evade his obligation to the children. Thus, the question is not whether the trial court properly exercised its discretion in denying Andrew the deduction, but whether the note payments were normal business expenses, and not “voluntarily incurred debt” as the trial court concluded. (CP 240) Because whether Andrew’s note payments are “normal business expenses” under RCW 26.19.071(5)(h) is a question of law, this Court should review this issue *de novo*.

- 1. To maintain his business income from Sellen, the father must make contractual note payments. As a result, these note payments should be deducted from the father’s gross income in calculating child support.**

Despite Tina’s attempts to obfuscate the issue, Andrew’s note payments are exactly what this Court described in *Mull* – capital contributions made to maintain his business income from a company of which he is both an owner and employee. 61 Wn. App. at 722. If Andrew fails to make these mandatory note payments, he will almost immediately lose this source of income. (CP 1247-48) In other words, to earn the income on which Andrew’s child support obligation is based, he must first make the note payments. Therefore, the payments are normal business expenses that the trial

court must deduct from the Andrew's gross income under RCW 26.19.071(5)(h) and *Mull*, before calculating child support.

As she did below, Tina misrepresents the facts in *Mull* and tries to distinguish this case by making the misleading argument that in *Mull* the father was required to answer "capital calls." (*See* Resp. Br. 1, 22, 23) But nowhere does *Mull* mention "capital calls" or that the contributions the father made were required for the law firm or building partnership "to remain in business." (Resp. Br. 23) Instead, *Mull* specifically dealt with the father's "capital contributions" to the law firm and building partnership and his initial "buy-in" to those partnerships. 61 Wn. App. at 721. This is exactly what we are dealing with here. Andrew agreed to make his "buy in" payments to Sellen over a ten-year period, and as a result must make mandatory contractual note payments to maintain his interest in the business and the associated income.

Tina claims that these note payments are "debts voluntarily assumed" and the fact the notes "must be paid off" does not make them "business expenses." (Resp. Br. 16) But Tina does not dispute that to receive his business income from Sellen, Andrew must make these note payments. This concession alone shows that the note payments qualify as "normal business expenses" under *Mull*, since

Andrew is required to pay the notes “in order to maintain his [ ] source of income.” 61 Wn. App. at 722.

The fact that Andrew’s business expenses are in the form of note payments makes no difference. So long as the payments are necessary to maintain a parent’s income, it should be deducted from the parent’s gross income for purposes of calculating child support. In fact, even before deciding *Mull*, this Court recognized the appropriateness of deducting “business loans” from the father’s gross income to determine his “net take home pay” to calculate child support in *Marriage of Peters*, 33 Wn. App. 48, 53, 651 P.2d 262 (1982) (*discussed* at App. Br. 17-18). While no other Washington court has addressed this issue, other jurisdictions have reached similar results. For instance, the Louisiana Court of Appeals held that the father’s payments on business loans used to build chicken houses and purchase equipment were “ordinary and necessary business expenses” to be deducted from his gross income, because “if there were no business loans . . . [the father] would have no poultry business” in *Mayo v. Crazovich*, 621 So. 2d 120, 123 (La. Ct. App. 1993). Similarly, the Ohio Court of Appeals reversed a trial court’s decision refusing to deduct the father’s payments on a loan used to acquire a tractor-trailer rig for his trucking business, because they

were “ordinary and necessary expenses incurred by the parent in generating the gross receipts” in *Woods v. Woods*, 95 Ohio App. 3d 222, 642 N.E.2d 45, 47-48 (1994).

Tina also claims that Andrew should not be allowed to deduct the note payments as business expenses because they are not classified as such in his tax returns. (Resp. Br. 20) But as this Court held in *Mull*, “whether or not such expenditures may be deductible for federal income tax purposes does not control whether they are deductible for purposes of child support calculations.” 61 Wn. App. at 722. Instead, the question is whether the payments are required to maintain the parent’s business income. In this case, it is indisputable that they are. Therefore, they are “normal business expenses” under *Mull*, and the trial court was required to deduct the payments from Andrew’s gross income under RCW 26.19.071(5)(h).

**2. The statute does not limit the deduction of normal business expenses to parents who are “self-employed.”**

RCW 26.19.071(5)(h) does not limit the deduction for normal business expenses to self-employed parents, as argued by Tina. (Resp. Br. 27) Instead, the statute is disjunctive, requiring deduction of “normal business expenses” *and* “self-employment taxes for self-

employed persons.” Normal business expenses are a separate category from self-employment taxes.

To read the statute to limit the deduction of normal business expenses to self-employed parents is illogical. There is no reason a legitimate business expense incurred by someone who is not self-employed, but owns an interest in an income-producing business, should be treated any differently than the same legitimate business expense incurred by someone who is “self-employed.” An interpretation of the statute in the manner suggested by Tina would result in countless legitimate business expenses being denied to persons who are not self-employed, as defined by the IRS.<sup>1</sup> The test is not whether the parent is “self-employed,” but whether payments made by the parent, self-employed or not, are required to maintain their income. *Mull*, 61 Wn. App. at 722.

In any event, regardless whether Andrew pays self-employment taxes, he is “self-employed” to the same extent that Mr. Mull was. Andrew is employed by Sellen, a corporation in which Andrew has an ownership interest as a shareholder. As a shareholder, he is issued an annual Schedule K-1 reporting his

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<sup>1</sup> Just as the court is not bound by the definition of business expenses for federal income tax purposes, *Mull*, 61 Wn. App. at 722, the court too should not be bound by the definition of “self-employed” individuals by the IRS.

“ordinary business income” from Sellen, (See CP 1116, 1166; see also CP 84), he also receives W-2 wages as an employee. (CP 1123, 1173) This is no different than in *Mull*, where the father was employed by Perkins Coie, a law firm in which he was one of many partners, and received a “base salary.” See 61 Wn. App. at 717. Just as the father in *Mull* had to “buy in” as part of the “requirements and commitments’ of his partnership position,” 61 Wn. App. at 721, Andrew too had to “buy in” to the business to establish his ownership interest in Sellen.

Andrew acquired his ownership interest in Sellen by agreeing to pay the buy-in cost over ten years. Andrew must make these contractual note payments to maintain the business income derived from his ownership interest in Sellen. (CP 1247-48) Accordingly, under *Mull* and RCW 26.19.071(5)(h) these note payments are normal business expenses that should have been deducted from Andrew’s gross income before calculating child support.

- 3. That the father’s ownership interest could potentially yield value beyond the income that it produces does not change the fact that to maintain that income, he must make mandatory note payments.**

That Andrew’s ownership interest in Sellen may potentially create value in addition to the income it produces is irrelevant in

determining whether the note payments necessary to maintain that income are normal business expenses. (Resp. Br. 18-20) Nearly every business may potentially have value beyond the immediate income it produces – this is not a reason to prohibit the parent business owner from deducting his business expenses.

Tina claims that Andrew’s ownership interest in Sellen is an “investment vehicle” or “retirement planning mechanism,” thus the note payments are not “normal business expenses.” (Resp. Br. 18-19) This Court rejected precisely this argument in *Mull*.

The mother also argued that the father’s contributions to his firm were “all investments that increase [the father]’s equity in the firm” and the father should not be allowed to “deduct those assets from his gross income in order to reduce his child support obligation” in *Mull*, 61 Wn. App. at 721. This Court held that because the contributions, including the father’s “buy-in,” were required as part of his “partnership position, [ ] the likelihood that [the father] may derive a future gain from the contributions does not alter that reality.” *Mull*, 61 Wn. App. at 721. The “reality” this Court spoke of is that the payments, regardless whether they contribute to a potential “future gain,” are necessary to “maintain his or her source

of income” now, and thus qualify as normal business expenses. *Mull*, 61 Wn. App at 721, 722.

The same is true here. While Andrew may potentially derive a “future gain” from his ownership interest in Sellen (although any gain is speculative at best)<sup>2</sup>, the current benefit from his ownership interest is the income that he receives, which is used towards his child support obligation. However, to receive that income he was first required to buy in to Sellen, and he must continue to pay all the mandatory note payments to maintain the associated income from his ownership interest.

Tina attempts to distinguish *Mull* by arguing that the father’s capital contributions and buy-in there were “requirements and commitments of his partnership position,” whereas Andrew voluntarily chose to buy in to Sellen. (Resp. Br. 23, 24-25) Tina implies that the decision by the father in *Mull* to become a partner at Perkins Coie was “not optional.” (Resp. Br. 24) First, nothing in this Court’s opinion suggests that the father in *Mull* was somehow forced into becoming a partner. Second, nothing in RCW 26.19.071 requires a parent to have been obligated to acquire or engage in a business

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<sup>2</sup> In fact, the value of Sellen Construction stock has declined in each of the prior three years, from \$635.76 per share on January 1, 2012 to \$575.49 per share on January 1, 2014. (CP 868, 873)

before the normal expenses associated with that business can be deducted from the parent's income.

As a matter of course, and except in rare circumstances, an individual's decision to acquire an interest in a business, start a business, or become a partner in a business, is always "voluntary." The only issue under RCW 26.19.071 and *Mull* is whether payments made by the parent are necessary to maintain the income from the business, thus qualifying them as normal business expenses. 61 Wn. App. at 722. Whether or not the acquisition of the business interest was mandatory or optional is irrelevant.

Finally, as here, the father in *Mull* was not required to "buy in" *because* he was a partner. He had to buy in to *become* a partner. In other words, absent the buy-in, the father in *Mull* would have never become a partner. Likewise here, a "requirement" of becoming a shareholder in Sellen was Andrew buying stock in Sellen. The "mandatory cost" of Andrew's ownership interest in Sellen is his payment on the notes that represent his buy-in obligation. (Resp Br. 23)

**4. That the father's ownership interest in Sellen is corporate stock rather than a partnership interest is irrelevant.**

The fact that Andrew bought into Sellen by "purchasing stock" in a corporation rather than an interest in a partnership is irrelevant.

(Resp. Br. 25, 26, 27) What is relevant is that this stock produces income, and is in a company which employs Andrew and in which Andrew has an ownership interest. Further, the relevance of the Sellen stock is not the value of the stock itself, as Andrew's ability to sell the stock is very limited (*See* CP 1182-96), but the net income it produces on which child support is based.

The form of the business entity that the parent owns should not control whether "normal business expenses" should be deducted. It should not matter that Andrew's ownership interest is in a corporation, rather than a partnership.<sup>3</sup> Regardless whether the business is a sole proprietorship, partnership, LLC, or corporation, if the parent must make payments to maintain his income from the entity it should be deducted under RCW 26.19.071 and *Mull*.

Contrary to Tina's claim, this is not the same as a parent buying stock in a publicly traded entity such as Google or Microsoft. (Resp. Br. 19, 25-26) Andrew bought stock in Sellen, which is both his employer and an employee-owned business (i.e. not publicly traded), of which he is also an owner. (*See* CP 1181: "Stockholders

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<sup>3</sup> In fact, Perkins Coie, like Sellen, appears to be a corporation, even though the shareholders in Perkins are termed "partners." *See Mull*, 61 Wn. App. at 718 ("Richard receives gross monthly income [ ] from the Perkins Coie Master Professional Service Corporation.").

are the owners of all of the outstanding capital stock of the Corporation and are either current or retired employees of the Corporation”; CP 1176: the purpose of the stock incentive plan is to allow employees to acquire a “proprietary interest in the Company”). Because Andrew has an ownership interest in the business, he does not merely receive “dividends” from Sellen, as he would from publicly traded stock. Instead, he receives “distributions” from Sellen as an owner, reported in his Schedule K-1s as “Ordinary Business Income.” (CP 1116, 1166; *see also* CP 84) Further, unlike an ordinary investor in publicly traded stock, the distributions that Andrew receives from Sellen are tied in part to the amount of effort Andrew puts into the business as a full-time employee, Chief Financial Officer, and supervisor of other employees.

Finally, Andrew acquired his stock through loans directly from Sellen. Under the terms of the notes, if Andrew fails to make these payments, he will be sued for breach, fired by Sellen, and the corporation will redeem the shares. (CP 1247-48) Thus, Andrew will immediately lose the income he receives from Sellen as both an employee and owner.

If, in contrast, Andrew were to default on a bank loan that he used to acquire publicly traded stock, he would not immediately lose

his right to the income from the stock nor would he be fired from his job. The bank might seek to foreclose on Andrew's assets for repayment of the loan, but any foreclosure is not inextricably linked to the source of his income or employment, as are the note payments here. This is also why Tina's analogy between Andrew's note payments and her student loans (Resp. Br. 20) is not at all comparable. If Tina were to default on her student loans, it would have absolutely no impact on her income – she would keep her law degree, and would not be fired by her employer. That Andrew's ownership interest in Sellen is held as corporate shares is irrelevant to the analysis of his normal business expenses.

**5. An ownership interest in a business that produces current income is not the same as a retirement plan that holds future benefits only.**

Tina's analogy of Andrew's ownership interest in Sellen with a retirement plan is as inapt as her comparisons to publicly-traded stock and student loans. (Resp. Br. 20-21) A retirement plan is for the future benefit of the parent only. An ownership interest in a business, on the other hand, is for the current benefit of both the parent and child, as the income it produces is looked to for the payment of child support. Because voluntary contributions to a retirement plan have limited benefit to the child, the Legislature

limits the amount the trial court can deduct from a parent's gross income for a parent's "voluntary retirement contributions." See RCW 26.19.071(5)(g) (the court shall deduct "up to five thousand dollars per year in voluntary retirement contributions actually made"). However, no limit is placed on the amount of "normal business expenses" to be deducted from the parent's gross income, because the parent's business interest benefits the child.

Even if Andrew's ownership interest in Sellen also potentially provides a benefit to only him in the future, this is not a reason to disallow a deduction for note payments that he must make to maintain the business income that he earns now. Because of these note payments, Andrew simply does not have available all of the gross income from his ownership interest in Sellen to pay his child support obligation. Any income received must be used to first pay the contractual payments on the notes. And in calculating child support, the court must look to the actual net income available to the parent, not just a parent's gross income. See *Peters*, 33 Wn. App. at 53 (the court must look at a parent's "net take-home pay" in calculating child support) (*discussed* at App. Br. 17-18); see also RCW 26.19.071(5)(a), (b), (d), (e) (requiring the trial court to deduct from the parents' gross income: taxes, FICA, mandatory union or

professional dues, state industrial insurance premiums, and court-ordered maintenance to extent actually paid).

The Legislature has in fact recognized, however, that even where payments made by a parent will result in a benefit to the parent in the future, it must still be deducted from the parent's gross income to calculate child support if the payment is "mandatory." RCW 26.19.071(5)(c) requires the trial court to deduct "mandatory pension plan payments," without limit, from the parent's gross income. Thus, the issue is not simply whether there is a future or current benefit for the parent, but whether the payment itself is mandatory because it reduces the net income available to the parent.

In this case, the note payments are mandatory. Regardless whether Andrew's initial decision to acquire an ownership interest in Sellen was voluntary or mandatory, now that he has that interest, the note payments are mandatory. *See Mull*, 61 Wn. App. at 717-18 (deducting the father's mandatory pension payments because even though the father voluntarily elected to participate in the firm's pension plan, the payments became mandatory once he enrolled).

Logic should prevail. If Andrew did not incur this payment obligation, there would be no business income upon which to calculate child support. Rather than basing his child support

obligation on the \$125,324 of gross income received in 2014, the child support obligation should be based on his net cash flow of \$13,653.

The trial court erred in failing to deduct Andrew's mandatory contractual note payments from his gross income as a business expense. The note payments are necessary to maintain his income, and impact the cash flow he has available to provide support. This Court should reverse and remand with directions to the trial court to deduct the husband's note payments from his gross income for purposes of calculating child support.

**B. Because the parents are entitled to jointly decide whether to enroll the child in activities, the trial court erred in requiring the parents to pay for the cost of any activities related to the son's education and healthcare recommended by third parties.**

The parties have joint decision-making on all "education" and "non-emergency health care" decisions for their son. (CP 1327) The trial court's order requiring the parties to pay their proportionate share of "educational expenses . . . recommended by [the] school" and other "[a]ctivities as recommended by [the son]'s health care providers" (CP 247-48) deprives the parents of their rights under the parenting plan to make those decisions themselves – not third parties. In a conflict between the parenting plan, which has not been

modified,<sup>4</sup> and a subsequently modified child support order, the parenting plan controls. *See e.g. Marriage of Mansour*, 126 Wn. App. 1, 11, ¶ 25, 106 P.3d 768 (2004); *Custody of Halls*, 126 Wn. App. 599, 606, 607, ¶¶ 17, 23, 109 P.3d 15 (2005) (*both discussed App. Br. 19*)

Any provision under the child support order that requires Andrew to pay his proportionate share of any activity for the son, for which he has not participated in the decision under the powers granted to him under the parenting plan, is improper. (Resp. Br. 28-29) This includes “school field trips, tutoring, [ ] skiing and swim lessons, pool passes, and Easter Seal Camps” recommended by the son’s school or healthcare providers. (CP 247-48)

Contrary to Tina’s assertion (Resp. Br. 30), an order that allows third parties to unilaterally decide in which activities the son should participate (regardless of cost) and requires the parties to both concede to and pay for the activities, certainly does “frustrate joint decision-making.” Tina claims that the “purpose of this provision is to ensure that [the son] can continue in activities

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<sup>4</sup> The parties apparently agreed to modify their parenting plan *after* the trial court’s decision modifying child support. (CP 1338) However, the joint-decision making provision on education and healthcare decision was left unchanged. (CP 1340)

recommended by his providers at the time of trial, or had participated in during the marriage.” (Resp. Br. 30) But the order goes far beyond that, requiring the parents to pay for any “educational expenses” or “activities” recommended by the son’s school or health care providers without any input from the parents. Even though the trial court attempted to delineate specific activities, such as “school field trips,” it still deprived the parents of the ability to decide whether a specific field trip is appropriate for their son or that the cost of that field trip should be borne by the parents, contrary both to the parenting plan and RCW 26.19.080.

RCW 26.19.080(4) requires the trial court to determine the necessity for and the reasonableness of additional amounts before it can obligate a parent to pay for extraordinary expenses. *See also Marriage of Daubert & Johnson*, 124 Wn. App. 483, 494-95, ¶ 22, 99 P.3d 401 (2004), *abrogated on other grounds by McCausland v. McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007) (*discussed App. Br. 20-21*). “In addition to necessity for and reasonableness of the amounts, the trial court must consider whether the additional amount to be paid is ‘commensurate with the parents’ income, resources and standard of living,’ in light of the totality of the

financial circumstances.” *Daubert*, 124 Wn. App. at 494-95, ¶ 22 (quoting RCW 26.19.001).

Tina argues that “*Daubert* does not suggest that a trial court is required to identify every item that justifies increased support,” nor that a “trial court is required to itemize and value every trip and camp a child might participate.” (App. Br. 31, 32) But as this Court held in *Daubert*, “[w]ithout cost estimates, the court had no basis to determine an amount to award for the opportunities sought and had no basis to make findings about the reasonableness of that amount. Parents are entitled to know what the additional child support is supposed to cover . . .” 124 Wn. App. at 498, ¶ 34. Here, there is no evidence of the future cost of the activities that the son’s school or healthcare providers might “recommend.” Although there may have been some evidence of the cost of the son’s past activities, “past events alone cannot provide a basis for future support.” *Daubert*, 124 Wn. App. at 497, ¶ 33.

Finally, Tina argues that the trial court’s decision depriving the parents of joint decision-making was also appropriate because the parties purportedly were unable to cooperate in the past. (Resp. Br. 32) However, the citation to the record that Tina relies on to support that claim (CP 132-34) shows at a minimum that the parties

had disagreements over the older daughters' activities, not the son. Instead, the evidence shows that Andrew has paid his share of *every* activity for the son that Tina proposed in the past few years. (CP 1255) In any event, the source of any disagreement by Andrew regarding the older daughters' activities was his concern that they might be "overscheduled with activities." (*See* CP 132) This is also a valid concern for the son, who has special needs. The parents have the authority and right to jointly decide which and how many activities the son should be involved in under the parenting plan.

The provisions of the child support order requiring the parties to contribute to the cost of any activity recommended by the son's school and healthcare provider improperly deprives the parents of their decision-making authority under the parenting plan, and usurps the court's authority under RCW 26.19.080. This Court should reverse and remand with directions to vacate these provisions.

**C. The trial court erred in ordering the parents to share the cost of respite care in the other parent's home.**

The trial court erred in ordering the parties to share the cost of "respite care" in each parent's home. Child support is intended to "meet a child's basic needs and to provide additional child support commensurate with the parents' incomes, resources, and standard of

living.” RCW 26.19.001. Child support is not intended to subsidize the other parent’s choices to hire a babysitter to allow “time off” during her residential time.

Tina admits that respite care is intended for the parents, and specifically her: “Tina needs respite care so that she can take of herself, her home, her job, and all of her children.” (Resp. Br. 35) It is undisputed that the son, who is usually in bed by 8:30 p.m., is already cared for on a daily basis during the week from 7:00 a.m. to 8:00 p.m. by the school and his nanny. (CP 113, 1244) During the week, Tina has 13 hours each day to take of “herself, her home, her job, and all of her children.” The parents also share the weekends, so every other weekend (Thursday to Sunday), Tina has a “break,” during which she can focus on herself or spend time with the older daughter, age 16, who no longer follows residential schedule for the younger children. (CP 131, 1322)

As Andrew asserted in the opening brief and below, he does not dispute that their son requires more constant and close supervision than an average developing child his age. (CP 1243) But in light of the amount of time that the son is already being cared for by the school, his nanny (for which the parents share the cost), and in Andrew’s home, Andrew should not be required to contribute to

the cost of additional child care in Tina's home. Nor should Tina be required to contribute to the cost of additional child care in Andrew's home. This Court should reverse and remand with directions to the trial court to vacate this provision.

**D. This Court should deny the mother's request for fees on appeal.**

This Court should deny Tina's request for attorney fees on appeal under RCW 26.09.140. Tina earns over \$145,000 annually (CP 167), receives tens of thousands of dollars of tax-free child support each year from Andrew, has the majority of her child care and the children's medical costs and costs of the children's activities paid by Andrew, and does not have the "need" for her attorney fees to be paid. Acknowledging her significant income, Tina argues that she is instead entitled to attorney fees because the children reside with her more of the time than with Andrew. (Resp. Br. 36) But while the residential schedule may be relevant for child support, it is not a basis for an award of attorney fees on appeal. Because Tina does not have the need for her attorney fees to be paid, this Court should deny her request.

### III. CONCLUSION

This Court should reverse, and remand with directions to the trial court to deduct Andrew's mandatory note payments from his gross income, vacate the provision of the child support order requiring the parents to share in the cost of activities recommended by the son's school or healthcare providers, and vacate the provision of the child support order requiring the parents to pay for respite care. This Court should also deny respondent's request for attorney fees on appeal.

Dated this 8<sup>th</sup> day of October, 2015.

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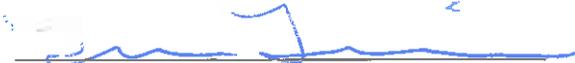
**DECLARATION OF SERVICE**

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 8, 2015, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 8<sup>th</sup> day of October, 2015.

  
Tara D. Friesen