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Court of Appeals  
Division I  
State of Washington

73257-9

No. 73257-9-I

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

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In re the Marriage of:

ANDREW J. AIKEN,

Appellant,

and

TINA M. AIKEN,

Respondent.

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BRIEF OF RESPONDENT

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## INTRODUCTION

For many years, Andrew Aiken has participated in his employer, Sellen Construction's, Stock Incentive Program, borrowing money from Sellen to purchase stock in the company. Andrew acknowledges that he voluntarily decided to borrow from Sellen to purchase Sellen stock and that his decision was unrelated to his continued employment. The result is an income-producing asset and substantial retirement nest-egg.

Andrew's principal issue on appeal is that these debts voluntarily incurred are really normal business expenses that must be deducted from his gross income to calculate child support. But unlike the capital calls in *Mull* (*supra*) upon which Andrew chiefly relies, these debts are not a requirement and commitment of Andrew's employment. They are, as he admits, voluntary. Andrew may choose to save for retirement, but his choice should not be at his children's expense. And in any event, Andrew is not self-employed, so cannot deduct normal business expenses.

Andrew's remaining arguments challenge other highly discretionary decisions related to sharing the cost of the children's activities and respite care for J. who has Down syndrome and profound Autism. This Court should affirm.

## STATEMENT OF THE CASE

- A. Following their 2010 divorce, Tina Aiken received short-term maintenance and child support as she became principally responsible for the parties' three minor children.**

When Andrew and Tina Aiken divorced in May 2010, Tina was designated the primary residential parent of their three children, then ages 10, 8, and 6. CP 35, 1274-75. Under the parenting plan entered during the dissolution, Andrew was scheduled to have the children about 30% of the time: 4 of 14 overnights, including 28 out of 52 weekends in the year. CP 1275.

Tina was not working when the parties divorced, though she had previously worked full-time as an attorney. CP 36. Just before the parties' second child was born, Tina reduced her hours to 80%. *Id.* She planned to stay at 80% while the children were young, but found it impossible after their third child, J. was born. *Id.*

J. has Down syndrome and Autism. CP 35. Before he was even six-months old, J. went through multiple surgeries and had a respiratory virus and other illnesses requiring hospitalization. CP 36. The parties initially sent J. to daycare, but their provider grew uncomfortable caring for J. *Id.* J.'s doctor told the parties that his immune system was too weak to withstand daycare's exposure to other children. *Id.* Tina left her job to care for J. and his two sisters,

and did not work outside the home from 2004 through the parties' 2010 divorce. *Id.*

One year after J.'s birth, Andrew began working for Sellen Construction Co., where he is currently a CFO. CP 20-21, 243. When the parties' divorced, Andrew's gross income was about \$300,000 per year, or \$25,000 per month. CP 61. After maintenance and other deductions, Andrew netted \$13,063 a month. CP 36, 61. Tina netted \$3,822, maintenance being her sole source of income. *Id.* The parties agreed that Andrew would pay \$3,000 per month in child support for all three children, slightly more than the standard child support calculation, and that the parties would split the cost of the children's additional expenses 50/50. CP 1, 36, 1240.

**B. Despite working fulltime as a lawyer, Tina earns less than half of what Andrew earns, and has the children more than twice as much.**

After the divorce, Tina began transitioning back to part-time employment, having been out of the workforce for seven years. CP 36. By 2013, maintenance had ended, and Tina had transitioned to fulltime employment as an attorney. *Id.* She currently works fulltime at Sebris Busto James, while also being the primary caretaker for the parties' three children, now ages 16, 14, and 11. CP 39, 41, 243.

Tina's 2014 gross income was \$142,320, including salary, annual bonus, and a special bonus for exceeding her billable-hours target by more than 100 hours. CP 39. Tina regularly works weekends and evenings to complete her assignments. *Id.* And given J.'s special needs, Tina often needs to arrange care for him while she works outside her typical office hours. *Id.*

Tina's net income for purposes of calculating child support is \$9,237. CP 137. Tina estimated that her monthly household expenses would exceed \$14,000, if she were able to provide all of the care J. needs. CP 69-71. Just providing adequate childcare, activities and education would cost nearly \$7,000 per month. *Id.*

**C. The child-related expenses are significant in large part because the parties' son J. has Down syndrome and Autism, so requires constant supervision just to stay safe.**

As mentioned above, J. has Down syndrome and Autism, which is "profound." CP 35, 254. Due to his dual diagnosis, J. is "quite low-functioning." CP 254. He cannot, for example, toilet himself or communicate verbally. CP 40, 129, 259, 1224, 1226.

Particularly difficult to manage is J.'s "impulsivity and lack of any self-safety skills." CP 254, 256, 1225. In short, J. is incapable

of recognizing dangerous situations and consequently “is unable to keep himself safe.” *Id.*

Thus, J. cannot be left alone, and requires close supervision at all times for his own safety. CP 41, 255, 1225. J. has a tendency to wander off and even run away. CP 127. This behavior, referred to as elopement, often results in serious, if not fatal, accidents. *Id.* Although J has eloped for several years, he is becoming more resourceful, and is continuously finding new ways to escape. *Id.* As much as Andrew recognizes the severity of this problem, he also minimizes it. *Compare CP 127 with CP 1242.*

Tina and Andrew have both struggled to keep J. safe and he has eloped from both households numerous times. CP 127. Andrew acknowledges that J. has eloped from his home when the girls have left doors open, when Andrew has relied on the girls to watch J. but they became preoccupied, or when Andrew has relied on his mother to watch J. *Id.* Andrew admits concerns about leaving J. at his mother’s home when others are in the house, where it is in group situations that J. is most likely to elope unnoticed. *Id.*

On one occasion, J. went missing while Andrew and Al. were talking after a basketball game. *Id.* On another, he wandered off

when Andrew left J. and Av. in the car for an extended period, and Av. fell asleep. *Id.* J. also attempts to elope from school. *Id.*

Tina openly acknowledges that J. has eloped from her home numerous times, at night while everyone else is asleep, or during the day when someone leaves chains unlocked. CP 128. He has been found walking down the block, entering a neighbor's unattended car, entering a neighbor's home, or sitting in the middle of the street staring at his iPad. CP 128, 1225

Andrew attempts to minimize this problem, claiming that Tina's efforts to keep J. from eloping are inadequate. CP 128, 1242. Tina has locks on the tops of all of the doors in her home, out of J.'s reach. CP 128. Of course, locks only work so long as the other children in the home do not forget to use them. *Id.* And as J. grows bigger and stronger, he finds new ways to elope and put himself in danger. *Id.* It is only a matter of time before J. figures out the he can pull a chair over to the door to reach the top lock and escape. *Id.*

J. also wanders at night. *Id.* Despite taking sleeping medication, J. often does not sleep through the night. *Id.* As far as Tina is aware, J. typically comes into her bed. *Id.* But he has started wandering around the house, and has been found watching television and eating cookies at 4:30 in the morning. *Id.*

**D. In addition to constant supervision, J. requires constant stimulation so that he does not slip into self-stimulating behaviors that are detrimental to his development.**

When J. is not engaged by others, he engages in “stimming behavior” that is detrimental to his development. CP 131, 1226. Stimming includes repetitive movement of the hands or body, such as “handflapping, finger twisting or flicking, rubbing, or wringing hands,” and “rocking, swaying, or pacing,” or odd posturing of the fingers, hands or arms. CP 259-60, 1226.<sup>1</sup> J.’s stimming also includes chewing on non-edible objects, including electrical cords that are plugged in. CP 1226. Stimming is common in Autistic children, and interferes with development, learning, communication, and interaction if the child is not redirected. CP 259-60.

When in group situations, J. often tries to remove himself so that he can engage in stimming behaviors or other dangerous or destructive behaviors. CP 131. For example, J.’s sisters indicate that J. is often by himself, unengaged, while at Andrew’s home, left staring at his iPad. CP 130-31. While allowing J. to stimulate himself may give those around him time to attend to other things, it is detrimental to his personal development. CP 131.

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<sup>1</sup> Tina’s declaration found at CP 258-68 was not put before the trial court during the trial by affidavit, although opposing counsel referred to it in her pleadings. CP 1243. Tina references her declaration here only to explain “stimming.”

**E. Unable to keep up, Tina moved to modify child support to make sure that J. and his sisters are taken care of.**

Under the May 2010 parenting plan, Tina was to have the children about 70% of the time. CP 41, 131, 1275. But since December 2014, Tina has had AI. 100% of the time, as she does not currently see Andrew. CP 130-31. And in April 2015, the parties jointly agreed to split weekends 50/50, giving Tina a few more weekends each year. Supp. CP \_\_\_\_.<sup>2</sup> Thus, Andrew no longer has the children every first, third, and fifth weekend – if there is one – and no longer has any residential time with AI. BA 5.

Tina also helps with the children's activities during Andrew's residential time. CP 42, 131. As an example, Tina takes J. skiing every weekend during ski season, giving Andrew a break during his residential weekends. CP 42. And Tina helps drive all of the children to activities that fall during Andrew's residential time, including doing all of the driving for AI. CP 130.

Finding it impossible to keep up, Tina moved to modify child support in October 2014. CP 1-5, 41, 131. Andrew ostensibly

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<sup>2</sup> Along with this brief, Tina files a Supplemental Designation of Clerk's Papers, designating the stipulated parenting plan. This stipulation was filed about one month after Andrew filed his Amended Notice of Appeal. *Compare* Supp. CP \_\_\_\_ with CP 237.

objected to Tina's request for a support modification, but also asked the trial court to establish a new support amount using the parties' current income levels. CP 18. He agreed with Tina's request to set post-secondary support for both girls, but otherwise asked the trial court to deny Tina's motion. *Id.*

As Andrew sought to reduce his child support obligation, his net monthly income was \$21,937, more than twice Tina's income. CP 136-37. Andrew argued, however, that for purposes of calculating child support, the trial court should deduct about \$9,000 from his net monthly income, the amount Andrew pays on loans he took to purchase Sellen stock. CP 76, 116-17. Although the parties began purchasing Sellen stock in January 2006, the loan payments were not deducted from Andrew's child-support income calculation during their 2010 divorce. CP 61, 840. This is Andrew's principal issue on appeal. BA 12-18.

The specifics on this issue are discussed in greater detail below. In brief sum here, Andrew is purchasing Sellen stock as part of an employee "Incentive Plan," whose express purpose is to "retain and motivate employees, officers, and directors of the Company by providing them the opportunity to purchase shares of the Company's common stock . . . and acquire a proprietary interest in the

Company.” CP 1176. Andrew acknowledges that he voluntarily decided to purchase Sellen stock and that his decision was unrelated to continued employment at Sellen. CP 108.

The Commissioner ruled largely in Tina’s favor. CP 135-51. The parties cross-moved for reconsideration of the Commissioner’s order modifying support, Tina challenging only the Commissioner’s decision denying “respite care,” and Tina’s request for a more specific list of children’s activities the parties would proportionately share. CP 135-51, 152-71, 172-229.

The trial court found that for purposes of calculating child support, Andrew’s net monthly income is \$21,904, more than twice Tina’s net income, \$9,237. CP 243-44. The court declined Andrew’s request to deduct his loan on the Sellen stock, ruling that it is debt voluntarily incurred, not a business expense. CP 240 (referring to RCW 26.19.071(5)(h)).

The trial court reduced the support payment to the standard calculation, ordering Andrew to pay \$2,366 child support for all three children. CP 244. The court ordered the parties to proportionally share extraordinary expenses, 70% Andrew and 30% Tina. CP 247-48. Andrew complains that these expenses are “not insignificant” given childcare and activities totaling \$4,560 per month. BA 10.

These costs are no less significant for Tina, whose income is less than half of Andrew's. CP 243-44.

The court ordered the parties to arbitrate any disagreement regarding extracurricular activities for their daughters. CP 248. For J., the court ordered the parties to proportionally share education expenses, such as tutoring, recommended by J.'s school, and activities, such as Easter Seal Camp, recommended by his healthcare providers. CP 247-48. Andrew takes issue with the provision for J., arguing that the parties agree to his activities "well over 90% of the time." CP 1258-59. Unsurprisingly, Tina does not share Andrew's opinion. RP 22.

There is a significant history of Andrew "agreeing" to contribute to an activity one year, and discontinuing his support the next. CP 132-33; RP 22. Worse yet, Andrew is willing to contribute to more activities for the girls than he is for J. CP 1256-58. In the two years leading up to trial, Andrew agreed to 4 activities for J. compared to 44 activities for Al. and Av. *Id.* Andrew points out that the children's activities sports, camps, and clubs totaled \$18,000, but he overlooks that only \$1,071 was spent on activities to keep J. safe and stimulated. *Id.*

One of the principal reasons Tina moved to modify support is her strong feeling that she and Andrew needed to make changes to have a responsible adult accountable for Jack at all times to keep him safe and engaged in developmentally appropriate activities. CP 129. It simply is not possible for Tina to remain constantly attentive to J., take care of her own responsibilities, and – occasionally – focus on her daughters. CP 41, 131. Thus, Tina asked the trial court to include as a shared expense, what she referred to as “respite care,” that is, having a qualified adult provide some care for J. in the parties’ homes. *Id.*

Andrew objected (and still does), arguing in part that between Tina, J.’s sisters, Tina’s significant other and his children, there are plenty of people in Tina’s home who can care for J. CP 129-30. Tina responded that the parties cannot continue relying on J.’s sisters to look after him, particularly as J.’s impulsivity and lack of safety skills are growing increasingly problematic. CP 128, 129, 256. J.’s pediatrician opined that J. should not be left with a minor, where the risk posed to J. is too great, as is the guilt that person would carry if something happened to J. CP 129.

In any event, the number of people on Tina’s house makes it harder to care for J., not easier as Andrew suggests. *Id.* More

people means more unlocked doors, more property, such as a phone, left unattended for J. to destroy, and more opportunities for people to wrongly assume that someone else is keeping track of J. *Id.* “Andrew and [Tina], as J[.]’s parents, are responsible for J[.], not [their] daughters, [their] significant others, or their children.” *Id.*

The court ordered the parties to proportionally share the cost of respite care, ruling that it is “directly related to support of [J.] in light of [his] significant impairments.” CP 241, 248. The court ruled that Tina could use up to 14 hours, and Andrew could use up to six hours, not to exceed \$25 per hour. CP 248.

Andrew appealed. CP 237.

## ARGUMENT

### A. This Court reviews for an abuse of discretion.

Andrew does not address the standard of review. This Court reviews a child support award for an abuse of discretion. *In re Parentage of Fairbanks*, 142 Wn. App. 950, 955, 176 P.3d 611 (2008). The trial court abuses its discretion only if its decision is “manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons.” *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997); *In re Marriage of Peterson*, 80 Wn. App. 148, 152, 906 P.2d 1009 (1995).

The court must support its child support order with written findings. RCW 26.19.035(2). This Court will not disturb challenged findings that are supported by substantial evidence. ***In re Marriage of Vander Veen***, 62 Wn. App. 861, 865, 815 P.2d 843 (1991). Substantial evidence is evidence in “sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise.” ***Vander Veen***, 62 Wn. App. at 865 (quoting ***Helman v. Sacred Heart Hosp.***, 62 Wn.2d 136, 147, 381 P.2d 605 (1963)).

The principal case Andrew relies on makes clear that this Court applies the abuse of discretion standard of review here as well. BA 12-17 (citing ***In re Marriage of Mull***, 61 Wn. App. 715, 812 P.2d 125 (1991)). In ***Mull***, the father elected to defer 5.6% of his gross income into a pension plan offered by his employer that supplemented his mandatory 401(k) retirement plan. ***Mull***, 61 Wn. App. at 717. Once made, this election was “mandatory” and “irrevocable.” 61 Wn. App. at 717. The issue before this Court on appeal was whether the trial court properly treated these pension-plan contributions as “mandatory pension plan payments” that are deducted from gross income for purposes of calculating child support. *Id.* at 720 n.3 (quoting Washington State Child Support

Schedule Comm'n, *Washington State Child Support Schedule Std.* 4, at 3 (1989)).<sup>3</sup>

Concluding that the Legislature had not precisely addressed the situation at hand, this Court ruled that the trial court's decision was discretionary. *Mull*, 61 Wn. App. at 720. The Court noted the importance of deferring to the trial court's discretion, particularly "in this area of the law" (*id.* at 720-21):

The trial judge is in the best position to evaluate the evidence of a child's needs and a parent's motivation for participating in a given pension plan program. Judicial discretion is particularly critical in this area of the law and must be exercised on a case-by-case basis. Rather than restrict trial courts, we espouse the approach that, unless prohibited by statute, trial courts may exercise the discretion necessary to arrive at a wise determination of each individual case.

**B. The trial court was well within its broad discretion in declining to deduct Andrew's retirement investment from his gross income to calculate child support.**

Andrew argues the trial court erred in declining to deduct from his gross income the payments he makes on loans he took to purchase Sellen stock. BA 12-18. While acknowledging that he voluntarily assumed this debt, Andrew argues that since paying the debt is involuntary, it is a normal business expense that must be

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<sup>3</sup> As addressed below, *Mull* also addressed whether capital contributions are business expenses that are properly deducted from gross income to calculate child support. *Supra*, Argument § B, *Mull*, 61 Wn. App. at 721-22.

deducted from his gross income to calculate child support. *Id.* Debts voluntarily assumed are not business expenses just because they must be paid off. And since Andrew is not self-employed, he cannot deduct ordinary business expenses in any event. RCW 26.19.071(5)(h). This Court should affirm.

To determine child support, the trial court must: (1) calculate the parents' combined net monthly income; (2) determine the appropriate support level from the economic table; (3) decide whether to deviate from the standard calculation; and (4) allocate the child support obligation based on each parent's share of the combined net income. *In re Marriage of Maples*, 78 Wn. App. 696, 700, 899 P.2d 1 (1995). To determine net monthly income (step 1), the trial court "shall" deduct the following from gross income:

- (a) Federal and state income taxes;
- (b) Federal insurance contributions act deductions;
- (c) Mandatory pension plan payments;
- (d) Mandatory union or professional dues;
- (e) State industrial insurance premiums;
- (f) Court-ordered maintenance to the extent actually paid;
- (g) Up to five thousand dollars per year in voluntary retirement contributions actually made if the contributions show a pattern of contributions during the one-year period preceding the action establishing the child support order unless there is a

determination that the contributions were made for the purpose of reducing child support; and

(h) Normal business expenses and self-employment taxes for self-employed persons. Justification shall be required for any business expense deduction about which there is disagreement.

RCW 26.19.071(5).

Andrew argues that the payments he makes on loans taken to purchase stock are “normal business expenses” that the trial court erroneously failed to deduct under RCW 26.19.071(5)(h). BA 12-14. Although only “self-employed persons” may deduct normal business expenses, Andrew does not claim that he is “self-employed.” *Id.* Nor does he assert that he can deduct his loan payments under any other provision of this statute. *Id.*

**1. Andrew’s loan payments are not “normal business expenses.” RCW 26.19.071(5)(h).**

The parties began purchasing stock from Andrew’s employer, Sellen Construction, on January 1, 2006. CP 840. They made additional purchases on January 1, 2008, and 2010. *Id.* Andrew continued purchasing Sellen stock every other January after the parties’ May 2010 divorce. CP 92, 840. To fund these purchases, Andrew borrowed money from Sellen, secured by promissory notes, some of which he is currently paying. CP 38, 120.

These purchases were, and are, made under the “Stock Incentive Plan” Sellen offers to its “employees, officers, and directors,” as a method of retaining and motivating them:

#### SECTION 1. PURPOSE

The purpose of the Sellen Construction Company, Inc. (the “**Company**”) Stock Incentive Plan (the “**Plan**”) is to retain and motivate employees, officers and directors of the Company by providing them the opportunity to purchase shares of the Company’s common stock, par value. \$1.00 per share (the “**Common Stock**”), and acquire a proprietary interest in the Company.

CP 1176. Andrew acknowledges that he voluntarily decided to purchase Sellen stock. CP 108. He did not have to buy the stock, and his purchase was not a condition to his continued employment at Sellen. *Id.* Andrew was offered an investment opportunity and he took it.

On its face, the stock Andrew is buying is an investment vehicle and a retirement planning mechanism – not a “normal business expense.” CP 120-22. At trial, the present value of Andrew’s stock had an estimated book value of \$596.62 per share, with a total value of nearly \$1 million. CP 38, 121. From 2012 through 2014, Andrew received over \$102,000 in dividends each year. CP 121. As an additional benefit, stockholders can use company condominiums in Sun River and Maui for a nominal fee. *Id.*

At age 60, Andrew can begin redeeming up to 20% of his stock at book value, each year for five years. CP 121.

In short, Andrew took on debt so that he could take advantage of an investment opportunity. That investment produces income now, and will most likely provide a nice retirement. CP 38, 120-22. The fact that Andrew is investing in the company he works for does not change his investment into a normal business expense.

Assume for example, that Andrew did not buy stock in Sellen, but took a loan to purchase stock in a publically traded entity, such as Google. Google pays dividends, providing Andrew with additional income, and Andrew intends to sell the Google stock when he retires, hopefully at a significantly increased value. If Andrew defaulted on his loan, he would have to sell the stock, and would lose both his dividend income and the retirement component of this plan. Buying stock in Google is plainly not a normal business expense.

This analogy is precisely the same as the situation at hand, save for the single fact that in it, Andrew invested in a company other than the one he works for. Andrew is purchasing stock to increase his annual income and to save for retirement. CP 38, 120-22. His purchase is an investment in an income-producing asset. *Id.* His

investment does not become a business expense just because he is investing in the company he works for, rather than another entity.

Indeed, the rule Andrew proposes defies any sense in other contexts as well. Tina currently pays \$1,200 per month on her student loans. CP 14. These loans, taken for law school, enable her to work as a lawyer and to produce an income for her family. Taking these loans was voluntary, but paying them is not. Despite their obvious connection to Tina's employment, these loans are not normal business expenses.

Andrew's loan payments were not deducted from his gross income in the parties' 2010 support order. CP 61. Andrew's tax returns, initial financial declaration, and child support worksheets do not classify the loans as business expenses. CP 21, 27, 535, 591. Indeed, Andrew first asserted this theory in amended pleadings. CP 75-81.

Allowing Andrew to deduct his loan payments also directly contradicts another provision of the controlling statute. RCW 26.19.071(5)(g) permits parties to deduct from their gross income a maximum of \$5,000 in voluntary retirement contributions. While a parent certainly can defer the maximum amount allowable into their retirement plan, they cannot deduct it for purposes of calculating

child support. Andrew should not be permitted to blow right past that statutory cap by styling a retirement investment as a “business expense.” That rule would let parents duck child support to fund their retirement.

**2. Andrew’s comparison to *Mull* is inapt.**

Andrew relies entirely on *Marriage of Mull*, *supra*, to support his theory that buying stock is a business expense. BA 12-18. As mentioned above, *Mull* first addresses whether pension plan payments were “mandatory,” and therefore deducted to calculate net income. 61 Wn. App. at 720-21. There, the pension plan was voluntary, but the plan “indisputedly became mandatory” once an employee elected to participate. *Id.* at 720. Noting a possible “debate” about whether the pension plan payment was a “mandatory” payment under the child support statute (now RCW 26.19.071(5)(c)), this Court ruled that the trial court had discretion to deduct the payments from gross income, “absent evidence of a parent’s bad faith in electing to participate in [the] pension plan that upon election becomes mandatory, and where the needs of the children are adequately met . . . .” *Id.* at 721.

Andrew argues that Tina never asserted that he was investing in Sellen in bad faith or that the children’s needs could not be

adequately met while deducting Andrew's loan payments from his gross income. BA 17. Andrew conflates two different inquiries. BA 15-17. In addressing "[t]he issue of 'voluntary versus mandatory,'" **Mull** was addressing the father's pension-plan contributions governed by the same language found in current RCW 26.19.071(5)(c), not his capital calls and buy-in. BA 15-16; 61 Wn. App. at 720-21. Andrew's stock purchase certainly does not qualify as a "[m]andatory pension plan payment[]," nor does he claim otherwise. RCW 26.19.071(5)(c). Indeed, here as below, he argues only that his stock purchase is a normal business expense governed by RCW 26.19.071(5)(h).

In any event, all this Court held in **Mull** was that the trial court had discretion to deduct the pension-plan contribution at issue. 61 Wn. App. at 720. Deferring to the trial court's discretionary decision in **Mull** does not create a mandate that any trial court who elects not to deduct a pension plan contribution abuses its discretion. Rather, as this Court noted in **Mull**, these decisions are highly discretionary and resolved "case-by-case." *Id.* at 721.

The second issue in **Mull**, and the one Andrew draws a comparison to, is whether a partner's capital contributions and partnership buy-in to his law firm are normal business expenses. 61

Wn. App. at 721. *Mull* says little about the nature of father's capital contributions other than that the executive director of the law firm where father worked submitted a declaration providing that father's "partnership position at the firm required him to make the contributions [at issue] as part of the 'requirements and commitments' of his partnership position." *Id.* In other words, the capital contributions and buy-in were not voluntary – they were mandatory costs of father's partnership. *Id.*

Noting that no other Washington case had addressed the issue, this Court held that a capital contribution is a normal business expense when "a parent is required to make capital contributions in order to maintain his or her source of income and when such contributions are not made to evade greater support obligations." *Id.* at 722. No Washington court has revisited this issue since.

Andrew first argues that his "note payments" are "in effect [his] 'buy-in' to Sellen." BA 13. That is a false analogy. Purchasing stock is not akin to capitalizing a business or buying into a partnership. Capital calls are an infusion of cash or other capital into a business that needs capital to remain in business. RP 14. Buy-ins are a payment for an ownership interest in a company. Neither is

comparable to purchasing stock in a company as part of an employee incentive program. *Id.*

Andrew claims that there was no evidence that the father in ***Mull*** was required to become a partner, presuming that father voluntarily became a partner, which triggered his capital calls and buy-in. BA 15-16. Surely Andrew is not asking this Court to make assumptions on this point based on a lack of evidence one way or the other. *Id.* Partnership in a law firm often is not optional, but is instead reflects a decision by the other partners that it is time for the employee at issue to step up or move on.

Andrew next argues his loan payments must be treated as normal business expenses because he must make the loan payments to maintain his dividend income. BA 13-14. He claims that the prospect that he will derive a future economic benefit does not change the fact that he must pay the notes to maintain his present income. *Id.* Here too, Andrew misapplies ***Mull***.

This Court's analysis in ***Mull*** is based on the fact that the father there was required to make capital contributions and a buy-in because he was a partner his law firm. 61 Wn. App. at 721. These payments were mandatory. *Id.* It is for that reason that this Court held that "[t]he likelihood that [father] may derive a future gain from

the contributions does not alter that reality”; *i.e.* the “reality” that the payments were mandatory in the first instance. *Id.*

Here, however, Andrew admits that he was not required to purchase Sellen stock. CP 108. Unlike the father in *Mull*, buying stock was not “part of the ‘requirements and commitments’” of Andrew’s employment at Sellen. *Mull*, at 61 Wn. App. at 721. Andrew ignores this distinction. BA 14-15.

Again attempting to analogize to *Mull*, Andrew argues that he “may” have voluntarily incurred the debt to purchase the stock, but that paying the debt is mandatory. BA 15. Whether Andrew voluntarily assumed this debt is not a question. *Compare* BA 15 with CP 108. He does not disagree that his stock purchase was voluntary, despite his best efforts to side-step the issue here. *Id.* But in any event, *Mull* simply does not support the contention that a voluntary debt becomes a business expense just because paying the debt is not voluntary.

As discussed above, by Andrew’s logic any number of investments would become deductible business expenses. Fine art, student loans, stock, even gold could be considered a business expense under the theory that a loan is taken to purchase the

investment, and the loan must be repaid or the investor will lose his income. That would be absurd.

The only difference here is that Andrew works for the company he wants to invest in. Instead of buying Microsoft Stock, Andrew buys Sellen stock. Who he buys stock from does not change the nature of the purchase – it remains an investment unrelated to his continued employment.

Finally, Andrew complains that his support obligation is not based on the income actually “available to him.” BA 17 (title case omitted). That would be equally true for a parent who chooses to max out her 401k at about \$17,500 per year, but can only deduct \$5,000 of that contribution from her gross income for calculating child support. RCW 26.19.071(5)(g). The same would also be true for a parent paying off the student loans that enable their income.

In sum, Andrew's reliance on *Mull* is misplaced. His voluntarily-assumed debt is not comparable to a buy-in or capital call that was a requirement of employment. And in any event, *Mull* recognizes the broad discretion afforded trial courts in this area. This trial court was well-within its discretion.

**3. Andrew is not self-employed, so cannot deduct normal business expenses.**

In any event, Andrew is not self-employed so is not entitled to deduct normal business expenses from his gross income. RCW 26.19.071(5)(h). RCW 26.19.071(5)(h) provides that the trial court shall deduct from gross income, “Normal business expenses and self-employment taxes for self-employed persons.” Where, as here, there is a disagreement, “[j]ustification shall be required for any business expense deduction.” RCW 26.19.071(5)(h).

Andrew’s brief does not address whether he is a “self-employed person,” and he never made that claim at trial. *Id.* Sellen’s payroll supervisor refers to Andrew as an “[e]xecutive level employee.” CP 82. As a shareholder in Sellen, an S Corp., Andrew receives pass through corporate income, losses, deductions and credits he has to report on his federal tax return. CP 84. He does not pay self-employment tax. CP 534, 590.

In short, since there is no indication that Andrew is self-employed, he is not entitled to deduct normal business expenses. RCW 26.19.071(5)(h). But in any event, purchasing stock as an investment is not a normal business expense. This Court should

affirm the trial court's discretionary decision to include all of Andrew's income in the child support calculation.

**C. The trial court has discretion to require the parties to jointly pay for some activities, while otherwise sharing joint decision-making.**

Again, the trial court's discretion in ordering child support is broad. Seeing the obvious need for therapies and activities that keep J. safe and improve his quality of life, the trial court ordered the parties to proportionally share educational expenses and "other educational support" recommended by J's school and healthcare providers, and activities recommended by his healthcare providers. CP 247-248. This Court should affirm.

Tina addresses below Andrew's principal argument that this provision in the support order governing extraordinary expenses for J. conflicts with and effectively modifies the joint decision-making provision in the parenting plan. BA 18-19. At the outset, however, it should be noted that Andrew appears to object to only part of this provision, though his brief is unclear.

The child support order requires the parties to pay their proportional share of agreed extra-curricular activities and educational expenses for Al. and Av. CP 247-48. As to J., there are two different clauses at issue. The first requires the parties to

proportionally share “[e]ducational expenses including school field trips, tutoring, and other educational support recommended by J[.]’s school or health care providers.” CP 247-48. The second requires the parties to proportionally share the cost of “[a]ctivities as recommended by J[.]’s health care providers including but not limited to skiing and swim lessons, pool passes, and Easter Seals Camps (4 weekend camps and one 7-day camp each year). Expenses for skiing include lessons, equipment and ski pass.” *Id.*

As to the first, Andrew does not seem to debate proportionally sharing the cost of field trips and tutoring, but takes issue with proportionally sharing other “educational expenses” J.’s school or doctors recommend. BA 18-19. The same is true for the latter. *Id.* Andrew does not seem to object to proportionally paying for skiing, swimming, and Easter Seals camp, but to paying his proportional share of other activities recommended by J.’s healthcare providers. *Id.* In short, it appears that Andrew objects only to recommended activities that are not delineated in the parenting plan, not those specifically delineated, such as field trips or Easter Seals camps. *Id.*

Ordering the parties to proportionally share recommended activities does not conflict with the parenting plan’s joint decision-making provisions. BA 18-19. Andrew suggests, without any

support, that joint decision-making is an all-or-nothing proposition. *Id.* But there is no reason that the parties cannot be required to pay for some things, and still have joint decision-making on all matters that are not expressly delineated in the child support order.

The purpose of this provision is to ensure that J. can continue in activities recommended by his providers that he was in at the time of trial, or had participated in during the marriage. RP 30-31. The support order simply requires the parties to follow the recommendations made by the professionals caring for their special-needs child. That does not frustrate joint decision-making.

Andrew next argues that the trial court could not obligate the parties to jointly pay for activities “recommended” by J’s school and healthcare providers without first determining: (1) that the amount exceeding the support obligation is reasonable and necessary; and (2) that the cost of the activity is commensurate with the parties’ income, resources, and standard of living. BA 20 (citing *In re Marriage of Daubert*, 124 Wn. App. 483, 494-95, 99 P.3d 401 (2004) abrogated on other grounds by *In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007)). *Daubert* does not require the trial court to line-item every activity.

In addition to the basic child support obligation derived from the economic table, a trial court has wide discretion to award additional amounts of support to be apportioned between the parties. **Daubert**, 124 Wn. App. at 490, 494. These include extraordinary health care expenses, day care, and special child rearing expenses. 124 Wn. App. at 494 (citing RCW 26.19.080(2) and (3)). Healthcare costs include mental health treatment. RCW 26.19.080(2). Special child rearing expenses include, but are not limited to, private school tuition, day care, tutoring, summer camps, and “travel for extracurricular activities or cultural experiences.” **Daubert**, 124 Wn. App. at 494, 497.

To exceed the basic support obligation, the trial court must determine that additional amounts are reasonable and necessary, considering, among other things, “the special medical, educational and financial needs of the children.” *Id.* at 495-96. The court must also determine whether the additional amounts are commensurate with the parties’ income, resources and standard of living. 124 Wn. App. at 494-95. This inquiry guides the trial court’s broad discretion. *Id.* at 490.

**Daubert** does not suggest that a trial court is required to identify every item that justifies increased support. *Id.* at 494, 497.

*Daubert* specifically held that summer camps, tutoring, and educational travel are special childrearing expenses that warrant increased support. *Id.* This Court did not, however, hold that a trial court is required to itemize and value every trip and camp a child might participate in. *Id.*

Finally, Andrew is incorrect that the parties have historically worked well to decide the children's activities. BA 21. Unfortunately, Andrew has a history of ignoring Tina's requests to share the costs of J.'s activities or agreeing to share costs one year, only to revoke his agreement – and his financial support – the next year. CP 132-34; RP 22. Like his sisters, J. should be able to participate in activities, and Tina should not have to wait and see whether Andrew chooses to help fund activities that keep J. safe and improve his quality of life.

**D. The trial court was well within its broad discretion in ordering the parties to share the cost of 20 hours of care for J. each month.**

Tina asked the trial court to include in the child support order as a shared expense what she called “respite care” – the cost of paying a qualified adult to provide some care for J. who requires round-the-clock supervision. CP 131-32. The trial court granted this request in part, ruling that such care was directly related to J.'s

support, given his significant impairments. CP 241. The court ordered respite care based on the residential schedule in place at that time: up to 6 hours for Andrew and 14 for Tina, in an amount not to exceed \$25 per hour. CP 248. If the parties use all their allotted respite care at the maximum hourly rate, Andrew will pay about \$350 and Tina will pay about \$150 each month. CP 248. Andrew claims that this is an abuse of discretion.

Andrew principally argues that respite care is for Tina, not J., so cannot be included in child support. BA 21. This distorts the reality of J.'s situation and the time and dedication it takes to adequately care for him. CP 127-32.

J. requires supervision 100% of the time to keep him safe and engaged in developmentally appropriate behavior. *Supra*, Statement of the Case § C. He needs to be supervised by a competent adult, not his teenage sisters. *Id.* If he is not supervised he is a danger to himself, and if he is not stimulated, he participates in self-stimulating behaviors that are detrimental to his development. *Id.*

It simply is not possible for Tina to engage with J. 100% of the time he is with her, take care of her daughters, manage a house, do her job, and take care of herself. CP 39, 41-42, 131. Under the

parenting plan, Tina has J. 70% of the time, but she often helps with his activities during Andrew's residential time too. CP 41-42, 131. And since December 2014, the parties' oldest daughter no longer spends residential time with Andrew, so is living with Tina 100% of the time. CP 130-31.

It is not an abuse of discretion to give Tina some time to spend with her teenage daughters, or to take care of herself, even if that just means knowing that J. is appropriately supervised so that she can grocery shop, exercise, or take a shower. This is not about "freedom," or J. having a babysitter so that Tina can go out with friends. It is about keeping J. safe and engaged while allowing Tina time to get things done, care for her other kids, care for herself, do her job, and yes – even have a small break. CP 39, 41-42, 131.

The trial court plainly understood this issue, comparing respite care to a parent putting on her own oxygen mask in an airplane emergency before putting on her child's mask. RP 39-40. The point of course is that parents must take care of themselves to be able to adequately care for their children. *Id.* Tina cannot care for J. or the parties' two daughters without some opportunity to care for herself.

Andrew incorrectly claims that J. is cared for by "other adults during almost all of his waking hours" and that J. resides with Andrew

“the majority of the weekends.” BA 22 (citing CP 113, 1244-45). This is not true. Tina does not have care after 8:00 p.m., or on the weekends, when she often has to work. CP 39.

And Andrew no longer has J. more weekends than Tina. BA 22. The parenting plan entered in 2010 gave Andrew J. weekends 1, 3, and 5 if there was a 5th weekend in the month. CP 1275. In an entire year, Andrew might have J. 4 more weekends than Tina. *Id.* But in April 2015, the parties jointly amended the plan to every other weekend.<sup>4</sup> Andrew no longer has more weekend time with J. Supp. CP\_\_\_\_. And again, Tina has often assumed care for J. on Andrew’s weekends so that J. can participate in activities. CP 42, 131.

But in any event, arguing about who has more residential time with J. does not really address the need for respite care. Tina needs respite care so that she can take care of herself, her home, her job, and *all* of her children. CP 39, 41-42, 131. Giving her a small tool to accomplish these things was well within the trial court’s broad discretion.

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<sup>4</sup> Along with this brief, Tina files a Supplemental Designation of Clerk’s Papers, designating this agreed order.

**E. This Court should award Tina fees.**

This Court may award attorney fees where the requesting party has financial need and the other party has the ability to pay. RCW 26.09.140; RAP 18.1; *In re Marriage of Kim*, 179 Wn. App. 232, 256, 317 P. 3d 555, *rev. denied*, 180 Wn.2d 1012 (2014). Tina will comply with RAP 18.1(c).

Tina has financial need and Andrew has the ability to pay. RCW 26.09.140. Tina's income is considerably less than half of Andrew's income. CP 243-44. Under the parenting plan, Tina was to have the children more than twice as much as Andrew, and her residential time has increased since the child support order was entered. CP 42, 131, 1274-75; Supp. CP \_\_\_\_\_. Andrew no longer has J. on more weekends, and Tina continues to take J. on Andrew's residential time, which is not reflected in the support order. *Id.* The parties' oldest child also lives with Tina 100% of the time – she has not spent residential with time with Andrew since December 2014. CP 131.

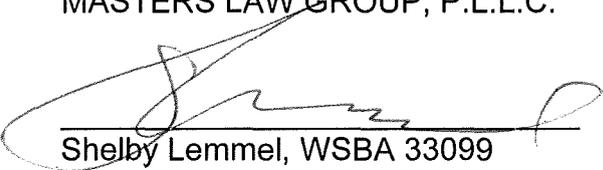
Tina simply cannot bear the additional child-related expenses and fees incurred on appeal. This Court should award Tina fees. RAP 18.1.

## CONCLUSION

Andrew should not be permitted to prioritize his retirement savings over his child support obligation. Nor should Tina have to argue over activities for their children and be solely responsible for the cost of providing some respite care so that J. is safe. This Court should affirm the trial court's discretionary decisions and award Tina fees.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of August,  
2015.

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**CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL**

I certify that I caused to be mailed, postage prepaid via U.S. mail, and/or emailed a copy of the foregoing **BRIEF OF RESPONDENT** on the 25<sup>th</sup> day of August 2015, to the following counsel of record at the following addresses:

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## **RCW 26.19.035**

### **Standards for application of the child support schedule.**

(1) **Application of the child support schedule.** The child support schedule shall be applied:

- (a) In each county of the state;
- (b) In judicial and administrative proceedings under this title or Title 13 or 74 RCW;
- (c) In all proceedings in which child support is determined or modified;
- (d) In setting temporary and permanent support;
- (e) In automatic modification provisions or decrees entered pursuant to RCW 26.09.100; and
- (f) In addition to proceedings in which child support is determined for minors, to adult children who are dependent on their parents and for whom support is ordered pursuant to RCW 26.09.100.

The provisions of this chapter for determining child support and reasons for deviation from the standard calculation shall be applied in the same manner by the court, presiding officers, and reviewing officers.

(2) **Written findings of fact supported by the evidence.** An order for child support shall be supported by written findings of fact upon which the support determination is based and shall include reasons for any deviation from the standard calculation and reasons for denial of a party's request for deviation from the standard calculation. The court shall enter written findings of fact in all cases whether or not the court: (a) Sets the support at the presumptive amount, for combined monthly net incomes below five thousand dollars; (b) sets the support at an advisory amount, for combined monthly net incomes between five thousand and seven thousand dollars; or (c) deviates from the presumptive or advisory amounts.

(3) **Completion of worksheets.** Worksheets in the form developed by the administrative office of the courts shall be completed under penalty of perjury and filed in every proceeding in which child support is determined. The court shall not accept incomplete worksheets or worksheets that vary from the worksheets developed by the administrative office of the courts.

(4) **Court review of the worksheets and order.** The court shall review the worksheets and the order setting support for the adequacy of the reasons set forth for any deviation or denial of any request for deviation and for the adequacy of the amount of support ordered. Each order shall state the amount of child support calculated using the

standard calculation and the amount of child support actually ordered. Worksheets shall be attached to the decree or order or if filed separately shall be initialed or signed by the judge and filed with the order.

[2005 c 282 § 36; 1992 c 229 § 6; 1991 c 367 § 27.]

## **RCW 26.19.071**

### **Standards for determination of income.**

(1) **Consideration of all income.** All income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent. Only the income of the parents of the children whose support is at issue shall be calculated for purposes of calculating the basic support obligation. Income and resources of any other person shall not be included in calculating the basic support obligation.

(2) **Verification of income.** Tax returns for the preceding two years and current paystubs shall be provided to verify income and deductions. Other sufficient verification shall be required for income and deductions which do not appear on tax returns or paystubs.

(3) **Income sources included in gross monthly income.** Except as specifically excluded in subsection (4) of this section, monthly gross income shall include income from any source, including:

- (a) Salaries;
- (b) Wages;
- (c) Commissions;
- (d) Deferred compensation;
- (e) Overtime, except as excluded for income in subsection (4)(i) of this section;
- (f) Contract-related benefits;
- (g) Income from second jobs, except as excluded for income in subsection (4)(i) of this section;
- (h) Dividends;
- (i) Interest;
- (j) Trust income;
- (k) Severance pay;
- (l) Annuities;
- (m) Capital gains;

- (n) Pension retirement benefits;
- (o) Workers' compensation;
- (p) Unemployment benefits;
- (q) Maintenance actually received;
- (r) Bonuses;
- (s) Social security benefits;
- (t) Disability insurance benefits; and
- (u) Income from self-employment, rent, royalties, contracts, proprietorship of a business, or joint ownership of a partnership or closely held corporation.

**(4) Income sources excluded from gross monthly income.** The following income and resources shall be disclosed but shall not be included in gross income:

- (a) Income of a new spouse or new domestic partner or income of other adults in the household;
- (b) Child support received from other relationships;
- (c) Gifts and prizes;
- (d) Temporary assistance for needy families;
- (e) Supplemental security income;
- (f) Aged, blind, or disabled assistance benefits;
- (g) Pregnant women assistance benefits;
- (h) Food stamps; and
- (i) Overtime or income from second jobs beyond forty hours per week averaged over a twelve-month period worked to provide for a current family's needs, to retire past relationship debts, or to retire child support debt, when the court finds the income will cease when the party has paid off his or her debts.

Receipt of income and resources from temporary assistance for needy families, supplemental security income, aged, blind, or disabled assistance benefits, and food stamps shall not be a reason to deviate from the standard calculation.

(5) **Determination of net income.** The following expenses shall be disclosed and deducted from gross monthly income to calculate net monthly income:

- (a) Federal and state income taxes;
- (b) Federal insurance contributions act deductions;
- (c) Mandatory pension plan payments;
- (d) Mandatory union or professional dues;
- (e) State industrial insurance premiums;
- (f) Court-ordered maintenance to the extent actually paid;
- (g) Up to five thousand dollars per year in voluntary retirement contributions actually made if the contributions show a pattern of contributions during the one-year period preceding the action establishing the child support order unless there is a determination that the contributions were made for the purpose of reducing child support; and
- (h) Normal business expenses and self-employment taxes for self-employed persons. Justification shall be required for any business expense deduction about which there is disagreement.

Items deducted from gross income under this subsection shall not be a reason to deviate from the standard calculation.

(6) **Imputation of income.** The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation. Income shall not be imputed for an unemployable parent. Income shall not be imputed to a parent to the extent the parent is unemployed or significantly underemployed due to the parent's efforts to comply with court-ordered reunification efforts under chapter 13.34 RCW or under a voluntary placement agreement with an agency supervising the child. In the absence of records of a parent's actual earnings, the court shall impute a parent's income in the following order of priority:

- (a) Full-time earnings at the current rate of pay;
- (b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;

(c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;

(d) Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is recently coming off public assistance, aged, blind, or disabled assistance benefits, pregnant women assistance benefits, essential needs and housing support, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;

(e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.

[2011 1st sp.s. c 36 § 14; 2010 1st sp.s. c 8 § 14; 2009 c 84 § 3; 2008 c 6 § 1038; 1997 c 59 § 4; 1993 c 358 § 4; 1991 sp.s. c 28 § 5.]

## **RCW 26.19.080**

### **Allocation of child support obligation between parents — Court-ordered day care or special child rearing expenses.**

(1) The basic child support obligation derived from the economic table shall be allocated between the parents based on each parent's share of the combined monthly net income.

(2) Health care costs are not included in the economic table. Monthly health care costs shall be shared by the parents in the same proportion as the basic child support obligation. Health care costs shall include, but not be limited to, medical, dental, orthodontia, vision, chiropractic, mental health treatment, prescription medications, and other similar costs for care and treatment.

(3) Day care and special child rearing expenses, such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses shall be shared by the parents in the same proportion as the basic child support obligation. If an obligor pays court or administratively ordered day care or special child rearing expenses that are not actually incurred, the obligee must reimburse the obligor for the overpayment if the overpayment amounts to at least twenty percent of the obligor's annual day care or special child rearing expenses. The obligor may institute an action in the superior court or file an application for an adjudicative hearing with the department of social and health services for reimbursement of day care and special child rearing expense overpayments that amount to twenty percent or more of the obligor's annual day care and special child rearing expenses. Any ordered overpayment reimbursement shall be applied first as an offset to child support arrearages of the obligor. If the obligor does not have child support arrearages, the reimbursement may be in the form of a direct reimbursement by the obligee or a credit against the obligor's future support payments. If the reimbursement is in the form of a credit against the obligor's future child support payments, the credit shall be spread equally over a twelve-month period. Absent agreement of the obligee, nothing in this section entitles an obligor to pay more than his or her proportionate share of day care or other special child rearing expenses in advance and then deduct the overpayment from future support transfer payments.

(4) The court may exercise its discretion to determine the necessity for and the reasonableness of all amounts ordered in excess of the basic child support obligation.

[2009 c 84 § 5; 1996 c 216 § 1; 1990 1st ex.s. c 2 § 7.]