

COURT OF APPEALS NO. 42959-4-II
PIERCE COUNTY SUPERIOR COURT NO. 93-3-04576-9

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

AMANDA L. BLANK,

Appellant,

and

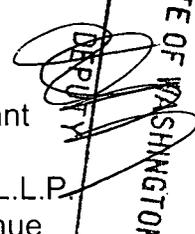
VERNON RUSSELL BLANK,

Respondent.

OPENING BRIEF OF APPELLANT

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FILED
COURT OF APPEALS
DIVISION II
2012 JUN 29 PM 1:05
STATE OF WASHINGTON
BY 

ORIGINAL

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Assignment of Errors.

1. The lower court erred and abused its discretion by finding that Russell’s monthly net income was \$8,195.
2. The lower court abused its discretion by failing to include all of Russell’s income to calculate his share of the support obligation, as it was required to do by RCW 26.19.071.
3. The lower court abused its discretion by ruling that only fifty (50%) percent of Russell’s personal expenses it found were paid by Perler Photography be included as part of Russell’s net monthly income.
4. The lower court erred in calculating the amount of the shareholder loans from Russell’s separate business which should have been included in his net monthly income.
5. The lower court abused its discretion by disregarding Russell’s unreported cash.

6. The lower court abused its discretion by ruling that Ryan was not enrolled in high school and not entitled to child support for February, March, July and August, 2010.

7. The lower court abused its discretion in looking at post-secondary support from the vantage point of the June 2011 evidentiary hearing, rather than from August 1, 2008, the effective date of the modification.

8. The lower court abused its discretion by refusing to make Russell pay his full proportionate share of post-secondary support for Adam's first semester at the University Of Idaho.

9. The lower court abused its discretion by holding that the costs of post-secondary support for Ryan be shared 1/3, 1/3, 1/3 because Russell applied for social security in June, 2011.

10. The lower court abused its discretion by not including the cost of Sylvan Learning as part of Adam's post-secondary educational support because Russell was not notified before that expense was incurred.

11. The lower court abused its discretion by failing to award Amanda her reasonable attorney fees and expenses.

12. The lower court abused its discretion by concluding it

was precluded from awarding attorney fees to Amanda for her prior appeal because this Court had declined to do so.

13. The lower court abused its discretion by failing to award Amanda her reasonable attorney fees and expenses, pursuant to RCW 26.09.140.

14. The lower court's finding that Amanda had not shown need, pursuant to RCW 26.09.140, was not supported by substantial evidence.

15. The lower court's finding that Russell did not have the ability to pay Amanda's attorney's fees, pursuant to RCW 26.09.140, was not supported by substantial evidence.

16. The lower court abused its discretion by failing to award Amanda her reasonable attorney fees and expenses due to Russell's intransigence.

17. The lower court abused its discretion by concluding that Russell did not engage in intransigence because he disclosed over 2000 pages of financial documents.

18. The lower court abused its discretion by concluding that Russell did not engage in intransigence because he brought the Petition for Modification in good faith.

19. The lower court abused its discretion by refusing to look at “past history” and “prior court findings” in determining whether Russell was intransigent.

20. The lower court abused its discretion by failing to award Amanda her reasonable attorney fees because Russell engaged in fraud.

21. The lower court’s finding that Russell did not engage in fraud is not supported by substantial evidence.

22. The lower court abused its discretion in not finding that Russell is collaterally estopped to relitigate whether his conduct constitutes fraud or intransigence.

Issues Pertaining to Assignment of Errors.

1. Is the lower court’s finding that Russell’s monthly net income was \$8,195 supported by substantial evidence?

(Assignment of Error 1).

2. Did the lower court abuse its discretion by failing to include all of Russell’s income to calculate his share of the support obligation, as it was required to do by RCW 26.19.071?

(Assignment of Error 2).

3. Did the lower court abuse its discretion by ruling that

only fifty (50%) percent of Russell's personal expenses it found were paid by Perler Photography be included as part of Russell's net monthly income? (*Assignment of Error 3*).

4. Does Russell's separate income from his separate business, Perler Photography, remain his separate property "through all of its changes and transitions" so long as it can be traced and identified, regardless of how he may choose to spend it? (*Assignment of Error 3*).

5. Is Russell collaterally estopped to re-litigate the issue of whether one-hundred (100%) of the payments of his personal expenses through his separate business, Perler Photography, should be included in his net monthly income where this issue was previously litigated before Honorable Sergio Armijo and the Honorable Lisa Worswick, and (1) the issue decided in the earlier proceedings is identical to the issue presented here, (2) the earlier proceedings ended in a judgment on the merits, (3) Russell was a party to those proceedings, and (4) application of collateral estoppel does not work an injustice against Russell because he had a full and fair opportunity to litigate this issue in the prior proceedings? (*Assignment of Error 3*).

6. Did the lower court err in calculating the amount of the shareholder loans from Russell's separate business which should have been included in his net monthly income when it mistakenly believed that \$12,025.90 was "the difference in the loan balance from the beginning to the end of the year", when it was actually only the difference for just five months? (*Assignment of Error 4*).

7. Did the lower court abuse its discretion by disregarding Russell's unreported cash when his bank accounts showed higher deposits than what he was reporting on his check ledgers? (*Assignment of Error 5*).

8. Did the lower court abuse its discretion by ruling that Ryan was not enrolled in high school and not entitled to child support for February, March, July and August, 2010? (*Assignment of Error 6*).

9. Did the court abuse its discretion by finding that Ryan was not enrolled in high school and entitled to child support for February, March, 2010 because he did not earn credits through the Running Start program during those months when basic child support is not conditioned upon academic achievement? (*Assignment of Error 6*).

10. Is the lower court's imposition of a condition of academic achievement to a finding of "enrollment" an unwarranted, retroactive modification of the support order under RCW 26.09.170? (*Assignment of Error 6*).

11. Is the lower court's finding that Ryan was not enrolled in high school and entitled to child support for February, March, July and August, 2010 supported by substantial evidence when Darlene Houk, who is responsible for Student Records for the Bethel School District, states that Ryan has been continuously enrolled in the Bethel School District for high school since January 27, 2009, including the months of February and March, July and August, 2010? (*Assignment of Error 6*).

12. Should basic child support be suspended during the summer recess? (*Assignment of Error 6*).

13. Was the lower court's ruling that child support be suspended during the summer recess an unwarranted, retroactive modification of the support order under RCW 26.09.170, where the Order of Child Support contained no provision for abatement during summer months, and the child was still dependent upon his parents for support? (*Assignment of Error 6*).

14. Did the lower court abuse its discretion in looking at post-secondary support from the vantage point of the June 2011 evidentiary hearing, rather than from August 1, 2008, the effective date of the modification? (*Assignment of Error 7*).

15. Did the lower court abuse its discretion by refusing to make Russell pay his full proportionate share of post-secondary support for Adam's first semester at the University Of Idaho? (*Assignment of Error 8*).

16. Did the lower court abuse its discretion by holding that the costs of post-secondary support for Ryan be shared 1/3, 1/3, 1/3 based upon Russell's bare assertion that he had applied for Social Security in June of 2011, and had no other evidence of his "current financial resources" after 2008? (*Assignment of Error 9*).

17. Did the lower court abuse its discretion by holding that the costs of post-secondary support for Ryan be shared 1/3, 1/3, 1/3 when Ryan does not have the ability to pay 1/3 of these expenses because of his health-related issues, and as a consequence, Amanda will be compelled to pay his one-third share by default? (*Assignment of Error 9*).

18. Did the lower court abuse its discretion by holding that

the costs of post-secondary support for Ryan be shared 1/3, 1/3, 1/3 when postsecondary educational child support must be apportioned between parents according to their respective net incomes in the same manner as basic child support? (*Assignment of Error 9*).

19. Did the lower court abuse its discretion by not including the cost of Sylvan Learning as part of Adam's post-secondary educational support because Russell was not notified before that expense was incurred, when there is no requirement in any Order of Child Support that he must be so notified? (*Assignment of Error 10*).

20. Did the lower court abuse its discretion by not including the cost of Sylvan Learning as part of Adam's post-secondary educational support where all of the Orders of Child Support entered in this case, including the current one, provide that the parents shall share the costs of "educational expenses", or "educational/tutoring expenses" for the parties' children, *in addition to the basic transfer payment?* (*Assignment of Error 10*).

21. Was the lower court's requirement that Amanda first notify Russell as a condition to being reimbursed for his share of

the Sylvan Learning educational expense an unwarranted, retroactive modification of the support order under RCW 26.09.170? (*Assignment of Error 10*).

22. Did the lower court abuse its discretion by failing to award Amanda her reasonable attorney fees and expenses? (*Assignment of Error 11*).

23. Did the lower court abuse its discretion by concluding it was precluded from awarding attorney fees to Amanda for her prior appeal because this Court had declined to do so because it did not know Russell's income and remanded this case to the lower court to make that determination? (*Assignment of Error 12*).

24. Did the lower court abuse its discretion by concluding it was precluded from awarding attorney fees to Amanda for her prior appeal because this Court had declined to do so because it wanted to have the lower court first make a determination of intransigence, because the limitations of appellate review, and remanded this case to the lower court to make that determination? (*Assignment of Error 12*).

25. Did the lower court abuse its discretion by failing to award Amanda her reasonable attorney fees and expenses,

pursuant to RCW 26.09.140, where the record lends no support to its findings of lack of need and lack of ability to pay, pursuant to RCW 26.09.140? (*Assignment of Error 13*).

26. Did the lower court abuse its discretion by finding that Amanda had not established the requisite showing of need in the absence of evidence that she had paid her attorney fees? (*Assignments of Error 13 and 14*).

27. Was the lower court's finding that Amanda had not shown need, pursuant to RCW 26.09.140, was supported by substantial evidence, where her net monthly income is \$4,738.12, and her monthly expenses are \$6,092.50? (*Assignments of Error 13 and 14*).

28. Was the lower court's finding that Russell did not have the ability to pay Amanda's attorney's fees, pursuant to RCW 26.09.140, supported by substantial evidence where the court found that Russell's net monthly income is \$8,195.08, and the total monthly expenses for his marital community is only \$7,810.77 of which his wife, Leann, pays a substantial portion? (*Assignments of Error 13 and 15*).

29. Was the lower court's finding that Russell did not

have the ability to pay Amanda's attorney's fees, pursuant to RCW 26.09.140, supported by substantial evidence where the court should have found that Russell's net monthly income is \$13,693.76, and the total monthly expenses for his marital community is only \$7,810.77 of which his wife, Leann, pays a substantial portion? (*Assignments of Error 13 and 15*).

30. Did the lower court abuse its discretion by failing to award Amanda her reasonable attorney fees and expenses, pursuant to RCW 26.09.140, where the record shows that Amanda is without funds to pay her attorney fees and Russell has the ability to pay those fees? (*Assignments of Error 13, 14 and 15*).

31. Did the lower court abuse its discretion by failing to award Amanda her reasonable attorney fees and expenses due to Russell's intransigence when he concealed and misrepresented his true income by using his separate business, Perler Photography, to pay his personal expenses? (*Assignment of Error 16*).

32. Did the lower court abuse its discretion by concluding that Russell did not engage in intransigence because he disclosed over 2000 pages of financial documents when his discovery was still incomplete, his attorney refused to meet and confer to address

Russell's failure to provide complete discovery? (*Assignment of Error 17*).

33. Did the lower court abuse its discretion by concluding that Russell did not engage in intransigence when Russell produced conflicting information about his income and, by his actions, forced Amanda to conduct intense discovery, which increased her legal bills. ? (*Assignment of Error 17*).

34. Did the lower court abuse its discretion by concluding that Russell did not engage in intransigence because he brought the Petition for Modification in good faith when good faith is not a defense to intransigence? (*Assignment of Error 18*).

35. Did the lower court abuse its discretion by concluding that Russell did not engage in intransigence because he brought the Petition for Modification in good faith when Russell prosecuted this Petition in bad faith by, yet again, fraudulently reporting and concealing his true income? (*Assignment of Error 18*).

36. Did the lower court abuse its discretion by refusing to look at "past history" and "prior court findings" in determining whether Russell was intransigent when Russell has continued to engage in the identical misconduct for a third time, namely

concealing and misrepresenting his true net income by thousands of dollars each month by using his separate business, Perler Photography, to pay his personal expenses, thereby forcing Amanda to conduct intense discovery, which she should not have been required to do, to ferret out his true income, which in turn substantially increased her legal bills,? (*Assignment of Error 19*).

37. Did the lower court abuse its discretion by failing to find that Russell engaged in fraud when he misrepresented and concealed his true income by using his separate business to pay his personal expenses? (*Assignment of Error 20*).

38. Did the lower court abuse its discretion by failing to award Amanda her reasonable attorney fees because Russell engaged in fraud when the record does not support the court's findings? (*Assignment of Error 20*).

39. Is the lower court's finding that Russell did not engage in fraud supported by substantial evidence where all nine elements of fraud are established? (*Assignment of Error 21*).

40. Is the lower court's finding that Russell did not engage in fraud supported by substantial evidence where Russell acknowledged that he "received some additional benefits" from

Perler Photography, but did not disclose that he was continuing to use Perler Photography to pay nearly all of his personal expenses under the guise of “business” expenses and shareholder loans which were never repaid, or were repaid through undisclosed accounts or unreported cash? (*Assignment of Error 21*).

41. Did the lower court abuse its discretion in not finding that Russell is collaterally estopped to relitigate whether his conduct constitutes fraud or intransigence where: (1) the issue of whether his misrepresentation and concealment of his true income by using his separate business to pay his personal expenses constitutes “fraudulent misrepresentation” and “intransigence in fraudulently reporting his income” has been litigated and decided in earlier proceedings and is identical to the issue presented here; (2) each of the earlier proceedings ended in a judgment on the merits; (3) Russell was a party to those proceedings; and (4) application of collateral estoppel does not work an injustice against Russell because he had a full and fair opportunity to litigate this issue in the prior proceedings? (*Assignments of Error 16-22*).

42. Where, as here, Russell’s bad acts permeate the entire proceedings, does the court below need to segregate which

fees were incurred as a result of intransigence and which were not?
(*Assignments of Error 16-22*).

43. Does sound public policy mandate an award of attorney fees in this case? (*Assignments of Error 16-22*).

44. Should this Court recognize and hold that both parents continue to have a fiduciary duty to one another *after* marriage to accurately disclose their incomes in proceedings to establish their respective support obligations for their children?
(*Assignments of Error 16-22*).

45. When a parent lies about his/her income in a child support proceeding, should that parent or the innocent parent bear the costs of the attorney and other professional fees which are necessarily incurred to establish the lying parent's true income?
(*Assignments of Error 16-22*).

Statement of the Case.

Russell and Amanda Blank¹ divorced on December 29, 1993. They have two children. Adam was born on April 17, 1989 and Ryan was born on November 11, 1991.

Throughout these proceedings, Russell has fraudulently misrepresented and concealed his true income by using his separate business, Perler Photography, Inc., to pay his personal expenses under the guise of “business” expenses and shareholder loans, without reporting those payments as income.

On May 26, 2004, the Honorable Sergio Armijo found, by clear, cogent and convincing evidence, that Russell had fraudulently misrepresented his income when the 1999 Order of Child Support was entered, and again when the parents were trying to have a new Order of Child Support entered, effective November 1, 2002, by failing “to disclose expenditures made on his behalf by Perler Photography during 1999 and 2002, which for accounting purposes constitute income.” CP 428-429.

Based on this finding, Judge Armijo vacated the Order of

¹ For ease and clarity, the parties shall be referred to by their first names. No disrespect is intended.

Child Support, entered on October 20, 1999, and ruled that a new Order of Child Support be entered for 1999, and that an Order of Child Support be entered for 2002, based on the parties' true net incomes, which would be determined through an evidentiary hearing. CP 430-432.

Judge Armijo also awarded Amanda the full amount of the attorney and accounting fees she had incurred, "pursuant to RCW 26.18.160, 26.09.140, and because of "Vernon Russell Blank's fraudulently reporting his income." CP 432.

Following an evidentiary hearing, the Honorable Lisa Worswick reaffirmed Judge Armijo's findings that Russell had misrepresented his income in 1999 and 2002. CP 436. She found that he had been using his separate business, Perler Photography, "as his personal bank account since its inception". CP 448.

In 1999, Russell had represented that his net monthly income was \$3,948.97. Judge Worswick found that it should have been \$11,358.00. CP 440, 453, 459, 600.

In 2002, Russell had represented that his net monthly income was \$2,460.92. Judge Worswick found that it should have been \$7,344.59. CP 440, 465-466, 475, 600-601.

These net income figures would have been much higher if Judge Worswick had not permitted Russell to take “his standard deductions” from Perler Photography’s payment of his personal expenses, for which he paid no taxes. CP 440.

On December 3, 2004, Judge Worswick entered a Revised Final Order Of Child Support 1999 Nunc Pro Tunc, CP 452-463, and a Final Order of Child Support for 2002, CP 464-479, which included a judgment in the amount of \$63,333.83 for the principal amount of child support Russell should and would have paid, but for his fraudulent misconduct. CP 452-463.

In the Final Order of Child Support, Judge Worswick awarded Amanda attorney and accounting fees because of “Vernon Russell Blank’s intransigence in fraudulently reporting his income and failing to provide proper and timely discovery regarding his income which disrupted these proceedings and unnecessarily increased the costs of this litigation.” CP 470.

Russell commenced this Petition for Modification of Child Support, CP 485-503, on July 31, 2008, to set post-secondary support for Adam and to adjust support for Ryan. He then filed a Motion For An Order Setting Child Support for Ryan only. CP 507.

In response to that motion, the following evidence was presented to the court below:

Amanda's net monthly income is \$4,738.12. CP 2035. According to Amanda's Financial Declaration, her total monthly expenses are \$6,092.50. CP 703-709.

Both Russell and his wife, Leann, are employees of Perler Photography, which is Russell's separate property. CP 799, 1274, 2050. Leann owns no part of this business. As the owner, Russell sets the salaries, CP 604, and controls its expenditures. CP 2050.

In his Declaration in Support of his Motion for an Order Setting Child Support, Russell attested that he received \$2,500 every two weeks, and that his net monthly income was \$4,462.79. Leann received \$2900 every two weeks. CP 519.

Russell offered to set his net income at \$5,500 per month because he received "some additional benefits from Perler Photography".² CP 519.

² According to Russell's attorney, Russell offered to set his net monthly income at \$5,500 because "it's arguable that some of the vehicle expenses that are passed through the business" and "the medical insurance that is provided to all other employees of the business is a personal expense to him." RP (5/22/09) 12; CP 1143.

Russell did not produce all of his and Leann's personal credit card statements, as well as many other financial records, which had been requested in discovery. His attorney refused to meet and confer to resolve Russell's failure to provide complete discovery. CP 606, 669-702.

A summary of the personal credit card statements which were provided show substantial balances paid down, without any corresponding checks or withdrawals from Russell's and Leann's personal or Perler Photography's business accounts showing the source of those payments. CP 607-609.

To determine Russell's income, the identical methodology adopted by Judges Armijo and Worswick to determine Russell's income in 1999 and 2002 was used again. CP 605.

All of the income Russell and Leann reported to the IRS, i.e. their wages, was deposited into their joint checking account. But the spreadsheet of that account, CP 611-626, shows the same lack of expected activity that their joint personal checking account had shown in 1999 and 2002. There were few or no cash or ATM withdrawals or debit card use. Little or no money was spent for items such as food, clothing, entertainment, travel, personal care,

auto expenses, insurance, and boat payments. CP 605.

A second spreadsheet summarizing all of Perler Photography's business credit card transactions, CP 627-692, shows that Russell and Leann frequently use Perler Photography's business credit cards to charge tens of thousands of dollars annually to pay for their personal expenses, just as they had done in 1999 and in 2002. CP 605.

A third spreadsheet shows which of Russell's personal expenditures were paid through Perler Photography's business checking account from 2006 – April, 2008, CP 692-697. According to its check ledger, Perler Photography paid \$66,488.85 of Russell's personal expenses in 2006, CP 192-193, 196-197; \$43,243.54 of his personal expenses in 2007, CP 190-191; and \$6,746.26 of his personal expenses in the first four months of 2008, CP 194.

The expenses Russell declared in his Financial Declaration for food, meals eaten out, health care, personal expenses, life insurance, boat moorage, and boat payments, CP 511-512, were not paid regularly (or in some cases at all) from the joint personal checking account, but rather were routinely purchased through the business checking account and with the business credit cards. CP

606.

Russell continued to use his business to pay for personal trips, including a trip to Rio de Janeiro³, CP 659, and multiple trips to his condominium in Phoenix. CP 634, 640, 641, 652, 655, 656, 659-665, 667, 669, 670, 672, 678, 680, 683, and 687.

Amongst many other misrepresentations, Leann claimed that her 2007 Lexus was owned by Perler Photography, and that Perler Photography's lease/purchase payment of \$29,757.79 was a business expense. CP 752. Yet, the Washington State Department of Vehicle Registration Certificate shows that the vehicle is owned by Leann, not Perler Photography. CP 829.

Russell's use of Perler's checking account and its business credit cards to pay for his personal expenses is exactly what Judges Armijo and Worswick found he was doing in 1999 and 2002. CP 605-606.

Russell also takes money from his business in the guise of

³ Significantly, apart from airline tickets, no other expenditures for food, lodging, or other items for this trip are shown in the financial records Russell provided, leading to the reasonable inference that these other expenditures were paid by unreported cash generated by his business, Perler Photography, or by undisclosed accounts.

shareholder loans which are not repaid⁴. CP 190-194, 604-605.

According to Amanda's initial analysis of this incomplete information, CP 607-609, Russell had a net monthly income of at least \$14,651.84 in 2006, and \$14,007.01 in 2007. Russell's net monthly income for 2008 was calculated as follows:

Wages as reported in Declaration (No W2) (\$75,575.00 less standard deductions)	\$ 58,612.80
Personal Expenses Paid through Perler Check Register Jan – June 2008 \$6,746.27 ⁵ annualized =	20,238.81
Loans to Shareholder Jan – April 2008 \$611.72 ⁶ annualized =	1,835.16
Russell's use of business Bank of America Credit Card Jan – June 2008 \$12,463.07 annualized =	24,906.14
Russell's use of business Key Smart Credit Card Jan – June 2008 \$5,467.48 annualized =	10,934.96

⁴ Although Perler Photography's records do show some payments, there are no corresponding checks or withdrawals from any other accounts. For example, Perler Photography's Loan Repay/Payroll Item Detail from November 20, 2003 through March 5, 2009 shows that Leann repaid a shareholder loan in the amount of \$8,183 on November 20, 2007. CP 268,1451. The Stockholder Loan Balance, CP 145, 1459, also show repayments. But there is no check or other proof from any account disclosed by Russell or Leann which corresponds to any such repayments. The reasonable inference is either that no such payments were actually made, or that such payments were made from undisclosed accounts.

⁵ CP 194

⁶ CP 194

Russell's use of business American Express Credit Card Jan – April 2008 \$3,107.57 annualized =	9,322.71
Leann's use of business Bank of America Card Jan – June 2008 \$6,918.08 annualized	<u>13,836.16</u>
Total Net Income for 2008	\$139,386.74

This results in a net monthly income of \$ 11,615.56

However, a substantial amount of Perler's income is received in cash. School dance and prom photographs are almost always paid in cash. Russell rarely deposits all of this cash into any account where it can be traced. CP 607.

Russell provided bank statements for his and Leann's joint personal checking account for the period of June 5, 2006 – April 22, 2008, except November and December 2006, January 2007, August 2007 and September 2007. CP 726-727, 730, 809-827.

Those records show that for the period of June – October, 2006, the only months for which documents were produced, Russell deposited \$632.43 more in his personal checking account than what he reported on his personal check register.

For the period of February – July, and October – December, 2007, the months for which documents were produced, Russell deposited \$36,292.13 more in his personal checking account than

what he reported on his personal check register.

For the period of January - March, 2008, the months for which documents were produced, Russell deposited \$7,112.35 more in his personal checking account than what he reported on his personal check register. CP 809-827.

When those excess deposits for 2008 are extrapolated over twelve months, they total \$28,449.40 for the year, which increases his net income by \$2,370.78 per month.

When it became apparent that Russell was again withholding evidence, and was once again using his separate business to pay his personal expenses, Amanda moved the court, pursuant to RCW 26.09.140⁷, to appoint a forensic accountant to audit *and to obtain complete records of* Russell's joint personal and his separate business accounts to accurately determine his income.

⁷ RCW 26.09.140 provides in pertinent part:

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 attorneys' 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.

CP 721-724.

Amanda's motion was denied. CP 834.

Judge Worswick entered an Order of Child Support Final Order on May 22, 2009, and denied Amanda's requests for an award of attorney fees. CP 1062-1075.

Amanda appealed. CP 2214-2246.

In an unpublished decision⁸, this Court vacated the Order of Child Support Final Order, and remanded this proceeding to the court below to make proper findings showing how it calculated Russell's income. Since the record did not adequately support the lower court's ruling as to Russell's income, Amanda's request for attorney fees was remanded as well. CP 2248, 2252.

On remand, the Honorable Elizabeth P. Martin, re-addressed the cross-motions for revision which had been before Judge Worswick. CP 2040.

In addition, on remand, the parties agreed to have the court set the post-secondary support for both Adam and Ryan. CP 2062-2063; RP (4/29/10) 40.

⁸ A true and accurate copy of this Court's unpublished opinion is found at A-1 – A-8; CP 2247 – CP 2255.

Since Russell had only paid \$3,275 in post-secondary support for Adam, and \$100 per month for the extraordinary health care expenses for the parties' children, Amanda moved for the entry of a judgment against Russell for his unpaid share of these expenses. CP 1316-1446.

The court below initially found that Russell's net monthly income was \$7,708 in a letter ruling on March 22, 2011. It denied Amanda's motion to appoint a forensic account and her motion for an award of her attorney fees. CP 1272-1282.

In recognition that Leann's income was from her salary from the business Russell owns, that Russell has the discretion to set the salaries for himself and Leann, and that Leann's salary was higher than his, even though he owned the company, the court found that twenty-five (25%) percent of Leann's net monthly income should be allocated to Russell (after deducting a \$13,000 pension payment). CP 1273-1274.

The court also ruled:

After full review of all available documents and Declarations, this Court finds that it is appropriate to designate 50% of the identified expenses as personal, after subtracting the \$250 per bi-weekly paycheck reimbursed by Leann Blank for personal

expenses incurred for the benefit of the marital community. Thus, the Court finds that the amount of personal expenses charged to the business for 2008 is \$36,369.39 plus \$1835.16 for a 2008 annualized loan to shareholders, 100% of which is deemed personal. The sum of \$19102.28 represents the petitioner's ½ community share of these expenses, for a value of \$1591.86 per month business income imputable to Russell Blank.

CP 1274. Amanda filed a Motion for Reconsideration. CP 1283-1315, 1447-1477, 1492-1495.

On April 29, 2011, the court entered its initial Order of Child Support Final Order and Order on Modification of Child Support and Order on Motions for Revision, which incorporated its March 22, 2011 letter ruling. CP 1542-1579.

On that same date, it heard Amanda's Motion for Reconsideration. Apart from denying Amanda's motion to reconsider its previous denial of her request for attorney fees, the court took the remaining issues under advisement. RP (4/29/10) 27.

The court subsequently ruled that Russell's net monthly income was \$8,195.08, CP 1769-1764, 2024, 2035. Rather than imputing twenty-five (25%) of Leann's wages to Russell, the court chose to combine their gross salaries and average them, and to impute \$569.75 to Russell each month to equalize them. The court

below also used the sum of \$12,025.90, instead of the \$1,835.16 originally presented by Amanda, as the amount of the shareholder loans to be amortized over the year to be included in Russell's net income. A-13 – A-14; RP (6/9/11) 4-5.

In addition, the court entered judgment against Russell in the amount of \$28,872.63 for his unpaid share of the educational and health care expenses both children, and for his unpaid share of post-secondary support for Adam. CP 2022-2161.

Each party has appealed the rulings of the court below. Additional evidence will be presented in the context of discussing the issues under review.

Argument.

A. Standard of Review.

A modification of child support is reviewed for an abuse of discretion. *McCausland v. McCausland*, 159 Wash.2d 607, 616, 152 P.3d 1013 (2007).

Substantial evidence must support the lower court's findings of fact. *In Re Marriage of Schumacher*, 100 Wn.App. 208, 211, 997 P.2d 399 (2000), *review denied*, 129 Wash.2d 1014(1996).

B. The Lower Court Abused Its Discretion By Failing To Include All Of Russell's Income To Calculate His Share of The Support Obligation.

In calculating child support, the court's primary task is to accurately determine the income of each parent.

In this case, the court abused its discretion by failing to consider all of Russell's income, as it was required to do by RCW 26.19.071.⁹

1. The Lower Court Abused Its Discretion By Ruling That Only Fifty (50%) Percent Of Russell's Personal Expenses It Found Were Paid By Perler Photography Be Included In His Net Monthly Income.

From the fifty (50%) of the \$79,238.78 in Perler's "business expenses" which the court below found "appropriate" to deem personal¹⁰, it ruled that only half represented Russell's "community

⁹ RCW 26.19.071 **Standards for Determination of Income** provides in pertinent part:

(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....

¹⁰ The court below abused its discretion by arbitrarily ruling "that it is appropriate to designate 50% of the identified expenses as personal" without making written findings of fact to support the exercise of that discretion, as required by RCW 26.19.035(2). *In re*

share of these expenses”. CP 1274; RP (4/29/11) 11.

This was error. A court abuses its discretion if its decision is based on an erroneous view of the law. *In re Marriage of Scanlon and Witrak*, 109 Wn.App. 167, 174-175, 34 P.3d 877 (2001).

The character of property and its income, as separate or community, is determined at the date of acquisition. *In re Marriage of Skarbek*, 100 Wash.App. 444, 447-448, 997 P.2d 447 (2000); *In re Marriage of Gillespie*, 89 Wash.App. 390, 399-400, 948 P.2d 1338 (1997).

Russell has owned Perler Photography, as his separate property, since 1984. CP 604, 2041. Accordingly, its income is Russell’s separate property. Separate property remains separate property “through all of its changes and transitions” so long as it can be traced and identified. RCW 26.16.010; *White v. White*, 105 Wash.App. 545, 550, 20 P.3d 481(2001); *In re Marriage of Skarbek*, 100 Wash.App. at 447-448; *In re Witte's Estate*, 21 Wash.2d 112, 124-125, 150 P.2d 595(1944); *In re Dewey's Estate*,

Marriage of Brockopp, 78 Wash.App. 441, 446, 898 P.2d 849 (1995). But, in the interest of bringing finality to this case, Amanda has elected to waive this error.

13 Wash.2d 220, 226, 124 P.2d 805(1942).

Since Leann has never been a shareholder or owner of Perler Photography, the court below erred and abused its discretion by allocating half of its payments for Russell's personal expenses to her. RCW 26.16.010.

When this issue was previously litigated before Judge Worswick, she found that "the business income is 100% Mr. Blank's income." CP 438. Accordingly, Russell is collaterally estopped to re-litigate this issue. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wash.2d 299, 306-307, 96 P.3d 957 (2004); *In re Marriage of Mudgett*, 41 Wash.App. 337, 342-342, 704 P.2d 169 (1985).

The issue decided in the earlier proceeding is identical to the issue presented here. The earlier proceeding ended in a judgment on the merits. Russell was a party to that proceeding. Application of collateral estoppel does not work an injustice against Russell because he had a full and fair opportunity to litigate this issue in the prior proceeding.

All of the expenses paid by Perler Photography which the court below found to be personal expenses of \$39,619.39, rather than just half, should have been included in Russell's net income

for the purpose of calculating his share of the parties' child support obligation.¹¹ In other words, the sum of \$3,301.62 should have been included in Russell's net monthly income instead of the \$1,591.86 used by the lower court.

The court below abused its discretion by failing to do so.

2. The Lower Court Erred In Calculating the Amount Of The Shareholder Loans From Russell's Separate Business Which Should Have Been Included In His Net Monthly Income.

In calculating the amount of the shareholder loans which needed to be included in Russell's net monthly income, the court below looked at Perler Photography's Transactions by Account Shareholder Loan, which showed that in the five month period between July 14, 2008 and December 14, 2008, the balance of shareholder loans taken by Russell increased from \$18,102.37 to \$30,128.27, CP 145, 1459, an increase of \$12,025.90.

The court then took this \$12,025.90 and divided it over

¹¹ This sum was calculated by taking the fifty (50%) of the \$79,238.78 in Perler's "business expenses" which the court found it "appropriate" to deem personal expenses, and eliminating the \$250 deduction from Leann's paychecks which the court corrected in its ruling on Amanda's motion for reconsideration. RP (6/9/11) 5.

twelve months in the mistaken belief that this sum was “the difference in the loan balance from the beginning to the end of the year”, RP (6/9/11) 5, rather than just five months.

This was simply a clerical error.¹²

When the sum \$12,025.90 is divided by 5 months instead of 12, the sum of \$2,405.18, rather than \$1,051 per month should have been included in Russell’s net income.

3. The Lower Court Abused Its Discretion By Disregarding Russell’s Unreported Cash.

As previously indicated, a substantial amount of Perler’s income is received in cash, and Russell rarely deposits all of this cash into any account where it can be traced. CP 607.

However, for the period of January - March, 2008, the months for which documents were produced, Russell deposited \$7,112.35 more in his personal checking account than what he reported on his personal check register. CP 809-827.

When those excess deposits for 2008 are extrapolated over twelve months, they total \$28,449.40 for the year, which increase Russell’s net income by \$2,370.78 per month.

¹² This error may also be corrected, pursuant to RAP 7.2 (e). See CR 60(a).

The lower court erred and abused its discretion by disregarding Russell's unreported cash.

In summary, Russell's net monthly income should be corrected as follows:

\$8,195.08	Judge Martin's finding
\$1,709.76	Perler paid personal expenses (\$3,301.62- \$1,591.86)
\$1354.18	Shareholder loans (\$2,405.18-\$1,051)
<u>\$2,370.78</u>	Unreported cash
\$13,629.80	Russell's corrected net monthly income

C. The Lower Court Abused Its Discretion By Ruling That Ryan Was Not Enrolled In High School And Was Not Entitled To Child Support For February, March, July and August, 2010.

All of the Orders of Child Support in this case contain the following statutory language CP 456, 468, 1001, 1066, 1546, 2027:

Support shall be paid until Ryan reaches the age of 18 or as long as he remains enrolled in high school, whichever occurs last....

The court below found that Ryan was not enrolled in high school for the months of February and March, 2010, when he was taking classes through the Running Start program at Pierce

College, but received no credits, or during the months of July and August, 2010 when he was on summer recess. CP 2056-2060, 2120.

This was error and an abuse of the court's discretion.

1. Ryan Was Enrolled In High School In February, March, July and August, 2010.

In the first instance, unlike post-secondary support, basic child support is not conditioned upon academic achievement. The lower court's imposition of such a condition to a finding of "enrollment" was an unwarranted, retroactive modification of the support order under RCW 26.09.170. *In re Marriage of Jarvis*, 58 Wash.App. 342, 347, 792 P.2d 1259 (1990).

Secondly, as shown by the letter from Darlene Houk, who is responsible for Student Records for the Bethel School District, Ryan has been continuously enrolled in the Bethel School District for high school since January 27, 2009, including the months of February, March, July and August, 2010. CP 1866-1871.

The lower court's finding is not supported by substantial evidence, is factually incorrect, and was an abuse of discretion.

2. Ryan Is Entitled To Support During The Summer Months of July and August, 2010.

When a student, like Ryan, finishes his or her school year, has not withdrawn from school, is dependent, and intends on returning in the fall, he or she remains enrolled in high school. Termination of the child support obligation because of the summer recess would not comport with a reasonable, fair, or just reading of the child support order. As the Court held in *In re Marriage of Jarvis*, 58 Wash.App. at 347:

Mrs. Jarvis contends the court also erred by not requiring Mr. Jarvis to pay child support during the summer months while Julie was not attending school. We agree. The decree requires him to make support payments, *each and every month*. There is no provision for abatement during summer months. In the absence of a substantial change in circumstances, a modification of the decree is not justified. On the record before us, Julie remained dependent during the summer months and there is no finding to the contrary. She was a full-time student, even though on summer break. In these circumstances, the court erred in modifying the decree to eliminate the support payments during the summer months.

Likewise here too, the court below erred and abused its discretion by modifying the Order of Support to eliminate support payments during the summer months. See also, RCW 26.09.170.

D. The Lower Court Abused Its Discretion In Looking At Post-Secondary Support From The Vantage Point Of The June 2011 Evidentiary Hearing, Rather Than From August 1, 2008, The Effective Date Of The Modification.

The court below approached the issue of post-secondary support from the vantage point of the June 2011 evidentiary hearing, rather than from August 1, 2008, the effective date of the modification when the court made its income determinations:

We have---in this case, instead of looking prospectively, as we normally are, we are, in part, looking retrospectively. We see what has happened to Adam. He has had his struggles.

CP 2068; See also CP 2088. This fundamental flaw in perspective caused the court below to make the following errors:

1. The Lower Court Abused Its Discretion By Refusing To Make Russell Pay His Full Share Of Post-Secondary Support For Adam's First Semester At The University Of Idaho.

RCW 26.19.090(3) states:

The child must enroll in an accredited academic or vocational school, must be actively pursuing a course of study commensurate with the child's vocational goals, and *must be in good academic standing as defined by the institution*. The court-ordered post-secondary educational support shall be automatically suspended during the period or periods the child fails to comply with these conditions.

Generally, the full amount of tuition, fees and books are paid at the beginning of the school quarter or semester. Everyone begins college in good academic standing. No one knows at the time those payments are made if the student will meet the academic requirements required by RCW 26.19.090(3).

If, at the conclusion of that school term, the student is not in good academic standing as defined by the institution, the parents' obligation to pay post-secondary support is suspended until the child regains good academic standing. RCW 26.19.090(3). Parents are not reimbursed for monies expended.

Russell made only one payment of \$3,275 to the University of Idaho for Adam's post-secondary support. CP 1585.

But the lower court ruled, CP 2068-2069:

He [Adam] started out at the University of Idaho and received no credits.¹³ The father did pay something towards his tuition at the University of Idaho. I'm going to rule that the father has no further obligation to pay for that semester, but there's no rebate of anything he has paid.

¹³ Adam withdrew after being taken to a hospital emergency room because of a heart condition a week or so before finals, causing him to miss a few days of school, and negatively impacting his grades. CP 1587-1588.

This was error.¹⁴ The court below abused its discretion by failing to require Russell to pay his full proportionate share of Adam's first semester at the University of Idaho.

2. The Lower Court Abused Its Discretion By Holding That The Costs Of Post-Secondary Support For Ryan Be Shared 1/3, 1/3, 1/3 Because Russell Applied For Social Security In June, 2011.

The court below abused its discretion by concluding that it was appropriate to allocate 1/3 of the cost of post-secondary support to Ryan, CP 2063, based upon Russell's bare assertion that he had applied for Social Security in June of 2011:

I just want to note for the record, I did take into account, in setting a one-third, one-third, one-third, rather than giving a more proportionate share, the fact that the father's resources are different from the resources that this Court evaluated in 2008. Going forward, the father is on Social Security. I think that making it an equal partnership between the three parties is appropriate under the circumstances.

CP 2066. While the court is required to look at the "current and future resources" of the parties in setting post-secondary

¹⁴ On the other hand, Amanda agrees that the court properly suspended post-secondary support for Adam's following two quarters at Pierce College until Adam regained his "good academic standing as defined by the institution".

support, RCW 26.19.090(2), the fact that Russell may have applied for Social Security in June of 2011 is irrelevant. The court below should have looked at the “current and future resources” of the parties from August 1, 2008, the effective date of the modification.

Apart from Russell’s bare assertion that he had applied for Social Security, the court below had **no** evidence whatsoever, as to what Russell’s financial resources were “going forward” beyond 2008.

He still does not receive Social Security payments. He provided no evidence, apart from his uncorroborated testimony, that he had even applied for social security¹⁵, much less when his Social Security payments would start or how much they would be.

It can be reasonably anticipated, that whatever income Russell will no longer report to the IRS¹⁶ after he actually begins to receive social security, will be more than offset by whatever social

¹⁵ Russell had previously represented falsely that he had applied for social security in 2009. CP 1233.

¹⁶ A beneficiary reaching full retirement age can earn \$38,880 a year and not lose any social security benefits.

security payments he receives and the continued use of his separate business to pay his personal expenses.

According to the court below, as of August 1, 2008, Russell and Leann had more than \$16,000 in net monthly income. Amanda had \$4,738.12.

When the parents' "current and future resources", are taken into consideration, as of August 1, 2008, there is no reason why Ryan should be saddled with substantial debt for his post-secondary educational expenses.

Ryan does not have the ability to pay 1/3 of these expenses. Ryan has serious ongoing health issues have caused him to miss school and have had a detrimental impact on his grades.

Since he was seven years old, Ryan has had severe chronic asthma. He was hospitalized in November 2010 for five days. After leaving the hospital, he recovered at home with aggressive steroid treatment and other medications.

In February, 2011, he became infected with MERSA for a third time. CP 1317-1318. As a result of such health-related absences, Ryan received a "D" average for his Winter Quarter at Clover Park Technical College. But for these absences, he would

have received a “B” average. CP 2064.

His health-related issues make it impractical for him to maintain a steady job while going to school, and would also cut into the time he needs to make up his absences from school.

As a consequence, the reality is that Amanda will be compelled to pay his one-third share by default. The parents’ current and future resources are more than adequate to bear and share the costs of Ryan’s post-secondary education expenses, without imposing this burden on him, or by default, on Amanda.

Moreover, notwithstanding the provision in RCW 26.19.090(1) stating that the child support schedule shall be advisory and not mandatory for postsecondary educational support, postsecondary educational child support must be apportioned between parents according to their respective net incomes in the same manner as basic child support. *In re Marriage of Daubert and Johnson* , 124 Wash.App. 483, 500-505, 99 P.3d 401 (2004), *reversed on other grounds, McCausland v. McCausland*, 159 Wash.2d 607, 152 P.3d 1013 (2007).

The court below abused its discretion by failing to do so.

E. The Lower Court Abused Its Discretion By Not Including The Cost Of Sylvan Learning As Part of Adam's Post-Secondary Educational Support Because Russell Was Not Notified Before That Expense Was Incurred.

Barry A. Carlaw, Ph.D. testified at an evidentiary hearing concerning post-secondary support that Adam was far behind his peers with fundamental learning skills in reading, writing and arithmetic, and that the lack of these skills would impede Adam's ability to be successful doing college level work. RP (6/9/11) 28-30, 50-52; CP 385-387.

Accordingly, Amanda enrolled Adam in Sylvan Learning to help him attain the academic skills Dr. Carlaw indicated he needed. CP 2185.

After completing just 36 hours of instruction, Adam's reading comprehension score increased from a grade equivalency of 4.9 to 11.6. His overall reading level grew by more than 3.5 years to become comparable to a student beginning the 10th grade. CP 2195-2196, 2198.

Adam's overall math level improved 3.7 grade levels. His math progress test computation score showed a grade equivalency of 13.0 and his math concepts and applications score was 13.0.

CP 2196-2197.

As a result, Adam achieved a cumulative GPA at Pierce College of 2.87. CP 2185-2186, 2200.

Post-secondary expenses include anything sufficiently related to the child's postsecondary educational needs. *In re Marriage of Kelly*, 85 Wash.App. 785, 791, 795, 934 P.2d 1218 (1997), *review denied*, 133 Wn.2d 1014 (1997). The court below recognized that Adam's tutoring by Sylvan Learning Center was related to his education, RP (12/9/11) 27, but held that Russell did not have to share its costs because Amanda did not consult him before incurring that expense. RP (12/9/11) 33.

This was error and an abuse of discretion.

All of the Orders of Child Support entered in this case, including the current one, provide that the parents shall share the costs of "educational expenses", or "educational/tutoring expenses" for the parties' children, *in addition to* the basic transfer payment. CP 456, 468-469, 950-951.

There is no requirement that Amanda first notify Russell as a condition to being reimbursed for his share of this educational expense. The lower court's imposition of such a requirement was

an unwarranted, retroactive modification of the support order under RCW 26.09.170. *In re Marriage of Jarvis*, 58 Wash.App. at 347.

The cost of tutoring Adam at the same Sylvan Learning Center was included in a previous Order of Child Support, when Russell enrolled him from April 2002 – May 2003, and each parent paid their proportionate share. CP 449, 2185; RP (12/9/11) 15.

Not only is Sylvan Learning “sufficiently related to the child’s postsecondary educational needs”, but indeed, it may be the best single investment made to help Adam succeed.

The court below erred and abused its discretion by refusing to include the cost of Adam’s tutoring from Sylvan Learning as part of his postsecondary educational support because Amanda failed to notify Russell before incurring that expense.

F. The Lower Court Abused Its Discretion By Failing To Award Amanda Her Reasonable Attorney Fees And Expenses.

Amanda moved for an award of her reasonable attorney fees, based both on her need and Russell’s ability to pay, pursuant to RCW 26.09.140, and because of Russell’s intransigence in failing to accurately disclose his income. CP 836-842, 874-956, 970-996.

Not only was her motion denied, CP 1568, but the court went further and ruled that to “the extent further fees are requested by way of new motion, that motion is likewise DENIED.” CP 1573, 2044.

The court below abused its discretion by failing to award Amanda the reasonable attorney fees she has incurred in this proceeding based both upon her need and Russell’s ability to pay, pursuant to RCW 26.09.140, and based on Russell’s intransigence in falsely reporting and concealing his true income for a third time by thousands of dollars each month.

1. The Lower Court Abused Its Discretion By Concluding It Was Precluded From Awarding Attorney Fees To Amanda For Her Prior Appeal Because This Court Had Declined To Do So.

In its letter ruling, the court below concluded that since this Court had not awarded attorney fees to Amanda on the appeal, it was precluded from doing so on remand. CP 1275, 2043.

This was error and an abuse of the court’s discretion.

When this Court issued its Unpublished Opinion, it held that even though both parties sought an award of attorney fees based on RCW 26.09.140, “Vernon [Russell] had not filed the necessary

financial declaration to consider an award in his favor.” CP 2254.

In short, this Court could not determine whether an award was appropriate, pursuant to RCW 26.09.140, without first knowing Russell’s actual income. Accordingly, it remanded this case to the lower court to make that determination. CP 2248. Once the court below determined Russell’s net monthly income, it was then able to determine whether an award of reasonable attorney fees should be made, pursuant to RCW 26.09.140.

Similarly, this Court also declined to find intransigence where the lower court had not first done so, because of the limitations of appellate review, and remanded this case back to the court below to make that determination. CP 2256.

Accordingly, the court below was not precluded from making an award of attorney fees on either basis, merely because this Court did not do so, and abused its discretion in failing to do so.

**2. The Lower Court Abused Its Discretion
By Failing To Award Amanda Her
Reasonable Attorney Fees And
Expenses, Pursuant to RCW 26.09.140**

In determining whether to award attorney fees, pursuant to RCW 26.09.140, the court must consider the financial resources of

both parties, and balance the needs of the requesting party against the other party's ability to pay. *In re Marriage of Nelson*, 62 Wash.App. 515, 521, 814 P.2d 1208 (1991).

The court below found that “Amanda Blank has made no showing that she actually paid any attorney’s fees to Mr. Berry and therefore, has not made the requisite showing of need.” CP 2044.

This was error and an abuse of discretion. There is no authority for the proposition that one must show payment of attorney fees to show need. A court abuses its discretion when its decision is “based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Krieger and Walker*, 147 Wash.App. 952, 959, 199 P.3d 450 (2008); *In re Marriage of Scanlon and Witrak*, 109 Wn.App. at 174-175.

In addition, the court’s finding that Amanda had not shown need is not supported by substantial evidence. The court found that Amanda’s net monthly income is \$4,738.12. CP 2035. Her total monthly expenses are \$6,092.50. CP 703-709.

Amanda needs Russell to pay her attorney fees. Indeed, the fact that Amanda has been unable to pay “any attorney’s fees” is proof that she has “need”, not the lack of it.

In addition, the court below found that Russell did not have the ability to pay Amanda's attorney fees. CP2030. That finding is not supported by substantial evidence either.

The lower court found that Russell's net monthly income is \$8,195.08.¹⁷ CP 2024, 2035. Yet, according to Russell's Financial Declaration, the total monthly expenses for his marital community is only \$7,810.77, CP 508-515, of which his wife, Leann, pays a substantial portion.

Russell has the ability to pay Amanda's attorney fees.

Since the record lends no support to the court's findings, the court's decision is untenable and constitutes an abuse of discretion. *State ex rel. Stout v. Stout*, 89 Wash.App. 118, 126, 948 P.2d 851 (1997).

It has long been the policy in this State, legislatively and judicially, that if a spouse is without funds and the other spouse has the ability to pay, denial of fees is an abuse of discretion. *Valley v. Selfridge*, 30 Wn.App. 908, 918, 639 P.2d 225 (1982); *Krieger v. Krieger*, 133 Wash. 183, 185, 233 P. 306 (1925).

¹⁷ As shown by this Brief, Russell's actual net monthly income is \$13,629.80

**3. The Lower Court Abused Its Discretion
By Failing To Award Amanda Her
Reasonable Attorney Fees And
Expenses Due to Russell's
Intransigence.**

Intransigence will also support an award of attorney's fees.

Fleckenstein v. Fleckenstein, 59 Wn.2d 131, 133, 366 P.2d 688 (1961); *In re Marriage of Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). Such an award is justified where the conduct of one of the parties causes the other "to incur unnecessary and significant attorney fees." *In re Marriage of Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002). As this Court held in *In re Marriage of Bobbitt*, 135 Wn.App. 8, 29-30, 144 P.3d 306 (2006):

It is well settled that "[a] trial court may consider whether additional legal fees were caused by one party's intransigence and award attorney fees on that basis." *In re Marriage of Greenlee*, 65 Wash.App. 703, 708, 829 P.2d 1120. "When intransigence is established, the financial resources of the spouse seeking the award are irrelevant." *In re Marriage of Morrow*, 53 Wash. App. 579, 590, 770 P.2d 197 (1989). Intransigence includes foot dragging and obstruction, filing repeated unnecessary motions, or making the trial unduly difficult and costly by one's actions. *Greenlee*, 65 Wash.App. at 708, 829 P.2d 1120.

This is precisely what happened here. Russell's has

continued to use his separate business, Perler Photography, Inc., to pay his personal expenses under the guise of “business” expenditures and shareholder loans, to conceal and misrepresent his true income, has made these proceedings “unduly difficult and costly”. Yet, the court below found that Russell did not engage in fraud or intransigence:

Here’s the difference I see here, Mr. Berry, is that in this case, he acknowledged that there are expenses they pay from the business, and he fully --- disclosed all of his financial information, And so I didn’t see that there was an attempt to hide or fraud, if you will, or to lie to the Court.

Yes, I had to go in and calculate it, but I don’t see that translates to fraud or intransigence, the fact that I had all of the information available to me from the materials Mr. Blank submitted.

CP 1276, 2044; RP (4/29/11) 17-18. The finding or conclusion that that Russell did not engage in intransigence is not supported by the law or the evidence.

- a. The Lower Court Abused Its Discretion By Concluding That Russell Did Not Engage In Intransigence Because He Disclosed Over 2000 Pages Of Financial Documents.**

The court below found that Russell did not engage in

intransigence because he “disclosed over 2000 pages of financial documents in response to discovery requests in connection with the Petition for Modification of Child Support.” CP 2044.

This too is error and constitutes an abuse of discretion.

In the first instance, Russell’s discovery was not complete. Contrary to the misimpression of the lower court, and as shown by this Brief, Russell did not disclose “ all of his financial information.”

The fact that Amanda’s attorney had to go through over 2000 pages of incomplete financial documents to try to establish Russell’s true income is proof of Russell’s intransigence, not the lack of it. As Judge Worswick observed in the 2004 proceeding:

Yes. I know that, Mr. Blank, there’s a lot of talk about the production of two banker’s boxes of documents being produced, but I was struck by the fact that many of things I was interested in there was just no documentation for.

There was even difficulty answering simple questions as to what Mr. Blank’s salary was. I just think that the production of voluminous material is not persuasive. Having practiced insurance defense for a number of years, I certainly am not swayed by volumes of materials. It’s the quality that’s given that matters and relevance that matters.

CP 442. In this case, all of the information the lower court had

available to it “from the materials Mr. Blank submitted” was provided to the court in spreadsheets which were the product of countless hours of tedious work and cross-checking of the incomplete financial records Mr. Blank did provide.

The information available to the court below did not just happen because Russell was being candid and forthcoming. To the contrary. Even after the work by Amanda, her attorney, and his paralegal, there were many substantial items which could not be accounted for and for which there was no documentation.¹⁸ As the Court held in *In re Marriage of Morrow*, 53 Wash.App. at 59:

The necessity of having to unravel numerous transactions to establish community interests justifies an award reflecting the fees and costs incurred in the process. [citations omitted].

Just as this Court found in *In re Marriage of Mattson*, 95 Wash.App. 592, 606, 976 P.2d 157 (1999), Russell “produced conflicting information about his income and, by his actions, forced [Amanda] to conduct intense discovery, which increased her legal bills.” *Id.*

¹⁸ This is why Amanda asked the court below to appoint a forensic accountant; namely, *to both obtain and to audit* Russell’s complete financial records.

b. The Lower Court abused Its Discretion By Concluding That Russell Did Not Engage In Intransigence Because He Brought The Petition for Modification In Good Faith.

In support of her refusal to award attorney fees to Amanda based on Russell's intransigence, the court below stated that "the Petition [for Modification] was brought in good faith". CP 2044. But whether the Petition was brought in good faith is neither relevant nor material to whether Russell engaged in intransigence.

That was error. A court abuses its discretion if its decision is "based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Krieger and Walker*, 147 Wash.App. at 959.

What is relevant is that Russell prosecuted this Petition in bad faith by, yet again, fraudulently reporting and concealing his true income in the identical manner the courts condemned in prior proceedings.

c. The Lower Court Abused Its Discretion By Refusing To Look At "Past History" And "Prior Court Findings" In Determining Whether Russell Was Intransigent.

The lower court indicated that it "did not look to past history or prior court findings, but focused solely on the conduct of the

Petitioner in connection with this particular Petition and related motions” CP 2044, to conclude that Russell was not being intransigent. This was error.

In *In re Marriage of Mattson*, 95 Wash.App. at 605, this Court specifically looked at “past history” and “prior court findings” to find that the husband had been intransigent with facts remarkably similar to those found in this case:

Moreover, the record in the first appeal demonstrates intransigence and obstruction by Mattson. In the 1995 motion for adjustment, he produced conflicting information about his income and, by his actions, forced Hall to conduct intense discovery, which increased her legal bills. The trial court specifically noted that Mattson's reported income increased with each round of investigation by Hall's counsel. Although the trial court did not use the word “intransigence,” the court's reasoning demonstrates that the court considered Mattson's intransigence when awarding fees to Hall. [citations omitted].

This is now the third time in as many proceedings, that Russell has misrepresented his net income by thousands of dollars each month by using his separate business, Perler Photography, to pay his personal expenses, thereby producing “conflicting information about his income and, by his actions, forced [Amanda]

to conduct intense discovery, which increased her legal bills.”

This is the same misconduct which Judge Armijo previously found constituted “fraudulent misrepresentation”, CP 429, and Judge Worswick found constituted “intransigence in fraudulently reporting his income”, CP 470.

**d. The Lower Court Abused Its Discretion
By Failing To Award Amanda Her
Reasonable Attorney Fees
Because Russell Engaged In Fraud.**

As Judge Armijo held in his May 26, 2004 letter ruling:

Any alleged fraud, misrepresentation, or other misconduct must be established by clear, cogent, and convincing evidence. *Lindegren v. Lindegren*, 58 Wn. App. 588, 794 P.3d 526 (1990). The moving party can establish fraud or misrepresentation either by (1) proving the nine elements of fraud, or (2) showing that the non-moving party breached an affirmative duty to disclose a material fact within his knowledge. *Crisman v. Crisman*, 85 Wn. App. 15, 21, 931 P.2d 163 (1997).

The evidence cannot be disputed that all nine elements of fraud are established here. *Household Finance Corp.of Seattle v. Williams*, 66 Wn.2d 183, 401 P.2d 876 (1965).

Russell’s representation that his net monthly income was \$4,462.79 in his Declaration in Support of his Motion for an Order

Setting Child Support, CP 2035, was the representation of an existing fact. That representation was material to determining what his share of the support obligation should be.

The mere fact that Russell offered to set his net income at \$5,500 per month because he acknowledged that he received “some additional benefits from Perler Photography”¹⁹, CP 519, does not avoid a finding of fraud. Nor do his incomplete discovery responses, even though they included more than 2000 pages of financial documents.

His representation was false. The court below found that his net monthly income is \$8,195.08, CP 1769-1764, 2024, 2035, thousands of dollars higher each month than what he represented. Clearly, Russell “breached an affirmative duty to disclose a material fact within his knowledge”. *Crisman v. Crisman, supra*.

¹⁹ According to Russell’s attorney, Russell agreed to set his net monthly income at \$5,500 because “it’s arguable that some of the vehicle expenses that are passed through the business” and “the medical insurance that is provided to all other employees of the business is a personal expense to him.” RP (5/22/09) 12; CP 1143. This is yet another falsehood. Neither Russell nor his attorney disclosed that Russell was continuing to use Perler Photography to pay nearly all of his personal expenses under the guise of “business” expenses and shareholder loans which were never repaid, or were repaid through undisclosed accounts or unreported cash. *Crisman v. Crisman, supra*.

Russell knew that what he had represented was his net monthly income was false. This was the third time he had misrepresented and tried to conceal his true income by using his separate business to pay his personal expenses under the guise that they were the expenses of Perler Photography.

Russell intended that both Amanda and the court below act on his false representation by accepting it in computing his share of the parties' support obligation.

Both the court below and Amanda were ignorant as to the falsity of Russell's representation.

Both the court below and Amanda relied upon his representation and had the right to rely upon his representation.

Both Amanda and the court below have been damaged as a result of their reliance upon his false material representation. In particular, Amanda has been damaged by having to become involved in protracted litigation and discovery, thereby incurring substantial legal fees to ferret out Russell's true income, on a matter which should have been simple, straightforward, and relatively inexpensive.

Amanda is entitled to an award of her attorney fees due to

Russell's fraud as well as his intransigence.

e. The Lower Court Abused Its Discretion In Not Finding That Russell Is Collaterally Estopped To Relitigate Whether His Conduct Constitutes Fraud Or Intransigence.

Since Russell has continued to engage in the identical misconduct here, namely the concealed use of his separate business, Perler Photography, to pay his personal expenses, which Judge Armijo previously found constituted "fraudulent misrepresentation", CP 429, and Judge Worswick found constituted "intransigence in fraudulently reporting his income", CP 470, Russell is collaterally estopped to re-litigate whether such conduct does or does not constitute "intransigence in fraudulently reporting his income" now. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wash.2d at 306-307; *In re Marriage of Mudgett*, 41 Wash.App. at 342-342.

Once again, the issue decided in the earlier proceeding is identical to the issue presented here. The earlier proceeding ended in a judgment on the merits. Russell was a party to that proceeding. Application of collateral estoppel does not work an injustice against Russell because he had a full and fair opportunity to litigate this

issue in the prior proceeding.

Amanda should be awarded her attorney fees due to Russell's intransigence, at least for that portion of this case, involved in trying to ascertain his true income.

But where, as here, "a party's bad acts permeate the entire proceedings, the court need not segregate which fees were incurred as a result of intransigence and which were not." *In re Marriage of Burrill*, 113 Wn.App. at 873; *In re Marriage of Sievers*, 78 Wash.App. 287, 311, 897 P.2d 388 (1995) (misrepresentations of income and failure to provide documentary evidence of income during the trial of the child support issues constitutes intransigence sufficient to justify award of attorney fees.).

In this case, Russell used the Petition for Modification as a pretext to avoid paying any post-secondary support for Adam beyond his initial contribution for Adam's first semester at the University of Idaho, or contribute anything more than \$100 per month towards his children's unreimbursed medical expenses. Amanda thus had to bear these expenses on her own, which she could only do by putting these charges on her credit cards which resulted in substantial interest charges. CP 1585-1586.

4. Sound Public Policy Mandates An Award Of Attorney Fees In This Case.

In addition to the statutory and case law previously discussed, sound public policy mandates an award of attorney fees in this case. In *Hartman v. Smith*, 100 Wash.2d 766, 768, 674 P.2d 176 (1984), the Washington Supreme Court held:

A custodial parent has no personal interest in the support funds collected and expended on behalf of his or her child, but rather acts as trustee for the child's benefit. *Ditmar v. Ditmar*, 48 Wn.2d 373, 293 P.2d 759 (1956).

As a trustee for the children's benefit, Amanda has a fiduciary duty to make sure that support is accurately determined. She cannot ignore Russell's dishonesty.

Thus, when she realized that Russell was up to his old ways by using his separate business to pay his personal expenses, and thereby misrepresenting and concealing his true income for a third time, she had no choice but to engage counsel in the tedious and time-consuming work to determine Russell's true income.

In *Seals v. Seals*, 22 Wash.App. 652, 655, 590 P.2d 1301 (1979), where the husband had deliberately concealed assets from his wife, the Court held:

Parties prior to and during marriage have a fiduciary duty to one another in agreements which have been reached between them. *In re Marriage of Hadley*, 88 Wash.2d 649, 565 P.2d 790 (1977); *Friedlander v. Friedlander*, 80 Wash.2d 293, 494 P.2d 208 (1972); *Hamlin v. Merlino*, 44 Wash.2d 851, 272 P.2d 125 (1954). A fiduciary duty does not cease upon contemplation of the dissolution of a marriage.

Even though an extension of this law is not necessary for Amanda to prevail, Amanda submits that this Court should extend these rulings to recognize and to hold that both parents continue to have a fiduciary duty to one another *after* marriage to accurately disclose their incomes in proceedings to establish their respective support obligations for their children.

Determination of child support should be a relatively straightforward and inexpensive matter to calculate. Yet, this is now the third time that Russell has been less than candid about his income, thus requiring Amanda to incur substantial legal fees to expose his fraud, that she would not have had to incur but for his dishonesty.

When a parent lies about his/her income in a child support proceeding, who should bear the costs of exposing that deceit?

The precedent that this Court will establish here is important.

If the parent who lies must bear that expense, parents will be deterred from lying. If the innocent parent must bear that expense, innocent parents will be deterred from undertaking the time and expense necessary to expose the other parent's fraud.

The choice is clear.

Amanda should not be penalized, nor should Russell be rewarded for his dishonesty.

This Court should make it clear:

If you try to cheat your children, you will pay the fees and costs necessary to expose your deceit.

H. Amanda Should Be Awarded Her Reasonable Attorney Fees On Appeal.

Amanda should be awarded her reasonable attorney fees and statutory costs both in the court below as well as for those incurred in the course of both appeals, pursuant to RAP 18.1.

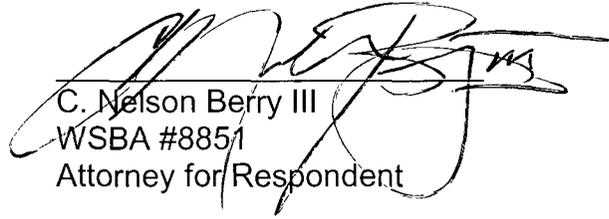
RCW 26.09.140 provides in pertinent part:

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

Choate v. Choate, 143 Wash.App. 235, 243, 177 P.3d 175 (2008); *State ex rel. Stout v. Stout*, 89 Wash.App. 126. Similarly, a

party's intransigence at the trial level may support an award of attorney fees on appeal. *In re Marriage of Mattson*, 95 Wash.App. at 605-606. And so it should here.

Respectfully submitted this 28th day of June, 2012.



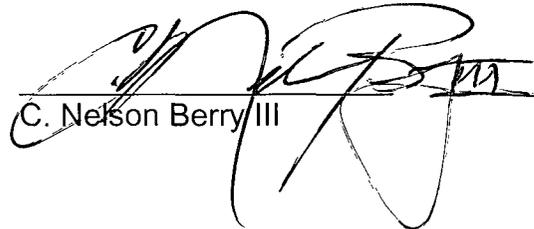
C. Nelson Berry III
WSBA #8851
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on the 28th day of June, 2012, I mailed a true and accurate copy of the foregoing Opening Brief of Appellant, by first class mail, postage prepaid, to:

Stephen W. Fisher
College Park Professional Center
314 19th Street West, Suite 8
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Attorney for Respondent

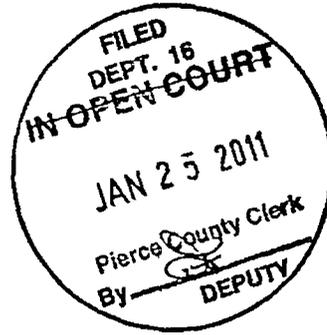


C. Nelson Berry III

APPENDIX



93-3-04576-9 35778113 CPRM 01-26-11



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re

VERNON RUSSELL BLANK,

Respondent,

and

AMANDA L. BLANK,

Appellant.

No. 39483-9-II

93.3-04576.9

UNPUBLISHED OPINION

Quinn-Brintnall, J. — A trial court entered a final order of child support ordering Amanda Blank to pay Vernon Blank \$5,248.15 in overpaid child support. Amanda¹ appeals the order, asserting that the trial court failed to conduct a de novo review of the record of the proceeding before the commissioner resulting in an improper calculation of Vernon's income. Amanda further argues that the trial court impermissibly modified a tax exemption provision in the child support order, erred when it did not award her reasonable attorney fees, and that the superior court judge was biased.

¹ The first names of the parties are used for the ease and clarity of the reader.

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We hold that the record of the trial court proceedings does not contain the trial court's explanation of its basis for denying Amanda's motion to revise the final order for child support and fails to demonstrate how it calculated Vernon's child support obligation. Because the record does not adequately support the trial court's ruling as to Vernon's income, its rulings regarding tax exemptions and attorney fees are not supported by substantial evidence. The record does not support Amanda's claim of trial court bias which, in any event, is moot. Accordingly, we vacate the trial court's final order for child support and remand for further proceedings.

FACTS

Vernon and Amanda divorced on December 29, 1993. They have two children, Adam and Ryan. On July 31, 2008, Vernon filed a petition for modification of child support, requesting the court (1) enter a new order for child support payments, (2) order repayment or credit for overpaid child support, and (3) award alternating years for tax exemptions between Vernon and Amanda.

On December 29, 2008, Vernon filed a motion for an order setting child support for Ryan, a minor child. Subsequent filings by the parties show an \$8,935 difference between what Amanda and Vernon each allege as Vernon's true monthly net income. Amanda asserts that Vernon fraudulently concealed his income behind his solely-owned business. Vernon denies any such concealment of income.

On March 18, 2009, a superior court commissioner heard Vernon's motion. Without reviewing the substantial volume of documents before him, the commissioner requested each party submit a three-page letter summarizing their position and directing him to key documents for review. The three-page summaries are not a part of the record before this court.

On March 31, 2009, the commissioner issued a letter ruling which concluded Amanda's

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income to be her asserted \$4,738 and Vernon's income to be \$7,600 for a support obligation for Ryan at \$750 per month. The letter did not articulate the methodology used to calculate these income amounts. The commissioner's final order also modified a tax exemption provision permitting Vernon to claim Ryan as a dependent in alternating years and awarded Vernon \$5,248.15 in overpaid child support. Both parties' requests for reasonable attorney fees were denied.

Amanda moved to revise the final order on the grounds that (1) the order should have been temporary, (2) the commissioner incorrectly found Vernon's income to be \$7,600, (3) the tax exemption provision should not have been changed because the issue was not argued in Vernon's motion for an order setting child support for Ryan, and (4) she should have been awarded reasonable attorney fees in light of Vernon's intransigence. Vernon also moved for revision, asserting that (1) he was entitled to interest on the overpaid child support, (2) the commissioner had incorrectly calculated Amanda's income, and (3) he was entitled to attorney fees.

On May 22, 2009, the trial court heard the parties on Vernon's motion for revision. Unlike the commissioner, the trial court stated it "read everything" in the record before it prior to the hearing. Report of Proceedings (RP) (May 22, 2009) at 12. Upon hearing argument, the trial court found there was no evidence of fraudulent behavior. But the trial court did make several comments regarding its opinion as to Amanda's motives for challenging Vernon's income claims. With respect to finding Vernon's income for purposes of setting child support, the trial

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court stated, "I reviewed [the commissioner's] order and his method for reaching the income. It actually seemed to me to make some sense. I'm not going to change it." RP (May 22, 2009) at 23. Ultimately, the trial court did not change any significant portion of the order, retained jurisdiction, denied both parties attorney fees and issued the order as final. Amanda timely appeals.

DISCUSSION

Vernon's Income Determination

Amanda contends that the trial court erred by failing to conduct a de novo review of the record in calculating Vernon's true net income for purposes of modifying child support. To the extent the trial court failed to enter or articulate findings of fact and conclusions of law to support its determination, we agree.

We review a trial court's modification of child support for abuse of discretion. *In re Marriage of Schumacher*, 100 Wn. App. 208, 211, 997 P.2d 399 (2000) (citing *In re Marriage of Peterson*, 80 Wn. App. 148, 152, 906 P.2d 1009 (1995), *review denied*, 129 Wn.2d 1014 (1996)). We will not substitute our judgment for that of the trial court unless the trial court's decision rests on unreasonable or untenable grounds. *Leslie v. Verhey*, 90 Wn. App. 796, 802-03, 954 P.2d 330 (1998) (citing *In re Marriage of Griffin*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990); *Pollock v. Pollock*, 7 Wn. App. 394, 399, 499 P.2d 231 (1972)), *review denied*, 137 Wn.2d 1003 (1999). Thus, substantial evidence must support the trial court's findings of fact. *Schumacher*, 100 Wn. App. at 211 (citing *Peterson*, 80 Wn. App. at 153). Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the declared premise.

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v. *SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987); *see also In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004) (an appellate court will uphold challenged findings of fact and treat the findings as verities on appeal if the findings are supported by substantial evidence). We may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. *In re Marriage of Lutz*, 74 Wn. App. 356, 370, 873 P.2d 566 (1994).

The record does not contain written findings or an oral ruling adequately setting out the basis for the trial court's ruling regarding Vernon's income. Contrary to Vernon's contention, the trial court's statement that the commissioner's method "seemed to me to make some sense" is not evidence, let alone the substantial evidence, required to support a finding that Vernon's monthly income was \$7,600 during the period of child support modification. RP (May 22, 2009) at 23; *see State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004) ("the superior court reviews both the commissioner's findings of fact and conclusions of law de novo based upon the evidence and issues presented to the commissioner"). Accordingly, we hold that the trial court's finding of a \$7,600 monthly income amount for Vernon is not supported by substantial evidence.

Modification of Tax Exemption Provision

Amanda contends that the trial court's modification of the tax exemption provision denied procedural due process.² Because this tax exemption will be decided on remand we do not address it here.

² Vernon requested a change in the allocation of tax exemptions in his petition for modification of child support. But he did not include the issue in his subsequent written motion for an order setting child support. It was only after the commissioner's ruling in Vernon's proposed final order of child support that the modified tax exemption provision appeared before the commissioner who signed the order over Amanda's objections.

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Attorney Fees

We review a trial court's award of attorney fees for an abuse of discretion. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996). A court may award costs and attorney fees in a modification proceeding after considering the parties' financial resources. *Stout v. Stout*, 89 Wn. App. 118, 126, 948 P.2d 851 (1997). The court must balance the needs of the requesting party against the other party's ability to pay. *Stout*, 89 Wn. App. at 126. But trial courts must exercise their discretion on articulable grounds, making an adequate record so the appellate court can review a fee award. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998). Further, the trial court must enter findings of fact and conclusions of law to support an attorney fee award. *Mahler*, 135 Wn.2d at 435. "[A]bsence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record." *Mahler*, 135 Wn.2d at 435.

Here, the trial court did not reference adequate support for its calculation of Vernon's monthly income and a review of a fee award based on each party's ability to pay is precluded. Accordingly, we hold that the record is inadequate to support denial of an attorney fee award and remand for further proceedings consistent with this opinion.

Bias

Amanda contends the trial court's statements regarding Amanda's motives create an appearance of bias or unfairness warranting recusal. Amanda objected to the trial court retaining jurisdiction over the case because of what she perceived to be the court's bias during the May 22,

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2009 hearing.³ Following the hearing, Amanda submitted a motion to vacate final order of child support and requesting that the trial judge recuse herself. The trial court heard and denied the motions on June 12, 2009.

A trial court is presumed to perform its functions regularly and properly without bias or prejudice. *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (citing *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000)), review denied, 167 Wn.2d 1002 (2009). We review a trial court's denial of a motion that it recuse for an abuse of discretion. *Meredith*, 148 Wn. App. at 903 (citing *Wolfkill*, 103 Wn. App. at 840). Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require that a judge disqualify him or herself from hearing a case if that judge is biased against a party or if his or her impartiality may be reasonably questioned. *Meredith*, 148 Wn. App. at 903 (citing *Wolfkill*, 103 Wn. App. at 841). The test for determining whether a judge's impartiality might reasonably be questioned is an objective one that assumes the reasonable person knows and understands all the relevant facts. *Sherman v. State*, 128 Wn.2d 164, 205-06, 905 P.2d 355

³ Specifically, Amanda argues that the following statements made by the trial court demonstrate bias or the appearance of bias,

Well, I can see why [Amanda] wants to go back to the future. We're here in 2009.

We are no longer in 2004.

RP (May 22, 2009) at 23.

What I did see is [Amanda] pulling up every expense she could use as a personal expense. . . . She's saying [Vernon's] income is nearly double what it was in 2004. I don't think that's the case. I'm not convinced of that.

RP (May 22, 2009) at 23.

I think that, frankly, that's indicative of [Amanda's] motivations in this case, which at this point are suspect. With the limited amount of child support that's remaining to her, this appears to be vindictive. The only really ongoing pattern I see is these two parties can't get along and need the Court to resolve every one of their disputes, apparently.

RP (May 22, 2009) at 27.

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(1995). The party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias. *State v. Dominguez*, 81 Wn. App. 325, 328-29, 914 P.2d 141 (1996).

The statements Amanda cites are not evidence of the trial judge's actual or potential bias. Rather, the statements evince the trial court's credibility determination with respect to Amanda's contentions. Credibility determinations are for the trier of fact and we do not review them. Amanda has failed to produce evidence that would lead a reasonable person to believe the trial court was biased or prejudiced against her independent of its determination that her claims were incredible and frivolous. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). In any case, because the trial judge in question is no longer a superior court judge, the case will necessarily be heard by a different superior court judge and the issue is now moot.

Attorney Fees on Appeal

Citing RCW 26.09.140, both parties request attorney fees on appeal. Amanda argues that this court should exercise its discretion to award her the fees in light of Vernon's alleged intransigence in continuing to misrepresent his income. But we decline to find intransigence where the trial court did not. *See Goodman v. Darden, Doman & Stafford Assoc.*, 100 Wn.2d 476, 483, 670 P.2d 648 (1983) (appellate review is limited to determining whether a trial court's findings are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law). Vernon has not filed the necessary financial declaration to consider an award in his favor. Accordingly, we decline to award attorney fees to either party on appeal.

No. 39483-9-II

We vacate the final order of child support and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, P.J.

VAN DEREN, J.

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF PIERCE

3

4 VERNON RUSSELL BLANK II,) Superior Court
5) No. 93-3-04576-9
6 Petitioner,) Court of Appeals
7) No. 42959-4-II
8 vs.)
9) **Excerpt - Judge's**
10) **Decision on**
11 AMANDA L. BLANK,) **Reserved Motions**
12) **for**
13 Respondent.) **Reconsideration**

10 **VERBATIM TRANSCRIPT OF PROCEEDINGS**

11

12 June 9, 2011
13 Pierce County Courthouse
14 Tacoma, Washington
15 Before the Honorable Elizabeth P. Martin

14 **APPEARANCES**

15 For the Petitioner: STEPHEN W. FISHER
16 Attorney at Law
17 6314 19th Street West, Suite 8
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19 253.565.3900

20 For the Respondent: CHARLES NELSON BERRY III
21 Attorney at Law
22 1708 Bellevue Avenue
23 Seattle, Washington 98122
24 206.441.5444

25

Suzanne L. Trimble, CCR, RPR
Official Court Reporter
Department 16 Superior Court
(253) 798-6632

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T A B L E O F C O N T E N T S

PROCEEDINGS PAGE

June 9, 2011

TESTIMONY

(No witnesses heard.)

OTHER

Excerpt - Judge's Decision on Reserved
Motions..... 3

E X H I B I T

EXHIBIT DESCRIPTION MARKED/ADMITTED PAGE

(No exhibits marked or admitted.)

A-11

1 BE IT REMEMBERED that on Friday, June 9, 2011, the
2 above-captioned cause came on duly for hearing before the
3 **HONORABLE ELIZABETH P. MARTIN**, Judge of the Superior Court
4 in and for the County of Pierce, State of Washington; the
5 following proceedings were had, to wit:

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7

<<<<<< >>>>>>

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9

THE COURT: We are here in the matter of Vernon
10 Russell Blank and Amanda Blank, Cause No. 93-3-04576-9. If
11 counsel can identify themselves for the record.

12
13

MR. FISHER: For the record, Stephen Fisher on behalf
of Russell Blank.

14
15

THE COURT: Mr. Blank is here, as well.

MR. FISHER: That's correct, Your Honor.

16
17

THE COURT: Good morning.

MR. BERRY: Good morning, Your Honor. My name is
18 Nelson Berry, and I represent Amanda Blank.

19
20

THE COURT: All right. Good morning. One of the
21 first issues we have this morning is I reserved some of the
22 issues on the motion for reconsideration on April 29th. I
23 have gone back. I have a motion for reconsideration from
24 Mr. Blank with regard to my inclusion of any income for
Leann Blank.

25

I went back and very carefully considered all of the

1 arguments that you made, all of the briefing, and went back
2 through all of the figures. I have revised, somewhat, what
3 I did before. I have granted, in a sense, the motion for
4 reconsideration on both sides, in part.

5 I have a new worksheet. I'm going to have my judicial
6 assistant give to you. I'm going to go over with you
7 orally what I have done. It's not that different in the
8 bottom line from where we were before.

9 The starting point of wages and salaries, of course,
10 remains the same. Those are based on the W-2s for both
11 parties. Interest and dividend income for the father is
12 also the same. That's based on the IRS tax return.

13 Rather than take just a percentage of Leann's income, I
14 reconsidered that because, ultimately, my goal was to look
15 at the fact that the salaries were disproportionate, even
16 though Mr. Blank owned the business; therefore, I took
17 their two gross salaries, not the net after pension but the
18 gross, and averaged them and looked at the difference. And
19 the difference is the 569.75 that I have now imputed to the
20 father, which is different than simply taking the lump sum
21 of her salary. So that is an equalizer. That would make
22 their salaries identical, 569.75. And I note she does work
23 full time for the business; therefore, I had already
24 determined that it was appropriate that she have salary.
25 Leann has no legal obligation to support this child, but I

1 have selected this method as I believe it is preferable and
2 more fair than the original method that I evaluated.

3 With regard to the other income, I went back and looked
4 again at all of the expenses. I believe -- I know that you
5 will disagree with me, Mr. Berry, but I looked at the gross
6 amount of expenses. I did not deduct, this time, the \$250
7 a month. I took the gross figure. I did not have any
8 deduction for what's taken out of Leann's paycheck, and
9 determined that half of that, roughly -- and we have to do,
10 somewhat, estimates, and I have to use my discretion, short
11 of an IRS tax audit in which I go over each and every
12 expense, which I did not do.

13 I believed that -- and I still believe that 50 percent
14 is an appropriate figure to use for the amount of the
15 expenses taken by the business that were really, arguably,
16 personal expenses, of which half of that is available to
17 Mr. Blank as income for purposes of child support.

18 So I used a 25 percent figure on the total number of
19 expenses. Then I went back and looked at the loan figures,
20 and I used the \$12,000 figure that's in your motion for
21 reconsideration, divided that by 12. That is the
22 difference in the loan balance from the beginning to the
23 end of the year. That was a figure of \$1,051 per month and
24 added that in, along with the vehicle expense, to come up
25 with an other income of 2,869.19.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

VERNON RUSSELL BLANK II,
Petitioner,
vs.
AMANDA L. BLANK,
Respondent.

)
)
)
) Superior Court
) No. 93-3-04576-9
) Court of Appeals
) No. 42959-4-II
)
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REPORTER'S CERTIFICATE

STATE OF WASHINGTON)
) ss
COUNTY OF PIERCE)

I, Suzanne L. Trimble, Official Court Reporter in the State of Washington, County of Pierce, do hereby certify that the foregoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken in the matter of the above-entitled cause.

Dated this _____ day of _____, 2012.



SUZANNE L. TRIMBLE, CCR
Official Court Reporter
CCR #2173