

No. 34626-5-II

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

KIMBERLY S. BORT,
Respondent

v.

MICHAEL D. BORT,
Appellant

07 JAN 31 PM 2:54
COURT OF APPEALS
STATE OF WASHINGTON
BY
DEPUTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it imputed income to Mr. Bort, who was incarcerated at the time of trial.
Finding of Fact No. 2.19*
Order of Child Support, Finding 3.2 (CP 292)
2. The trial court erred when it made the Final Order of Child Support retroactive.
Finding of Fact No. 2.19*
CP 294
CP 265 (oral finding)
3. The trial court erred when it required the parties to annualize extraordinary medical expenses.
Finding of Fact No. 2.19*
CP 268 (oral ruling)
4. The trial court erred when it failed to distribute all of the community liabilities as part of its final division of the marital property.
Finding of Fact No. 2.10
5. The trial court erred when it ordered Mr. Bort to pay Ms. Bort's attorney's fees and costs.
Finding of Fact No. 2.14

* The trial court's written Findings of Fact and Conclusions of Law do not expressly address these assignments of error, but the trial court's findings contained in the Final Order of Child Support and/or its oral findings do. Those citations are provided for the Court's convenience.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by improperly determining Mr. Bort's income?
Assignment of Error 1.
2. Did the trial court err in its Final Order of Child Support?
Assignments of Error 2 and 3.
3. Did the trial court err by failing to distribute all liabilities of the marital community?
Assignment of Error 4.
4. Did the trial court err by awarding Ms. Bort her attorney's fees and costs?
Assignment of Error 5.

STATEMENT OF THE CASE

The dissolution of a 20 year marriage underlies this appeal. At issue is the trial court's final orders pertaining to child support, its failure to distribute the marital community's debts, its award of attorney's fees and the trial court's denial of reconsideration of those final orders.

Factual background

Kimberly and Michael Bort were married in 1986. CP 2. At the time of trial, they had two minor children. CP 1. Mr. Bort owned and operated Mike Bort Construction. He had also owned a business with his father, Bort & Sons Construction. VRP 112; CP 92.

Mr. Bort had been incarcerated for approximately 60 days in late 2002. VRP 10-11. At that time, Mr. Bort was still receiving payments for work performed prior to his incarceration. VRP 11. The Borts' federal income tax returns reflect business income of \$25,861 in 2002 and \$30,900 in 2003. VRP 31-32, Ex. 12.

The Borts separated on December 17, 2004. CP 2; VRP7. Mrs. Bort started dissolution proceedings on December 20, 2004. CP 37.

Earlier in the marriage, Mrs. Bort had worked for Mike Bort Construction as bookkeeper/office manager, and had also worked for Kids-R-Us as a manager. VRP 9. During the pendency of the dissolution proceeding, she returned to work at Kids-R-Us (VRP 96), and then

worked as office manager for her boyfriend's construction business. CP 93, VRP 100.

The family home was sold during the pendency of the dissolution proceeding. CP 84. The proceeds from the sale, approximately \$83,527.52, were deposited into the Court registry. CP 97.

In December of 2005, Mrs. Bort brought a motion for a temporary order, in which she sought, among other relief, temporary child support. CP 88. Temporary child support was not ordered. The hearing on this motion was continued (CP 189), and the record does not indicate the motion was ever fully heard – temporary child support was not ordered.

Trial was held on February 9, 13, 14 and 15, 2006. At the time of trial, Mr. Bort was incarcerated. VRP 118.

During Mr. Bort's incarceration, Mike Bort Construction conducted no business, VRP 112, but Mr. Bort "earned" \$20.58 per month for work performed at the correctional facility. VRP 118. In addition to her own earnings, Mrs. Bort borrowed money from her father, her mother and her boyfriend to pay living expenses. VRP 15-16, 17, 18; CP 93, 164-65, 167-68, 170-71.

At the time of trial, the marital community had debts totaling approximately \$25,000. These debts included unpaid, uninsured medical expenses, consumer debt (e.g., credit cards), arrearages owed on the

family home mortgage, past due utilities and household expenses, unpaid income taxes and miscellaneous expenses incurred preparing the family home for sale. CP 150-53, 206-07, 239-40.

At the conclusion of trial, Judge Stolz's rulings included the following, pertinent to this appeal:

1. Payment of various debts from proceeds held in the Court Registry or allocation of said funds:

\$12,000.00	tax debt
\$ 8,300.00	to Mrs. Bort's father to repay loans
\$ 3,000.00	to Sterling Bank
\$ 1,200.00	unpaid medical bills for children
\$ 5,000.00	for future GAL, psychological exams
<u>\$ 220.00</u>	initial filing fee ¹
\$29,720.00	Total

CP 260-62.

2. Valuation and distribution of the following marital assets:

<u>Property/in-kind value</u>	<u>to Mrs. Bort</u>	<u>to Mr. Bort</u>
Household furnishings	\$2,500	
Mitsubishi Lancer	\$0	
Jewelry	\$2,000	
Tools		\$5,000
Dump truck		\$0
1981 trailer		\$400
1985 trailer		\$500
1986 horse trailer		\$100
1994 GMC truck		\$4,000
Cash (house sale proceeds)	\$36,200	\$20,300
Prior attorney's fees award		- \$1,000

¹ Mrs. Bort had been granted leave of Court to file her Petition for Dissolution *in forma pauperis*. CP 10.

Attorney's fees (trial)		- \$2,000
TOTAL	\$40,700	\$27,300

CP 261-63.

3. Payment of debts:

Judge Stolz ordered Mrs. Bort to pay her own credit card debt, and Mr. Bort to pay the Corliss debt. CP 266.

4. Final order of child support:

Judge Stolz ruled that she was going to “assess Mr. Bort reasonable child support from January ‘05 when his support amount was originally set.” CP 265.

The Final Order of Child Support was entered on March 24, 2006. CP 290-98. The trial court determined the monthly transfer payment by imputing income of \$6,000 per month to Mr. Bort. CP 292. Judge Stolz found:

that the father became voluntarily underemployed prior to his incarceration. When father was incarcerated in 2002, it was uncontroverted that when father was released he got \$30,000.00[.]

CP 292. Judge Stolz orally found, “So it appears whether Mr. Bort is incarcerated or not, he has the ability to generate a substantial income.”

CP 263. The Court imputed income to Mrs. Bort, at her current wage of \$15 per hour, based on a 40 hour work week. CP 264.

The monthly transfer payment was set at \$1,262.48, the standard calculation, with no deviation or extrapolation. CP 293, 294. Based on this effective date, an arrearage in child support of \$18,937.20 resulted. CP 311. The trial court ordered that this arrearage would be offset against the cash awarded to Mr. Bort from the house sale proceeds. CP 265.

5. Uninsured (extraordinary) medical expenses.

In addition, Judge Stolz ordered that uninsured (extraordinary) medical expenses would be annualized by taking the monthly threshold amount from the child support worksheets (at line 8(e)) and multiplying it “timed by 12 months.” CP 268. The parties were to pay these expenses in the same proportion as indicated on the child support worksheets. CP 300, line 8.

6. Attorney’s fees.

The trial court found that because “the wife ha[d] the need for payment of [attorney’s] fees and costs and the other spouse ha[d] ability to pay”, Mr. Bort was ordered to pay Mrs. Bort’s attorney’s fees in the amount of \$3,000. CP 306 (FOF 2.14).

Mr. Bort sought reconsideration of the Court’s final orders. CP 322. Mr. Bort argued that imputing a monthly income of \$6,000 for purposes of determining child support, making the child support order retroactive, annualizing the extraordinary medical expenses, failing to

distribute all of the marital community's debts and awarding attorney's fees to Mrs. Bort was error. CP 323. The trial court denied the motion for reconsideration. CP 328. Mr. Bort appeals.

D. ARGUMENT

I. THE TRIAL COURT'S AWARD OF CHILD SUPPORT WAS IMPROPER.

Standard of Review Pertaining to Orders of Child Support.

Setting the amount of child support rests within the discretion of the trial court. *In re Marriage of Fiorito*, 112 Wn. App. 657, 663-64, 50 P.3d 298 (2002); *In re Marriage of Stern*, 57 Wn. App. 707, 717, 789 P.2d 807, review denied, 115 Wn.2d 1013, 797 P.2d 513 (1990).

Thus, a trial court's decision setting child support is reviewed for abuse of discretion. *Fiorito*, 112 Wn. App. At 663-64 (citing *In re Marriage of Crosetto*, 82 Wn. App. 545, 560, 918 P.2d 954 (1996)). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *Fiorito*, 112 Wn. App. at 663-64 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A trial court necessarily abuses its discretion when its decision is "based on an erroneous view of the law." *In re Marriage of Scanlon and Witrak*, 109 Wn. App. 167, 175, 34 P.3d 877 (2001).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standards. It is based on untenable grounds if the trial court's factual findings are unsupported by the record. It is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Fiorito*, 112 Wn. App. at 663-64 (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

In this case, the trial court abused its discretion by incorrectly determining Mr. Bort's income, and by making the final order of child support retroactive.

A. It was improper to impute income to Mr. Bort while he was incarcerated.

When determining the parents' respective incomes for purposes of setting child support, a trial court is required by statute to impute income to a parent when that parent is voluntarily underemployed or unemployed. But when a parent is unemployable, trial courts are proscribed from imputing income to that parent. RCW 26.19.071(6) specifically provides:

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. . . . In the absence of information to the contrary, a parent's imputed income shall be based on the median 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.

See also Goodell v. Goodell, 130 Wn. App. 381, 122 P.3d 929 (2005).

Division Two provided a thorough analysis of this statute in terms of its meaning and its application in *In re Blickenstaff*, 71 Wn. App. 489, 859 P.2d 646 (1993). Speaking for the Court, Judge Petrich wrote:

[A]n incarcerated parent is not 'voluntarily unemployed' within the meaning of the child support statutes unless the parent was imprisoned for a crime of nonsupport or for civil contempt for failure to pay support.

Blickenstaff, 71 Wn. App. at 498. *See also State ex rel. Taylor v. Dorsey*, 81 Wn. App. 414, 914 P.2d 773, 424 n.6 (1996). *Blickenstaff* is squarely on point with this case.

At the conclusion of trial, Judge Stolz stated that *Blickenstaff* was not applicable to this case because *Blickenstaff* dealt with child support modification. However, RCW 26.09.071 does not distinguish between imputation of income for a permanent order of child support versus

modification of an existing child support order. Therefore, the fact that *Blickenstaff* dealt with a child support modification is not material here.

RCW 26.09.071 allows a court to impute income to a person who is voluntarily unemployed or underemployed. According to *Blickenstaff*, an incarcerated person is not voluntarily unemployed or underemployed. *Blickenstaff*, 71 Wn. App. at 498. Because he was incarcerated, Mr. Bort was not voluntarily unemployed or underemployed.

The trial court erred by imputing income to Mr. Bort for the period of time during which he was incarcerated.

B. It was improper for the trial Court to retrospectively award child support.

A trial court must determine child support according to the *current* circumstances of the parties. *In re Marriage of Scanlon and Witrak*, 109 Wn. App. 167, 178-79, 34 P.3d 877 (2001).

The principals that prohibit trial courts from retroactive modification of child support should apply equally to a retroactive award of permanent child support, as was done in this case. In child support modification proceedings, the law prohibits retroactive modification because it opens the door to uncertainties, costs and hardship. *Schumacher v. Watson*, 100 Wn. App. 208, 212, 997 P.2d 399 (2000). *Cf. In re Marriage of Ortiz*, 108 Wn.2d 643, 648-49, 740 P.2d 843 (1987)

(retroactive application of escalation clauses creates substantial uncertainties); *Mathews v. Mathews*, 1 Wn. App. 838, 842-43, 466 P.2d 208 (1970) (retrospective modification of accrued child support not allowed).

In this case, the trial court imputed a monthly net income of \$6,000 to Mr. Bort while he was incarcerated. In addition, the trial court made the permanent order of child support effective as of January 2005, **thirteen months** prior to the date of trial. Mr. Bort was incarcerated during this period of time. This necessarily resulted in an immediate arrearage of \$18,937.20 CP 311. Although the trial court awarded Mr. Bort \$20,300 of the family home sale proceeds, the trial court ordered that the child support arrearage be taken by Mrs. Bort as an offset against it. Therefore, of the \$83,527.52 in house sale proceeds, Mrs. Bort received \$59,637.20, or 71.3%; and Mr. Bort received \$8,362.80, or 28.7%. This is a highly inequitable result.

Moreover, the court has discretion to mitigate the harshness of a claim for back support. It can do so to avoid an injustice to the custodial parent or the child. *In re Parentage of Hilborn*, 114 Wn. App. 275, 278, 58 P.3d 905 (2002) (citing *Hartman v. Smith*, 100 Wn.2d 766, 768-69, 674 P.2d 176 (1984)).

C. **It was an abuse of discretion for the trial Court to order the parties to annualize extraordinary medical expenses.**

Divorce proceedings are governed by equitable principles. *Harris v. Harris*, 63 Wn.2d 896, 902, 389 P.2d 655 (1964).

Extraordinary health care costs are costs that exceed five percent of the basic support obligation. RCW 26.19.080(2). They are allocated to each parent in the same proportion as their basic support obligations. RCW 26.19.080(1).

In practice, unreimbursed/extraordinary medical expenses are calculated on a monthly basis, not an annual basis. In this case, the trial court ordered that these expenses be paid on an “annualized” basis. CP 268.

The applicable statutes and case law do not directly address whether these expenses are to be paid annually or monthly. *See* Scott J. Horenstein, 20 Washington Practice: Family and Community Property Law § 37.9.

There are two ways to deal with [extraordinary medical] expenses. One method is to try to determine them in the manner suggested by the worksheet and then apportion them according to the formula in the worksheet. The other way to do it is to require the parents to pay for them on a monthly basis, with each paying their respective share according to their percentage of the support obligation.

Id. A complete copy of this article has been appended to this brief as Appendix A for the Court's convenience.

All other aspects of the child support worksheets are stated in terms of monthly annual application. Child support is calculated based on the parents' *monthly* incomes. Support is paid on a *monthly* basis.

In this case, the child support worksheets entered by the trial court provide that the maximum ordinary *monthly* health care is \$85.65. CP 300 (at Line 8(e)). As applied, therefore, Mrs. Bort is responsible to pay the first \$85.65 in unreimbursed, uninsured ("extraordinary") medical expenses. Any amount above \$85.65 should be paid in the proportions shown on Line 8 of the worksheet. CP 300. Therefore, in this case, Mr. Bort would be required to pay 73.7% of any unreimbursed, uninsured medical expenses that exceed \$85.65 in a month's time.

In practice, there may be months in which this "threshold amount" is not met or exceeded; therefore, the obligee would not be responsible for any reimbursement that month, because the obligee's proportionate share of that amount is already "built into" the basic support payment. Annualizing the medical expenses provides a guarantee of reimbursement to the obligee for months when it is not warranted.

For illustrative purposes only, if, hypothetically, the following medical expenses were incurred by Mrs. Bort:

January	\$150	July	\$ 45
February	\$ 40	August	\$ 20
March	\$ 75	September	\$ 99
April	\$ 94	October	\$250
May	\$102	November	\$ 80
June	\$ 16	December	<u>\$ 60</u>
		Total	\$1,031

On an *annualized* basis, Mr. Bort would be required to pay \$759.85 as his share.

On a *monthly* basis, Mr. Bort's obligation, \$196.59, would be determined as follows:

		Less <u>threshold</u>	Remaining <u>unreimbursed</u>	<u>73.7%</u>
January	\$150	\$85.65	\$64.35	\$47.42
February	\$ 40	\$85.65	\$ 0.00	\$ 0.00
March	\$ 75	\$85.65	\$ 0.00	\$ 0.00
April	\$ 94	\$85.65	\$ 8.35	\$ 6.15
May	\$102	\$85.65	\$ 16.35	\$ 12.05
June	\$ 16	\$85.65	\$ 0.00	\$ 0.00
July	\$ 45	\$85.65	\$ 0.00	\$ 0.00
August	\$ 20	\$85.65	\$ 0.00	\$ 0.00
September	\$ 99	\$85.65	\$13.35	\$ 9.84
October	\$250	\$85.65	\$164.35	\$121.13
November	\$ 80	\$85.65	\$ 0.00	\$ 0.00
December	\$ 60	\$85.65	\$ 0.00	<u>\$ 0.00</u>
			Total	\$196.59

The difference is highly significant.

The trial court is vested with broad discretion in family law matters. However, as a court of equity, the exercise of this discretion should not operate to cause an undue hardship on one of the parties. In

this case, by ordering that unreimbursed, uninsured medical expenses be annualized, the trial court abused its discretion.

II. THE TRIAL COURT ERRED BY FAILING TO DISTRIBUTE THE LIABILITIES OF THE MARITAL COMMUNITY.

Standard of Review Pertaining to Distribution of Marital Property.

Distribution of marital property is governed by RCW 26.09.080. A trial court's division of marital property is generally not reversed on appeal absent a showing of "manifest abuse." *In re Marriage of Wright*, 78 Wn. App. 230, 234-35, 896 P.2d 735 (1995) (citing *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992)); *Matter of Marriage of Monkowski*, 17 Wn. App. 816, 817, 565 P.2d 1210 (1977) (review of trial court's division of property limited to determination of whether division was manifest abuse of discretion.

RCW 26.09.080 provides:

In a proceeding for dissolution of the marriage . . . the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties[.]

Mrs. Bort's Pretrial Information Form listed numerous marital debts. CP 239-40. The marital debts distributed by the trial court does not include all debts before the court at the time of trial. CP 260-63. For example, the trial court valued the Mitsubishi Lancer at a zero value (CP 262), however, the record indicates there was an outstanding installment

loan on the car. CP239. The trial court did not address the installment loan. The trial court's failure to allocate all marital debts was an abuse of discretion.

III. THE TRIAL COURT ERRED BY AWARDING MS. BORT ATTORNEY'S FEES AND COSTS.

Standard of Review Pertaining to Attorney's Fees Award.

When a trial court awards attorney' fees pursuant to a statute, that award is reviewed on appeal for an abuse of discretion. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 29-30, 144 P.3d 306 (2006).

RCW 26.09.140 provides:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Stated otherwise, in making a discretionary award of attorney's fees in a dissolution case, a trial court balances the requesting party's needs against the other party's ability to pay. RCW 26.09.140. *In re Marriage of Shui and Rose*, 132 Wn. App. 568, 125 P.3d 180 (2005) (citing *In re Marriage of Rideout*, 150 Wn.2d 337, 357-58, 77 P.3d 1174 (2003)).

In one Washington case, a trial court's decision not to award a wife attorney's fees was affirmed, even though there was a significant disparity in the incomes of both parties. The wife had received a substantial share of the proceeds from the sale of the family home and was thus able to pay her own fees. *Mansour v. Mansour*, 126 Wn. App. 1, 17, 106 P.3d 768 (2004).

In this case, the trial court found that because Mrs. Bort "ha[d] the need for payment of [attorney's] fees and costs" and Mr. Bort "ha[d] ability to pay", Mr. Bort was ordered to pay Mrs. Bort's attorney's fees in the amount of \$3,000. CP 306 (FOF 2.14).

At the time of trial, Mr. Bort was incarcerated. He was generating no income. The trial court awarded Mrs. Bort a disproportionate share of the marital assets. Therefore, Mrs. Bort's ability to pay her attorney's fees was far greater than Mr. Bort's. The trial court abused its discretion by ordering Mr. Bort to pay Mrs. Bort's attorney's fees.

CONCLUSION

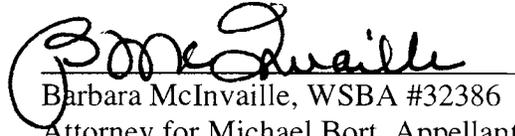
The trial court abused its discretion by imputing income to Mr. Bort during the period of time in which he was incarcerated, by ordering the payment of unreimbursed, extraordinary medical expenses on an annualized basis, by failing to distribute all of the marital liabilities, and

by awarding Mrs. Bort attorney's fees. It was also inequitable for the trial court to retroactively order permanent child support.

For the reasons and based upon the authorities cited above, the Appellant respectfully requests that this Court reverse the trial court and remand this matter for either entry of orders in conformity with the appropriate legal standards or for retrial of these issues.

DATED this 31st day of January, 2007.

RESPECTFULLY SUBMITTED,


Barbara McInville, WSBA #32386
Attorney for Michael Bort, Appellant

Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington
I affirm the following to be true:

On this date I transmitted the original document to the Washington
State Court of Appeals, Division II, by personal service and delivered a
copy of this document via United States Postal Service to the following:

Kimberly Bort, pro se
26911 – 122nd Avenue E.
Graham, WA 98338

Signed at Tacoma, Washington on this 31st day of January, 2007.



Lisa Johnson

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APPENDIX

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20 WAPRAC § 37.9

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20 Wash. Prac., Fam. And Community Prop. L. § 37.9
 (Publication page references are not available for this document.)

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**Part VII. Dissolution of Marriage
 Chapter 37. Child Support**

§ 37.9. Child support schedule and worksheets--Additions to basic child support; child support credits

1. In General

In addition to determining the basic child support obligation of each parent, the court must also determine any additional support sums to be paid by them, and it must also determine the support credits a parent should receive due to direct payments to (1) the child, or (2) because of direct payments to third parties on behalf of the child.

The basic support amount is determined on the basis of an economic table and is intended to include sums for certain basic child rearing costs such as food, clothing, housing, and the like.[FN1] There are certain items that are not included in the basic support amount--**extraordinary** health care expenses, day care, education expenses, and long distance transportation, and other special child rearing expenses.[FN2] When these expenses exist and are reasonable, [FN3] they may be added into the child support calculation and included in the Order of Child Support.

Child support *credits* are not mentioned in RCWA 26.19. However, they are recognized and provided for in the worksheet, and they are also recognized by case law. Additional support items and credits upon the child support obligation are recognized for direct payment of the following in respect to the children:

- (a) Health insurance premiums.
- (b) Uninsured health care expenses.
- (c) Day care expenses.
- (d) Education expenses.
- (e) Long-distance transportation expenses.
- (f) Other special child rearing expenses.
- (g) Social Security or worker's compensation paid directly to the child, or the child's guardian.

A discussion of these categories follows. However, before doing so, a general observation needs to be made. All of the above expenses are variable: medical insurance premiums usually change each year; the amount of uninsured health care expenses are never fixed; day care expenses often variable, and to some extent controlled by the choices the custodial parent makes about when to pick up the children; and long-distance transportation expenses, particularly if by commercial transportation, vary widely due to fare wars and the like.

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There are two ways to deal with these expenses. One method is to try to determine them in the manner suggested by the worksheet and then apportion them according to the formula in the worksheet. The other way to do it is to require the parents to pay for them on a monthly basis, with each paying their respective share according to their percentage of the support obligation.

The first method has the advantage of being certain, which is what a support collection agency that uses computers must have in order to efficiently function. The problem with this method, however, is that it often does not reflect the true expenses. Those of us who deal with these matters on a daily basis know of cases in which the court has ordered the obligor to pay a certain amount for day care or some other expense, and the custodial parent has then changed the schedule so that the actual cost is much less. At this point the obligor is being treated unfairly by being required to continue to pay phantom expenses, and the custodial parent is pocketing the money. The obligor is faced with seeking an offset or credit,^[FN4] or with seeking to modify the order. Even assuming that the obligor can prove the grounds for an offset or credit, or can prove that there has been a substantial change of circumstances which justifies a modification, the cost of the proceeding is prohibitive and children are involved in parental uproar.

The other method is fair to both parents in that they share the actual expense that is reasonably being incurred. Of course, if the obligor fails to pay, or is repeatedly delinquent, then the custodial parent is being treated unfairly because that parent is being compelled by the creditor to pay the whole bill, while the other parent temporarily pockets the money. The custodial parent is then faced with modification and/or enforcement proceedings, again with the attendant cost and the parents engaging in conduct that directly impacts the children.

It is the opinion of the author that method to apply should be determined on a case-by-case basis depending on the support payment history and likelihood of payment.

When there is a history of voluntary support, acceptable parental conduct, and the likelihood of the obligor actually paying these expenses, then the second method should be selected. These items are then not included in the monthly transfer payment shown on the worksheet. Rather the Order of Child Support directs the actual expenses to be shared on a monthly basis. In many cases there will not be a problem with this arrangement.

On the other hand, if there is not a history of acceptable parental conduct, where payment in the past has been inadequate and/or less than voluntary, and when there appears to be a risk in not having these expenses in the transfer payment on the worksheet and in the Order of Child Support, then the first method is appropriate.

Under no circumstances should the ease of using the collection services of a public agency with computers be the governing criteria. There is already enough bitterness over Washington's very high support schedule and the arbitrariness with which decisions are made in respect to it. Treating parents as humans on a case-by-case basis is a goal which, in the author's opinion, has much greater value than the ease of using public agency computers. Children are directly harmed by parental conflict, which in many cases is caused and/or increased by the application of an arbitrary support schedule administered by an administrative agency.

2. Health Insurance Premiums

The premium actually paid by either parent for health insurance for the children may be taken as a credit against the support obligation of that parent.^[FN5] Sums paid on behalf of a parent by a third party, such as employer, and sums paid for other members of the household may not be included. ^[FN6]

3. Uninsured Health Care Expenses

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"Ordinary health care expenses" are included in the economic table, which means that each order of basic child support already includes a sum for these expenses, calculated to be 5% of the basic child support amount. Any sums above these ordinary health care expenses are called "**extraordinary** health care expenses" and are to be proportionately shared by the parents.[FN7]

Unfortunately, like many parts of the child support legislation, this statute is vague and is the cause of much argument. The following are some of the unresolved issues that frequently arise with varied results in the trial courts.[FN8]

- (a) What happens if the children have no health care expenses for several months and then have large expenses in one month? Is the custodial parent's contribution cumulative on a yearly basis or on a monthly basis? For example, assume that the Order of Child Support commenced support on January 1st. In June the children incur a medical billing of \$1,000 and the monthly "ordinary health care amount is \$50." Does the custodial parent pay \$50 with the parents dividing the remaining \$950 according to their proportionate share of the income, or does the custodial parent pay \$300 (6 times \$50) with the parents dividing \$700?
- (b) If there are two children, and one becomes ill and the other does not, is the "ordinary health care expenses" amount to be allocated between the two children? Using the above example, if the \$1,000 was incurred by one child, is the custodial parent's initial payment to be \$25, \$50, \$150, or \$300?
- (c) If the "ordinary health care expense" portion of the child support payment is cumulative, what are the starting dates for accumulation? The date support was first ordered and the anniversary date thereafter? The last time there was a major expenditure that exhausted the unspent amount which was not accumulated?
- (d) If the amount of the "ordinary health care expense" paid is cumulative, why do the legislation and the worksheets always refer to monthly amounts?
- (e) If the amount of the "ordinary health care expense" paid is cumulative, what is permitted to be deducted in order to determine the unexpended amount? What about vitamins, Vicks, a vaporizer that may also be used by other members of the household, and the like?
- (f) If the amount of the "ordinary health care expense" paid is cumulative, who has the burden of proving what?
- (g) May the parent who furnishes the insurance claim the insurance payments as being that parent's share of the contribution for "**extraordinary** payments"? [FN9]

These are questions which should be resolved by appropriate legislation. [FN10]

If these expenses are to be assessed as child support, to the extent that a parent pays them that parent is entitled to a credit against the support obligation of that parent.

4. Day Care Expenses

Day care expenses are not included in the economic table and are therefore not included in the basic support amount, which means that the parents share them on a proportionate basis.[FN11]

Due to legislative inexactness, this is another area in which there is constant disagreement. What day care expenses are included? The legislature did not define the term "day care,"[FN12] nor did it state whether it must be work-related. If the obligor can furnish day care free of charge or a much reduced cost, should the custodial parent be able to insist that day care be furnished by a third person at a much higher cost? Should the custodial parent be able to stop at the grocery store, or the bar, or wherever, before claiming the children from the day care provider? So long as support orders provide that the obligor parent must pay the majority of day care expenses, it is not surprising to find that these arguments exist.

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The court has the final supervisory power as these issues,[FN13] but it exercises this power without any guidance from the legislation itself. When it is possible to do so, these issues should be specifically addressed in the Order of Child Support and the Parenting Plan.

If these expenses are to be assessed as child support, to the extent that the obligor pays them directly to the provider, the obligor is entitled to a credit against the support obligation.

Day care expenses may be assessed not only when a third person provides day care, but also when the primary residential parent loses day care income due to providing day care to that parent's own child.[FN14]

In 1996 the legislature amended RCWA 26.19.080 by adding a method to recoup day care expenses which were paid by the obligor parent, but not expended by the other parent.[FN15] This amendment provides some relief, but is not a fully satisfactory solution. This amendment is discussed elsewhere in this work.[FN16] In many cases the best way to prevent this type of problem is for the obligor to be able to make payment directly to the day care provider.

5. Education Expenses

Education expenses are not included in the economic table.[FN17] Interestingly, there is a slight difference in terminology between the statute [FN18] and the Child Support Schedule Standards contained in the Appendix to RCWA 26.19.[FN19] Despite this difference in terminology, it is evident that the cost of education beyond that normally provided in the public schools is special expense that may be shared by the parents according to their respective percentages of the income.

If the parents have jointly decided to place the children in a private or parochial school, there is usually no argument that needs to be resolved by the court. However, when the parents are not in agreement about education in any school except a public school, and have not resolved the disagreement in dispute resolution, the court may be called upon to decide what is often a financial dispute.

The general rule in this respect is, in the absence of special circumstances justifying special school education, and where acceptable public schools are available, a noncustodial parent is not obligated to contribute to the private education expenses of the children.[FN20] However, when family tradition, religion, past attendance at a private school, or other factors exist that show the need or advantage to the children of attending a private school, the court has discretionary jurisdiction to order that the obligor contribute for the cost of the private education.[FN21]

In addition to the public school/private school question, questions occasionally arise about the educational expenses of a child who is in need of private tutoring or special education. In some instances the question may be blurred with **extraordinary** medical expenses,[FN22] but in others it is matter of an educational problem that can be resolved by a special program or service beyond that which is afforded in the public schools.[FN23] There appear to be no cases directly in point. However, the test should be the same as above--are there special circumstances that justify education that is not available in the public schools at an acceptable level.

If these expenses are to be assessed as child support, to the extent that a parent pays them, that parent is entitled to a credit against the support obligation of that parent.

All of these issues rest in the sound discretion of the trial court to determine the necessity for these expenditures and the reasonableness of the expenditure.[FN24]

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6. Long-Distance Transportation Expenses

In many cases a parent moves the children to a distant location, or one or more children attend school at a distant location. Long distance transportation expenses incurred to permit visitation between the children and a parent, or parents, are not included in the economic table and are an additional item of child support that is allocated between the parents in the same proportion as the basic child support obligation.[FN25]

This legislation is vague in that there is no definition provided about what constitutes a "long distance". Is it just the mileage or is the cost of getting there also a factor? Can anything other than actual transportation expenses be included? This vagueness leads to arguments, confusion, and judicial inconsistency.[FN26]

If these expenses are to be assessed as child support, to the extent that a parent pays them, that parent is entitled to a credit against the support obligation of that parent.

7. Other Special Child Rearing Expenses

The statute[FN27] speaks "special child rearing expenses" being allocated between the parents and gives as examples day care, tuition and long distance transportation. However, these are not the only "special child rearing expenses" which are incurred on behalf of children, nor does the statute imply that these categories are inclusive. Some "special" expenses will hardly be debatable, such as speech therapy for a child born with a speech impediment. Others, though, are the subject of debate. Is the cost of Little League, the glove, and registration, included in the basic amount? What about piano lessons or dance lessons? What about summer camp? Many of these activities can be quite costly, particularly if there are several children engaged in them. Each of these categories are judged on a case by case basis with little consistency. [FN28]

In 1996 the legislature amended RCWA 26.19.080 by adding a method to recoup "special child rearing expenses" which were paid by the obligor parent, but not expended by the other parent.[FN29] This amendment provides some relief, but is not a fully satisfactory solution. This amendment is discussed elsewhere in this work. [FN30] In many cases the best way to prevent this type of problem is for the obligor to be able to make payment directly to the provider of the "special expense."

8. Social Security or Worker's Compensation Paid Directly to Child or Guardian

The obligor is entitled to credit for funds paid directly to the child, or the child's guardian, for Social Security disability dependency benefits, retirement benefits, survivor's insurance benefits due to death, disability, or retirement of the obligor, and funds so paid under labor and industry laws due to the disability of the obligor. [FN31] These payments are treated just as though they had been paid by the obligor. The obligor is also required to include these payments as income to the obligor.[FN32]

[FN30] Member of the Washington Bar, Principal in Weber & Gunn, Adjunct Professor, Lewis and Clark, Northwestern School of Law.

[FN31] Author and Editor.

[FN32] Kenneth E. Brewe, Mabry C. DeBuys, Thomas B. Hamerlinck, Scott J. Horenstein, Peter S. Lineberger, Howard H. Marshack, Christine A. Meserve, Mary H. Wechsler and Kathryn Holland (not a member of AAML).

[FN1] **Certain basic costs**

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See RCWA 26.19.011(1) and (5).

[FN2] **Not included**

RCWA 26.19.080.

[FN3] **And are reasonable**

RCWA 26.19.080(4) states: "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."

[FN4] See § 39.4 which discusses offsets and credits.

[FN5] **Premium paid**

Health insurance is discussed in § 37.11, below.

See *In re Marriage of Scanlon*, 109 Wn.App. 167, 34 P.3d 877 (2001).

[FN6] **May not be included**

Child Support Schedule Appendix to RCWA 26.19, Instructions for Worksheets, Health Care Expenses.

[FN7] **Proportionately shared**

RCWA 26.19.080(2).

[FN8] **Varied results**

While the court mentioned the terms, *In re Marriage of Wayt*, 63 Wn.App. 510, 820 P.2d 519 (1991) does not seem to have addressed these issues.

[FN9] **Claim the payments**

According to the Standards contained in the Child Support Appendix, Ch. 26.19 App., payments made by insurance is not to be included in the calculation of **extraordinary** health care expenses. This is because the worksheet refers to "Uninsured Monthly Health Care Expenses Paid for Child(ren)," whereas the legislation, RCWA 26.19.080(2) refers to "**extraordinary** health care expenses." Obviously, the two terms are not synonymous, particularly since the legislature specifically defined "**extraordinary** health care expenses."

[FN10] According to the Appendix to the Child Support Schedule, Part II, if "health care ... expense ... varies

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during the year, divide the annual total of the expense by 12 to determine a monthly expense". While this is helpful in using past or known information to forecast future expense in preparing a child support worksheet, it does not answer the questions.

[FN11] **On a proportionate basis**

RCWA 26.19.080(3). "The 'basic child support obligation' of RCW 26.19.020 does not include the cost of day care. RCW 26.19.080(3). But where reasonable and necessary the trial court may include day care costs in determining child support. RCW 26.19.080(3), (4)." In re Johnson-Skay, 81 Wn.App. 202, 204, 913 P.2d 834, 835 (1996).

It has been held elsewhere that day care expenses may not be imputed as a deduction when income is imputed to a parent. In re Marriage of Mackey, 940 P.2d 1112 (Colo.App.1997).

[FN12] **Did not define**

The use of a standard dictionary definition is not helpful in resolving this issue. For example, the Random House Webster's College Dictionary 346 (1991) defines *day care* as follows: "Supervised daytime care for preschool children, the elderly, or those with chronic disabilities. usually provided at a center outside of the home." The term is so inexact that there has been litigation distinguishing a "day care center" from a "nursery school" or "pre-kindergarten school" for zoning purposes. Lakeside Day Care Center, Inc. v. Board of Adjustment, City of Baton Rouge, 121 So.2d 335, 339 (1960).

[FN13] **Supervisory power**

RCWA 26.19.080(4) provides: "The court may exercise its discretion to determine the necessity for and the reasonableness of all amounts ordered in excess of the basis child support obligation."

[FN14] In In re Johnson-Skay, 81 Wn.App. 202, 913 P.2d 834 (1996) the residential parent was in the day care business which she operated in her home. Because of state regulations, the care of her own child caused her to lose the income which would have been received had she been able to care for the child of another. The court required the father to pay the mother for the day care of their child.

[FN15] Laws of 1996, ch. 216, sec. 1; RCWA 26.19.080(3).

Day care expenses

See Marriage of Barber, 106 Wn.App. 390, 23 P.3d 1106 (2001). Any reimbursement due for overpayment of child care expenses should not be offset against back child support. However, equitable defenses are available for any child care reimbursement due to the obligor parent.

RCWA 26.19.080, discussed in the main volume, was remedial in nature. It did not create a new right and is applicable retroactively. The statute merely clarified procedures obligor might use to recoup payments made for day care expenses which were not incurred. In re Marriage of Hawthorne, 91 Wn.App. 965, 957 P.2d 1296 (1998).

[FN16] See sec. 39.4.

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[FN17] **Not included**

RCWA 26.19.080(3).

[FN18] **The statute**

RCWA 26.19.080(3) refers to "special child rearing expenses, such as tuition"

[FN19] **The standards**

The Standards refer to "the average monthly costs of tuition and other related educational expenses."

[FN20] **Not obligated**

In re Marriage of Stern, 57 Wn.App. 707, 720, 789 P.2d 807, 814 (1990), rev den, 115 Wn.2d 1013, 797 P.2d 513 (1990).

[FN21] **Private education**

In re Marriage of Vander Veen, 62 Wn.App. 861, 865-67, 815 P.2d 843, 845-46 (1991).

[FN22] **Blurred with medical expenses**

For example, if the education is in the form of therapy for a child is deaf.

[FN23] **Educational problem**

For example, a child who needs a reading tutor.

[FN24] **Sound discretion**

RCWA 26.19.080(4).

[FN25] **Allocated between parents**

RCWA 26.19.080(3).

See In re Marriage of Scanlon, 109 Wn.App. 167, 34 P.3d 877 (2001).

See In re Paternity of Hewitt, 98 Wn.App. 85, 988 P.2d 496 (1999).

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See *Dortch v. Straka*, 59 Wn.App. 773, 801 P.2d 279 (1990).

It has been held that the duty to allocate long distance travel expenses on the same proportional basis as the basic support obligation is mandatory and it was error for the trial court to order the father to pay all such expenses. *Murphy v. Miller*, 85 Wn.App. 345, 932 P.2d 722 (1997).

[FN26] For example, a parent resides in Vancouver and the children are in Spokane. For alternate weekend visits the parent flies to Spokane and rents a motel. Is this "long distance"? Although technically not "transportation", should the cost to the parent of having a place to stay during the visit be a factor? Should the custodial parent be able to argue that credit should be given only for the cost of gasoline--at the IRS rate--instead of the cost of an airline ticket? And what if the trip is only between Seattle and Olympia, is that "long distance"?

[FN27] RCWA 26.19.080(3).

[FN28] A possible guide to answering these questions is whether the requested expenditure is necessary and reasonable. RCW 26.19.080(4). However, there will still be considerable differences of opinions between judges about what is "necessary" or "reasonable".

Long distance travel expenses are considered an extra expense not allocated for in the basic child's obligation and under 26.19.080(3) and shall be shared by the parents in same proportion as basic child support obligation in proportion with parent's income once they determine it reasonable and necessary. The Court recognized an exception to the rule requiring allocation in same proportion as the basic child support obligation where findings support a deviation. *Katare v. Katare*, 125 Wn.App. 813, 105 P.3d 44 (December 20, 2004).

[FN29] Laws of 1996, ch. 216, sec. 1; RCWA 26.19.080(3).

[FN30] See sec. 39.4.

[FN31] **Entitled to credit**

RCWA 26.18.190.

See *In re Marriage of Dicus*, 110 Wn.App. 347, 40 P.3d 1185 (2002). Note that RCW 26.18.190 is not retroactive.

In re Marriage of Briscoe, 134 Wn.2d 344, 949 P.2d 1388 (1998).

[FN32] **To the obligor**

Maples v. Maples, 78 Wn.App. 696, 899 P.2d 1 (1995).

In re Marriage of Briscoe, 134 Wn.2d 344, 949 P.2d 1388 (1998).

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