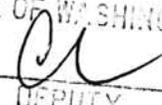


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DIVISION II

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STATE OF WASHINGTON

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

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JOSEPH CHAUSSEE,  
Appellant,

v.

BREE ANNE FEIL,  
Respondent.

---

BRIEF OF RESPONDENT

---

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## **STATEMENT OF THE CASE**

An order requiring the Appellant to contribute toward his son's post-secondary educational support underlies this appeal.

### **APRIL 22, 2005 ORDER OF CHILD SUPPORT**

Appellant Joseph Chaussee ("Joseph") was first obligated to pay child support to Respondent Bree Feil ("Bree")<sup>1</sup> for their two minor sons when the initial Order of Child Support was entered on April 22, 2005. CP 172-190.

Paragraph 3.14 of that Order of Child Support, which incorporates mandatory/pattern language, provided that "The right to petition for post secondary support is reserved, provided that the right is exercised before support terminates as set forth in paragraph 3.13." CP 178.

Paragraph 3.13 of that Order of Child Support provided that child support would be paid "[u]ntil the children reach the age of 18, or as long as the children remain(s) enrolled in high school, whichever occurs last, except as otherwise provided in Paragraph 3.14." CP 177.

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<sup>1</sup> For the Court's ease of reference and identification, this writer refers to the parties by their first names throughout this Brief. No disrespect whatsoever to either party is intended thereby.

### **APRIL 22, 2011 ORDER OF CHILD SUPPORT**

On April 22, 2011, a (modified) Order of Child Support was entered by the Court. CP 193-213. The language in paragraph 3.13 of the April 2011 Order of Child Support is identical to the language contained in paragraph 3.13 of the April 2005 Order of Child Support. CP 177, 197.

Paragraph 3.14 of the April 2011 Order of Child Support provided "The provisions for post secondary educational support in the Order of Child Support entered on 4/22/05 are in full force and effect." CP 197, 178.

### **NOVEMBER 21, 2011 ORDER OF CHILD SUPPORT**

Child Support was modified again on November 21, 2011. CP 1-26. Paragraph 3.13 of the November 21, 2011 Order of Child Support is identical to paragraph 3.13 of the April 2005 and April 2011 Orders of Child Support. CP 8, 177, 197.

Paragraph 3.14 of the November 2011 Order of Child Support is identical to paragraph 3.14 of the April 2005 Order of Child Support. CP 8, 178.<sup>2</sup>

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<sup>2</sup> That provision had also been incorporated by reference in the April 2011 Order of Child Support. CP 197.

Paragraph 3.16 of the November 2011 Order of Child Support is of particular importance to this appeal. It contains the following interlineation:

It is contemplated that in May 2012 there shall be a post-secondary support modification. There shall be no adjustments due to any unemployment between this date [and] May 2012. **Support for the minor child and [any] request for post-secondary support may be made by motion before the Commissioner.**

CP 8. Counsel for both parties initialed this interlineation. CP 8 (emphasis added). Of particular significance to this appeal, Joseph did not seek reconsideration of this order, nor did he appeal it.

#### **JUNE 20, 2012 ORDER OF CHILD SUPPORT**

Bree filed a Motion and Declaration for Adjustment of Child Support on May 21, 2012, in which she sought post-secondary educational support for the parties' son, Tanner. CP 28-30.

In his sworn declaration filed in response to Bree's motion, Joseph stated,

I ask that this court make a discretionary ruling which obligates Ms. Feil and I to share the costs of TANNER's post-secondary education [tuition, books and supplies] on a basis of either Ms. Feil [70%] with me paying [30%] or 75%-25% depending upon how much consideration the Court gives to my present situation versus Ms. Feil's present financial circumstances.

CP 69.

The subsequent Order of Child Support, at issue here, was entered on June 20, 2012. CP 112-127. Paragraph 3.14 set out the parameters of payment of post-secondary support and the computation thereof in careful detail. CP 116, 117.

The June 20, 2012 Order of Child Support reflects the estimated cost of tuition, books, supplies, as well as room and board for the 2012-2013 academic year, using rates published by Highline Community College. CP 116. In addition, Tanner's transportation and personal expenses are estimated – and are allocated to Tanner as his responsibility. CP 116. The expenses allocated to Tanner were subtracted from the first group of estimated expenses. CP 116. The remaining expenses were allocated between Bree and Joseph in the same proportion as shown on the child support worksheet at Line 6. CP 116, 123. Bree was obligated to pay 61.3% of the remaining post-secondary expenses, and Joseph was obligated to pay 38.7%. CP 116.

**MOTION FOR REVISION OF JUNE 20, 2012 ORDER OF CHILD SUPPORT**

On July 2, 2012, Joseph moved to revise the June 20, 2012 Order of Child Support. CP 128-129. Joseph argued the Court lacked jurisdiction to adjust the prior Order of Child Support, and that the post-secondary educational support, as ordered, was "speculative." CP

129. Joseph provided a Memorandum of Authorities to the trial Court in support of his Motion for Revision. It went into far greater detail than did the underlying motion. CP 137-150.

The Motion for Revision was heard by Judge Tollefson on August 17, 2012. CP 136. Joseph's counsel made an oral request for an award of attorney's fees at the conclusion of his argument, stating, "Attorneys' fees should be awarded to [Joseph] just because of the disparity in income and his need for attorneys' fees." RP 21.

Judge Tollefson denied Joseph's request for attorney's fees and the motion for revision. CP 155 – 156; RP 28. Judge Tollefson specifically ruled:

This ruling is based on the law of the case. [Joseph] never filed to revise or amend [the] Nov. 21, 2011 support order. [Bree] had authority to file a motion to modify post-secondary support based on the clear language of the Nov. 21, 2011 order. The motion was filed on a mandatory form.

CP 156. *See also* RP 26 – 28. Joseph timely filed a Notice of Appeal on September 14, 2012. CP 157-168.

## ARGUMENT

### THE TRIAL COURT'S ORDER REQUIRING JOSEPH TO PAY POST-SECONDARY EDUCATIONAL SUPPORT WAS PROPER.

#### I. STANDARD OF REVIEW.

A trial court has broad discretion in modifying a child support order. *In re Marriage of Dodd*, 120 Wn. App. 638, 644, 86 P.3d 801 (2004). A reviewing court should not reverse a trial court's child support modification absent a manifest abuse of discretion. *In re Marriage of McCausland*, 159 Wn.2d 607, 616, 152 P.3d 1013 (2007).

Under the manifest abuse of discretion standard, a reviewing court “cannot substitute its judgment for that of the trial court unless the trial court's decision rests on unreasonable or untenable grounds.” *Dodd*, 120 Wn. App. at 644 (quoting *In re Marriage of Leslie*, 90 Wn. App. 796, 802-03, 954 P.2d 330 (1998)).

When the record on review shows that the trial court considered all relevant statutory factors and the resulting support award is “not unreasonable under the circumstances,” a reviewing court will not find an abuse of discretion. *In re Marriage of Fiorito*, 112 Wn. App. 657, 664, 50 P.3d 298 (2002) (quoting *In re Marriage of Stern*, 57 Wn. App. 707, 717, 789 P.2d 807 (1990)).

Findings of fact that are supported by substantial evidence will not be disturbed on appeal. *See, e.g., State ex rel. Stout v. Stout*, 89 Wn. App. 118, 124, 948 P.2d 851 (1997). “Substantial evidence is that which would persuade a fair-minded and rational person of the truth of a stated premise.” *Id.*

**II. BREE PROPERLY REQUESTED POST-SECONDARY EDUCATIONAL SUPPORT BECAUSE THE NOVEMBER 21, 2011 ORDER OF CHILD SUPPORT IS THE LAW OF THE CASE.**

Joseph first argues that Bree’s request for post-secondary educational support was improper because she failed to file a petition for modification of child support and pay the concomitant filing fee. Br. of App. at 13-14. However, under the unchallenged terms of the November 21, 2011 Order of Child Support, Bree was permitted to seek post-secondary educational support by way of a motion. CP 8. Because it was unchallenged, the November 21, 2011 Order of Child Support became the law of the case.

**A. A Motion for Revision is Functionally Equivalent to an Appeal.**

The “acts and proceedings of court commissioners” are subject to revision by the superior court. RCW 2.24.050; *In re B.S.S.*, 56 Wn. App. 169, 170, 782 P.2d 1100 (1989), *review denied*, 114 Wn.2d 1018

(1990). Any party in interest seeking review of a court commissioner's ruling is required to file a motion for revision within ten days of entry of the order/ruling at issue. RCW 2.24.050. The superior court's review is based on the case records in addition to any findings of fact and conclusions of law entered by the court commissioner. RCW 2.24.050. If a party fails to do so, the court commissioner's rulings or orders become "the orders and judgments of the superior court[.]" *Id.* Appellate review may be sought thereafter in the same manner as any other ruling or order of the superior court. *Id.* See also, *Marriage of Robertson*, 113 Wn. App. 711, 714, 54 P.3d 708 (2002).

*State ex rel. Biddinger v. Griffiths*, 137 Wash. 448, 451, 242 P. 969 (1926), has been cited by the Washington Supreme Court "for the proposition that 'revision' is the equivalent of an appellate court type of review--one that is on the record." *In re Marriage of Moody*, 137 Wn.2d 979, 992, 976 P.2d 1240 (1999).

**B. The Law of the Case Rule is Applicable to Trial Court Rulings.**

Derived from the doctrine of collateral estoppel, the law of the case rule precludes re-litigation of legal issues previously "resolved." *In re Marriage of Trichak*, 72 Wn. App. 21, 23-24, 863 P.2d 585 (1993).

The law of the case rule establishes “[t]he binding effect of determinations made by the appellate court on further proceedings in the trial court on remand.” *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: JUDGMENTS § 380, at 55 (4th ed. 1986)). Application of this rule is limited to issues actually decided. *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 620, 724 P.2d 356 (1986).

Because the revision process is akin to the appellate process, the law of the case rule is also applied at the trial court level. In one widely-cited case, the trial court allowed the obligor father to offset his child support obligation against his child’s income from Social Security disability. *In re Marriage of Trichak*, 72 Wn. App. 21, 23-24, 863 P.2d 585 (1993). The mother did not seek revision or reconsideration of that ruling, nor did she appeal it. *Id.*

The obligee mother sought modification of that child support order two years later, in which she sought to exclude the offset. The Court of Appeals held that the offset as originally ordered was the law of the case, and held that the mother was barred from revisiting the issue. *Id.* The law of the case rule is similarly applicable to this case.

**C. Because Joseph Never Sought Revision of or Appealed the November 21, 2011 Order, it is the Law of the Case.**

Joseph never sought to revise the November 21, 2011 ruling/order under which the Court gave Bree leave to seek post-secondary educational support by way of motion rather than petition, nor was that order appealed. CP 8, RP 16. Therefore, the ruling allowing Bree to seek post-secondary educational support by motion is the law of the case. RCW 2.24.050; *Trichak*, 72 Wn. App. at 23-24. Bree properly sought post-secondary educational support for Tanner, and the order setting forth the parameters of payment should not be disturbed by this Court.

**III. BREE TIMELY SOUGHT POST-SECONDARY EDUCATIONAL SUPPORT.**

Joseph also argues that Bree's Motion and Declaration for Adjustment of Child Support was untimely. Br. of App. 2, 16. Joseph is also incorrect in this regard.

Tanner became eighteen years of age on May 4, 2012. CP 68. Bree filed the motion seeking post-secondary educational support on May 21, 2012. CP 28. Tanner graduated from high school on June 8, 2012. CP68.

Paragraph 3.14 of the November 22, 2011 Order of Child

Support provides:

The right **to request** post secondary support is reserved, provided that the right [to request] is exercised before support terminates as set forth in paragraph 3.13.

CP 8 (emphasis added). Paragraph 3.13 of the November 22, 2011 Order of Child Support explains:

[Child] Support shall be paid until the children reach the age of 18, or as long as the children remain(s) enrolled in high school, **whichever occurs last**, except as otherwise provided below in Paragraph 3.14.

CP 8 (emphasis added).

Joseph argues that because the Court did not actually **enter** the Final Order of Child Support (on June 20, 2012) until **after** (a) Tanner became eighteen years of age (on May 4, 2012) **and** (b) Tanner graduated from high school (on June 8, 2012), the Court lost subject matter jurisdiction enabling it to address Tanner's post-secondary educational support. Br. of Appellant at 16; CP 112, 68. The plain language of the Order of Child Support demonstrates that Joseph's argument is incorrect.

Bree was not required **to obtain entry** of the final order within the timeframe set forth in paragraph 3.14 of the Order of Child

Support. Rather, she was required **to request** post-secondary educational support before the later of Tanner's eighteenth birthday or graduation from high school. CP 8. Bree requested post-secondary support by filing her Motion and Declaration for Adjustment of Child Support on May 21, 2012, which was prior to Tanner's graduation from high school on June 8, 2012. CP 28, 68. Therefore, Bree's request was timely.

In a similar case, the father, who was the primary residential parent, filed a request for post-secondary educational support three days before the parties' daughter graduated from high school. The child had turned 18 at the beginning of the school year. *In re Marriage of Sagner*, 159 Wn. App. 741, 247 P.3d 444 (2011). The father duly served the mother via certified first class mail. *Sagner*, 159 Wn. App. at 445. The mother argued the request was not timely filed, although on different grounds than are argued here. *Sagner*, 159 Wn. App. at 446. Division III affirmed the trial court's denial of the mother's opposition to the request. *Sagner*, 159 Wn. App. at 449 (finding the father complied with former RCW 26.09.175 by filing his request for post-secondary support before the child graduated from high school

and by serving the mother by certified mail with a return receipt requested).

Bree's request for post-secondary educational support for Tanner was timely. The trial court's affirmation of the June 20, 2012 Order of Child Support should be affirmed by this Court.

**IV. THE AWARD OF POST-SECONDARY EDUCATIONAL SUPPORT WAS NOT BASED ON SPECULATION.**

Joseph next argues that the order requiring payment of post-secondary educational support is impermissibly speculative. Br. of App. at 19.

A trial court has broad discretion in awarding post-secondary educational support.

**The court shall exercise its discretion when determining whether and for how long to award postsecondary educational support** based upon consideration of factors that include but are not limited to the following: Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together.

RCW 26.19.090(2) (emphasis added).

A trial court is not required to allocate post-secondary educational expenses between parents solely based on the child support schedule. Instead, the legislature intended for a trial court to first accurately calculate (a) the parents' incomes and then (b) the respective "presumptive proportionate shares" of their combined income. *In re Marriage of Newell*, 117 Wn. App. 711, 720, 72 P.3d 1130 (2003). *See also Kelly v. Hannan*, 85 Wn. App. 785, 792, 934 P.2d 1218 (1997) (trial court has "broad discretion to order postmajority educational support based on a percentage of educational costs."); *Wimmer v. Wimmer*, 44 Wn. App. 842, 723 P.2d 531 (affirming order that father pay one-half of daughter's education), *review denied*, 107 Wn.2d 1016 (1986).

A trial court has the discretion to then equitably allocate post-secondary educational expenses. In so doing, it may order "either or both parents" to pay for a child's post-secondary educational support. RCW 26.19.090(6); RCW 26.19.001; *In re Marriage of Kelly*, 85 Wn. App. 785, 794, 934 P.2d 1218 (1997); *See also Newell*, 117 Wn. App. At 720 ("Under the statute, it is within the trial court's discretion to decide whether, for how long, and how to apportion postsecondary educational expenses. But to do so without accurately calculating

income and the proportional share of the income as required by the child support schedule, the court is not properly advised or informed under RCW 26.19.090(1).” Under the statute, use of the child support schedule is advisory. RCW 26.19.090(1).

In this case, the June 20, 2012 Order of Child Support utilized cost estimates published by Highline Community College for the 2012-2013 academic year, it made Tanner responsible for a portion of those costs, and it divided responsibility for the remainder between Bree and Joseph in proportion to their combined incomes. CP 116, 123. This is the precise methodology contemplated by RCW 26.09.090(2) and as applied by trial and reviewing courts. *Newell*, 117 Wn. App. at 720; *Kelly*, 85 Wn. App. at 792; *Wimmer*, 44 Wn. App. at 842. *See also In re Parentage of Goude*, 152 Wn. App. 784, 792-793, 219 P.3d 717 (2009) (affirming trial court’s exercise of discretion in awarding post-secondary educational support determined by considering the economic table of the child support schedule, the published costs of the school the child would be attending, less the cost of room and board while the child lived at home).

The June 20, 2012 Order of Child Support is not based on speculation. It is based on verifiable data. The trial court did not abuse

its discretion in so ordering it. Moreover, Judge Tollefson did not err by denying Joseph's motion to revise it. Judge Tollefson should be affirmed.

**V. JOSEPH WAS NOT, AND IS NOT, ENTITLED TO AN AWARD OF ATTORNEY'S FEES.**

**A. Judge Tollefson Properly Denied an Award of Attorney's Fees to Joseph Below.**

Joseph argues the trial court erred by denying his request for an award of attorney fees at the revision hearing on August 17, 2012. CP 156. Joseph argued his request was based on the disparity between his income and Bree's income and his "need for attorneys' fees." RP 21.

RCW 26.09.140 provides:

The court from time to time after considering the financial resources of both parties **may** order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable 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.

Emphasis added.

A trial court's award of attorney's fees in this context is discretionary. RCW 26.09.140; *In re Marriage of Crosetto*, 82 Wn. App.

545, 563, 918 P.2d 954 (1996) (citing *In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994), *review denied*, 126 Wn.2d 1011 (1995)).

A party who challenges a trial court's decision to award or decline to award attorney fees must show the trial court exercised its discretion in a way that was "clearly untenable or manifestly unreasonable." *Id.* (quoting *Knight*, 75 Wn. App. at 729).

It is not an abuse of discretion for a trial court to order that each party pay their own attorney fees, even if one party has greater earning potential than the other party. *Fernau v. Fernau*, 39 Wn. App. 695, 694 P.2d 1092 (1984). Even under the "need versus ability to pay" standard, a party seeking attorney's fees must produce evidence that they are unable to pay their own attorney's fees in addition to the other party's ability to pay them. *In re Thorensen*, 46 Wn. App. 493, 730 P.2d 1380 (1987).

The record in this case contains nothing to show that Joseph was unable to pay his own attorney's fees at the time of the revision hearing and the hearing on the underlying motion. It was not an abuse of discretion for Judge Tollefson to deny this request.

**B. This Court should Deny Joseph's Request for Attorney's Fees on Appeal.**

Joseph also asks for an award of his attorney's fees on appeal.

Br. of App. at 34. He cites RCW 26.18.160 as the sole basis for his request. That statute provides:

In any action **to enforce** a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees. An obligor may not be considered a prevailing party under this section unless the obligee has acted in bad faith in connection with the proceeding in question.

RCW 26.18.160 (emphasis added).

Neither chapter 26.09 RCW nor chapter 26.18 RCW define the terms "enforce" or "modification." If a statutory term is not defined within a statute, a reviewing court applies the plain meaning of the term and may consult a dictionary. *State v. Bustamante Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010).

Black's Law Dictionary defines "enforce" as "To give force or effect to." Black's Law Dictionary 549 (7<sup>th</sup> ed. 1999). Black's Law Dictionary also defines "modification" as "A change to something; an alteration." Black's Law Dictionary 1020 (7<sup>th</sup> ed. 1999).

RCW 26.18.160 applies to **enforcement** of child support obligations, not **modification** thereof. The underlying action concerns

the modification, not enforcement, of a child support order. Therefore, Joseph is not entitled to an award of attorney fees according to RCW 26.18.160.

Further, even if, for purposes of argument, this statute is applicable here, as obligor, Joseph is required under the statute to show that Bree acted in bad faith in order to be considered a prevailing party. RCW 26.18.160. Joseph has pointed to no evidence in the record to indicate Bree acted in bad faith in seeking post-secondary educational support for Tanner. Therefore, Joseph's request for an award of attorney's fees on appeal should be denied on this basis as well.

**C. Bree Should be Awarded Attorney Fees for the Necessity of Responding to this Appeal.**

RCW 26.09.140 provides:

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 attorney's fees in addition to statutory costs.

RAP 18.9 provides, in pertinent part:

The appellate court on its own initiative or on motion of a party may order a party or counsel . . . who . . . files a frivolous appeal . . . to pay terms . . . to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

“An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.” *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985) (citations omitted).

None of Joseph’s arguments have any basis in the law or in the record below. Reasonable minds cannot differ as to the issues presented by Joseph. Therefore, this Court should deem Joseph’s appeal to be frivolous and should award Bree her attorney’s fees for having to respond to it.

#### **CONCLUSION**

The order requiring Joseph to contribute toward Tanner’s post-secondary educational expenses was properly granted, and Judge Tollefson did not err by affirming it.

Bree was granted leave of court to request post-secondary educational support for Tanner by way of motion rather than formal petition. The order allowing Bree to do so was never revised or appealed. Therefore, it is the law of the case and Judge Tollefson did not err by affirming it.

Bree timely obtained the order requiring and allocating the payment of Tanner’s post-secondary educational expenses, because

she requested the order prior to Tanner graduating from high school. Therefore Judge Tollefson did not err by affirming it.

The order of child support itself was based on published costs of attendance at Highline Community College and allocated the payment of the expenses between Bree and Joseph in proportion to their incomes as set forth in the child support worksheet, which was not appealed. Therefore, Judge Tollefson should be affirmed by this Court.

Joseph failed to allege or make any showing that he was unable to pay his own attorney's fees below; therefore, Judge Tollefson did not err by denying his request that Bree pay his attorney's fees.

This appeal is frivolous. It is based on a misapprehension of the law and a misreading of the applicable court orders. Therefore, Joseph's request for attorney's fees on appeal should be denied, and Bree's request for attorney's fees on appeal should be granted.

The trial court should be affirmed in all respects.

DATED this 6<sup>th</sup> day of May, 2013.

RESPECTFULLY SUBMITTED,

  
\_\_\_\_\_  
Barbara McInville, WSBA #32386  
Attorney for Bree Ann Feil

**Declaration of Transmittal**

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

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

Barry C. Kombol  
Rainier Legal Center, Inc. P.S.  
31615 Maple Valley Highway  
Black Diamond, WA 98010

Signed at Tacoma, Washington on this 6th day of May, 2013.

*Heather Devyak*  
Heather Devyak  
DEPUTY  
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