

No. 68053-6-I

COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION ONE

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DOUGLAS MACKENZIE,

*Appellant*

v.

ALEEN ADAMS,

*Respondent.*

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ON APPEAL FROM  
KING COUNTY SUPERIOR COURT  
(The Honorable James A. Doerty)

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DOUGLAS MACKENZIE'S REPLY BRIEF

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COURT OF APPEALS  
DIVISION ONE

ORIGINAL<sup>1</sup>

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## I. REPLY ARGUMENT

### A. The Trial Court's Discretion to Determine Necessity and Reasonableness Should Not Override the Child's Best Interests by Overriding the Residential Provision in the Parenting Plan.

The first issue this Court must decide is whether the trial court's discretion in apportioning long distance transportation expenses is limited, as Father suggests, to determining the reasonable transportation expenses necessary to fulfill the residential provisions in the parenting plan, which are agreed to be in the child's best interests. Mother, on the other hand, argues that the trial court when determining child support can override the residential provision in the parenting plan, the child's best interests, and RCW 26.19.080(3) by requiring one parent to pay more than his or her proportionate share of long distance transportation costs simply by determining that less residential time than is in the parenting plan is all that is necessary. The Mother's position is that any residential time above the necessary time, although less than the amount that is in the child's best interests, can occur only if one parent pays all the costs associated with the additional residential time; and if the parent does not pay the full cost, then the child is deprived of the contact with that parent that is in the child's best interests. Father rejects Mother's argument, as should this Court, because it is antithetical to the child's best interests.

From the outset of their endeavor to parent their daughter, J., Father has cooperated with mother's agenda, and bent over backward to have a relationship with J. despite Mother's disruptive agenda. Meanwhile, Mother has dismissed every attempt Father has made to create an equitable arrangement, so that both can parent and work. While she maintains that she has only been trying to create a stable and dependable parenting plan, Mother's argument that she pay only one-half of three visits to the east coast and credit Father \$50 per month in child support if the annual cap has not been met is not in the child's best interests.

Additionally, paragraph 3.11(a)<sup>1</sup> of the parenting plan covers only a 10-month period with three east coast visits, not one year. The parties agreed to a schedule covering the *10-month* period from October, 2011 through July, 2012, as shown in paragraph 3.1<sup>2</sup> of the parenting plan.

The present arrangement severely and unnecessarily limits child's time with Father. Contrary to Mother's arguments, it also presents Father with a Hobbesian choice to either act in the child's best interest by exercising all the residential time in the parenting plan at his sole cost and expense or detrimentally affecting the child by only exercising the residential time Mother is willing to pay for. Not only does Father pay a

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<sup>1</sup> CP 305.

<sup>2</sup> CP 302.

disproportionate amount of child expenses, given incomes and income histories, but now also must pay two rents, and travel costs including airfare and rental car. He must also continue to earn money while traveling. It is unreasonable to expect him to pay a disproportionate share of travel costs to cooperate with Mother's agenda to live in Seattle. There is no justification as to why he should pay disproportionately and travel, while Mother gets to remain in Seattle and work part time and buy a new house.

This present predicament is precipitated by Mother's refusal to find common ground and fairness. If indeed, in legal terms, her promise to Father to live where each could work and thrive is "immaterial," nothing could be further from the reality Father faces. Father has compromised hugely, materially. While he has moved through geographic, professional, cultural, physical, financial, and community-shifting upheaval to meet Mother's choices, she has been unwilling to embrace, consider, or change toward his offerings and needs in similarly basic ways. The cost of these changes has been enormous to Father, and continues to undermine his ability to parent their daughter. He has used every means at his disposal to show up for J. and also provide for her. Meanwhile mother has means, but does not choose to use them to pay for

the costs of her decisions; she would have him continue to pay for the downside of her choices.

A trial court's discretion to determine reasonable and necessary expenses is not as unfettered as Mother suggests in her Response Brief. The legislature limited the courts' discretion: "[T]he court has the discretion only to determine whether long-distance transportation costs are needed and whether a particular amount for those costs is reasonable."<sup>3</sup>

1. Long Distance Transportation Costs are Necessary.

Here, there is no doubt long distance transportation costs are necessary. Father lives in New York and the child lives in Seattle. Transportation costs are, therefore, necessary for the child and the father to exercise their court-ordered residential time. This is exactly how this Court analyzed the long distance transportation expense in *Hewitt* where it rejected the mother's argument the long distance transportation costs were not necessary:

Again, the parenting plan provides for Negrie's [Father's] visitation with Daniel [child] in Boston every six weeks. As long as Negrie remains in Washington, he can visit his son only by traveling to Boston. Negrie did not agree to pay the full amount of his travel expenses.<sup>4</sup>

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<sup>3</sup> *Murphy v. Miller*, 85 Wn. App. 345, 349, 932 P.2d 722 (1997).

<sup>4</sup> *In Re Parentage of Hewitt*, 98 Wn. App. 85, 90, 988 P.2d 496 (1999).

2. Reasonableness Should be the Actual Costs for Necessary Long Distance Transportation Unless They are Unreasonable

The trial court's discretion to determine reasonable costs should be limited to determining the reasonable costs required to accomplish the long distance transportation expenses that are necessary to effectuate the residential time sharing in the parenting plan. Reasonable costs should be the actual expenses incurred provided they are reasonable. In other words, neither parent should be required to pay for an unreasonably expensive ticket such as an avoidable last minute reservation or a first class ticket.

A reasonableness determination should not be, as Mother argues, an opportunity for a trial court to circumvent RCW 26.19.080(3)'s mandatory language by providing for residential time that is in the child's best interests in a parenting plan on the one hand, and then simultaneously on the other hand in a separate child support order, finding that the time sharing arrangement in the parenting plan is unreasonable. Mother's argument should be rejected, especially in this case, when the parenting evaluator specifically found that Father's bending over backwards to be an integral part of the child's life since she was born was beneficial to the child and that both parents should have continuing frequent access to the child. This same parenting evaluator

helped the parents craft the parenting plan and recommended it be adopted by the trial court.

Public policy, as found in Washington's parenting plan and child support statutes, supports Father's position that a court's proper inquiry in determining reasonableness is whether the actual long distance transportation cost expended to effectuate the time sharing arrangement in the parenting plan were reasonable when incurred. The residential provisions in a parenting plan are controlled by the child's best interests.<sup>5</sup> Child support is also determined in the child's best interests.<sup>6</sup> "Reasonable and necessary," while not defined in RCW 26.19.080(3), has been interpreted "in a manner that serves the best interests of children."<sup>7</sup> Public policy, therefore, supports Father's argument that reasonable long distance transportation costs that are necessary to effectuate the residential provision in the parenting plan, which are admittedly in the child's best interests, are to be allocated between the parties in proportion to the parties' net income.

Mother articulates no public policy in her Response Brief that supports her argument allowing courts to do an "end run" around RCW

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<sup>5</sup> RCW 26.09.002 and RCW 26.09.187.

<sup>6</sup> RCW 26.19.001.

<sup>7</sup> *Mattson v. Mattson*, 95 Wn. App. 592, 600, 976 P.2d 157, 162 (1999).

26.19.080(3)'s mandatory language. Her argument should be rejected because it is financially unfair to the Father or unfair to the child. Either Father pays the additional necessary travel expenses, even if they are reasonable, or else the child is deprived of contact with the Father, contrary to what has been found to be in the child's best interests.

Mother's case law is also factually distinguishable. Mother relies on case law regarding private school education when there is a viable public education alternative. Necessary long distance transportation expenses are different because there is no publicly subsidized alternative. Hence, the long distance transportation costs are necessary because there is no alternative like there is in the education context. In this regard, this long distance transportation situation is more akin to the necessary day care costs in *Mattson*. There, if both parents work and day care costs are necessary, then the actual costs are apportioned in accordance with the parties' respective net incomes provided the actual costs are reasonable. Here, air fares, lodging and transportation costs are necessary and the parties agreed \$500 per round trip air fare was a reasonable round trip air fare. All the long distance costs should be shared proportionately.

B. Mother Led the Trial Court Into Error by Proposing the Long Distance Transportation Expense Apportionment in the Parenting Plan.

Mother led the trial court into error when she proposed paragraph 3.11 in the Parenting Plan.<sup>8</sup> Mother's proposal that was adopted by the trial court provided:

- Mother pay her own round trip air fare three times per year to take the child to the east coast for residential time with the father, required the father to pay for his own round trip air fare three times per year when he returned the child to Seattle.
- Mother and Father equally split the child's airfare for the three east coast visits every year.
- Mother credit Father \$50 per month toward his child support to offset the 9 other times per year that he must travel to Seattle to exercise his one-week residential time with the child each month there is no east coast visitation.
- No matter what Mother's total annual expenses for long distance travel, expenses are capped at \$2,850.
- Mother is not required to contribute anything to Father's rental car or lodging expenses when he is in Seattle.

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<sup>8</sup> CP 305.

This proposal requires Father to pay over 68% of the projected reasonable air fare necessary to effectuate the residential provisions in the parenting plan. Using Mother's \$500 per round trip air fare figure that she considers reasonable, the annual air fare costs are \$9,000. This includes Father's 9 round trip air fares to see the child when there is no east coast visit ( $9 \times \$500 = \$4,500$ ), Mother's 3 round trip air fares when there are east coast visits ( $3 \times \$500 = \$1,500$ ), Father's 3 round trip air fares when there are east coast visits ( $3 \times \$500 = \$1,500$ ), and the child's 3 round trip air fares when there are east coast visits ( $3 \times \$500$ ). These total \$9,000 ( $\$4,500 + \$1,500 + \$1,500 + \$1,500$ ). Under Mother's proposal Father is solely required to pay his 9 round trip air fares for his Seattle visits ( $\$4,500$ ), plus his 3 round trip air fares when there are east coast visits ( $\$1,500$ ), and one-half the child's air fares when there are east coast visits ( $\$1,500/2 = \$750$ ) He is credited \$50 per month by Mother or \$600 annually. Father, therefore, pays \$6,150 annually ( $\$4,500 + \$1,500 + 750 - 600$ ). This is 68.33% of the projected reasonable air fares necessary to accomplish the residential provisions in the parenting plan.

Mother, on the other hand, has to pay only 31.67% of the reasonable round trip air fares necessary to effectuate the residential provisions in the parenting plan. She pays her three round trip air fares for east coast visitation ( $3 \times 500 = \$1,500$ ), plus one-half the child's

round trip air fares for the child's east coast visits (\$750). In addition, she credits Father \$50 per month (\$600 annually) toward his air fare. This equates to \$2,850 or 31.37% of the annual round trip air fare.

Requiring Mother to pay her accurate proportionate share of the round trip air fares is only an extra \$175 per month and is, therefore, reasonable. Using Mother's model, the total air fare she considers to be reasonable is \$9,000. Mother already pays \$2,850 toward round trip air fare: \$1,500 for her three round trip visits to the east coast, \$750 for one-half the child's 3 round trip visits to the east coast, and a \$600 annual child support credit to Father. Her accurate proportionate share is \$4,950 ( $\$9,000 \times 55\%$ ). The difference between what RCW 26.19.080(3) requires Mother to pay (\$4,950) and what she proposed she pay (\$2,850) is only \$2,100 per year or \$175 per month. This is not, as Mother contends, "getting blood from a stone." She has ample resources to pay her accurate proportionate share of all the long distance transportation expenses.

Mother's argument that requiring her to pay the additional \$175 per month is unreasonable is ludicrous given this record. Despite being admittedly able to reduce her hours and now work only part time and voluntarily reducing her earnings 33% from what they were for the 22 consecutive months prior to the child support trial, Mother has sufficient

income and resources to buy a new home and increase her housing costs \$1,000 per month.<sup>9</sup> She has the income to take the child on vacations at her sole cost and expense, as allowed in the Parenting Plan.<sup>10</sup> And she can afford to work only part time.<sup>11</sup> Finally, the parents can be expected to pay over \$1,000 per month for a 3-year-old's full time day care even though Mother works only 25 hours per week.<sup>12</sup> Yet, they cannot be expected to pay \$750 per month in round trip airfares for Father to spend quality time with their child, which the parenting evaluator says is beneficial to the child's development.

In addition, there was no provision to allocate Father's lodging and transportation expenses while spending residential time with their child in Seattle. Father's \$350 per month in lodging expenses is clearly reasonable for one week per month.

Mother's argument in her Response Brief also shows the trial court legally erred or abused its discretion in allocating long distance transportation costs. Even if this Court were to accept Mother's argument that the trial court could determine that only 4 visits per year between this involved father and the parents' child was all that was necessary and reasonable, despite a parenting plan to the contrary, the

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<sup>9</sup> CP 249.

<sup>10</sup> CP 306-308, Parenting Plan, ¶3.13.

<sup>11</sup> RP 42:20-44:25 (Nov. 14, 2011).

<sup>12</sup> CP 223, ln. 11(a); CP 228, ln. 11(a).

trial court still did not apportion the long distance air fares proportionately to the parents' net incomes. In her Response Brief, Mother correctly shows that she is paying 57% of the round trip air fare costs and Father is paying only 43% of the round trip air fare costs. The parents' respective net incomes are 55% to Mother and 45% to Father. This clearly shows the trial court ignored RCW 26.19.080(3)'s mandatory language and apportioned long distance transportation costs without regard to the statute. Reversal is required.

C. The Artificial Cap on Mother's Proportionate Share of Transportation Expenses was Error.

Mother further led the trial court into error when she inserted a provision that caps her, but not Father's, contribution to air fare expenses. This improperly allocated the entire risk of rising air fares to the Father and did not apportion it between the parents as required by RCW 26.19.080(3). The parenting plan, ¶3.11(d), provides Mother's liability for round trip air fares shall not exceed \$2,850.<sup>13</sup> This further skews the actual long distance transportation expense allocation in Mother's favor and further burdens Father.

Assume Mother takes the child to the east coast for winter break or Christmas vacation with Father and Father's family, when the air fares are extraordinarily high, and then her future obligation, and Father's

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<sup>13</sup> CP 305.

already inadequate \$50 per month child support credit are compromised. Assume Mother pays \$750 for her air fare and \$375 for one-half the child's air fare (\$1125 total) during this extraordinarily expensive travel season. Then Mother will only be required to expend \$1725 further. When she flies out to the east coast the next two visits and pays \$1,000 for her air fares and \$500 for one-half the child's air fares for these visits, then she will only credit Father \$225 for the whole year for his 9 round trip air fares when he travels to Seattle and not the \$600 she would otherwise be required to contribute toward Father's \$4,500 in round trip air fares. In conclusion, by placing a cap on only Mother's obligation to contribute toward long distance transportation expenses, the risk associated with any increase in fares is shifted entirely to the Father and not apportioned proportionately between the parents as required by RCW 26.19.080(3).

D. The Award of Fees and Costs in the Judgment Summary is unsupported by the Findings of Fact and Conclusions of Law.

Full time income is required to be imputed to Mother because she is voluntarily underemployed.<sup>14</sup> The court determines whether to impute income by evaluating the parent's work history, education, health, age

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<sup>14</sup> RCW 26.19.071(6); *In re Marriage of Pollard*, 99 Wn. App. 48, 52-53, 991 P.2d 1201, 1204 (2000) ("the court must impute income to a parent when that parent is voluntarily unemployed or voluntarily underemployed.")

and any other relevant factor.<sup>15</sup> Here, there is no dispute that Mother quit her full time freelance work to become a part time employee. Mother admits in her Response Brief that she is employed only part time. Examining Mother's work history, education, health, age and other relevant factors does not suggest that she cannot work full time. The trial court made no finding Mother could not work full time. There was no evidence Mother could not work full time. To be sure, Mother never addressed Father's argument in his Opening Brief that Mother could take on additional freelance work to supplement her part time income. Because there was nothing that indicated Mother could not work full time, and she works only part time, full time income must be imputed to Mother.

Mother seems to argue that the trial court being able to consider her work history means she can work part time provided she makes the same amount she had made at some point in the past. This argument is not persuasive. First, Mother admittedly remains employed only part time—she has the capacity to work more, but chooses not to. There is nothing in her work history or health that renders her incapable of being employed full time. Second, Mother suggests this Court should look to her earnings for the two years that she was pregnant and then raising an

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<sup>15</sup> *Pollard*, 99 Wn. App. at 53

infant child with Father's help as representing her true earning capacity. In doing so, she asks this Court to ignore her 22 months of over \$9,000 per month net earnings that she had made immediately prior to trial. Mother's argument should be rejected as legally insufficient and contrary to the legislature's intent in enacting child support legislation.

Mother's argument that the trial court's finding that her part time employment offered more stability and benefits may be true, but does not provide a statutory basis not to impute income to her. The only statutorily recognized exception to the income imputation rule is if the underemployed parent is "gainfully employed full time" and is not purposely underemployed to reduce her or his child support obligation.<sup>16</sup> Here, Mother does not meet this statutory exception. She is admittedly not employed full time.

In *Pollard*, the mother was a career woman who voluntarily quit working full time to work part time and care for the two children of her new marriage.<sup>17</sup> While understandable, the appellate court held the trial court's refusal to impute income to the mother was error.<sup>18</sup> The result should be no different here. As in *Pollard*, reversal is required with instructions to the trial court to impute full time income to the Mother.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 52.

<sup>18</sup> *Id.* at 54.

E. Mother is not Entitled to Attorney Fees Because RCW 26.09.140 does not Apply to Proceedings Like This That are Brought Pursuant to the Uniform Parentage Act and This Appeal was not Frivolous.

Mother's request for appellate attorney fees pursuant to RCW 26.09.140 must be denied because RCW 26.09.140 does not apply to these proceedings. Mother's Response Brief argues entitlement to attorney fees pursuant to RCW 26.09.140. RCW 26.09.140, however, explicitly provides that it applies only to actions "pursuant to this chapter." RCW 26.09.140, therefore, "grants attorney fees only where there is or has been a marital relationship between the parties."<sup>19</sup> Because the parties were unmarried and this action was brought pursuant to the Uniform Parentage Act, RCW ch. 26.26, Mother's claim for appellate attorney fees pursuant to RCW 26.09.140 must be denied.

Similarly, Mother's claim for attorney's fees pursuant to RAP 18.9 should also be denied. RAP 18.9 allows this Court to assess appellate attorney fees as a sanction for a totally frivolous appeal. Because this appeal is not totally devoid of merit or totally frivolous, no appellate attorney fees under RAP 18.9 should be awarded.

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<sup>19</sup> *W. Cmty. Bank v. Helmer*, 48 Wn. App. 694, 699, 740 P.2d 359, 362 (1987); and *Hunter v. Hunter*, 52 Wn. App. 265, 273, 758 P.2d 1019, 1024 (1988).

F. Father is Entitled to his Attorney Fees Pursuant to RCW 26.26.140 Because he is Likely to Prevail in This Appeal.

Father is entitled to appellate attorney fees under RCW 26.26.140 and RAP 18.1. Mother offers no argument against Father's proper request for attorney fees pursuant to RCW 26.26.140. Attorney fees on this basis may be made without reference to the parties' respective need or ability to pay.<sup>20</sup> Rather, attorney fees are awarded more on a prevailing party basis.<sup>21</sup> Because Father should prevail in this appeal, he should be awarded his appellate attorney fees pursuant to RCW 26.26.140.

## II. CONCLUSION

This Court should reverse the trial court's refusal to follow the mandatory statutory language in RCW 26.19.080(3) and remand this case back to the trial court to apportion all the long distance transportation costs actually incurred necessary to effectuate the residential provisions in the Parenting Plan provided the actual costs are reasonable. This Court should also reverse the trial court's refusal to follow the mandatory statutory language in RCW 26.19.071(6) and impute full time income to

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<sup>20</sup> *In re Marriage of T*, 68 Wn. App. 329, 334, 842 P.2d 1010, 1012 (1993) ("Because RCW 26.26.140 does not contain the language 'after considering the financial resources of both parties' as RCW 26.09.140 does, the paternity statute does not require consideration of need or ability to pay in making an award.")

<sup>21</sup> *In re Parentage of Q.A.L.*, 146 Wn. App. 631, 638, 191 P.3d 934, 938 (2008) ("to the extent that Q.A.L.'s paternity may be further determined, he has prevailed here. Accordingly, we grant D.M.G.'s request for attorney fees on appeal.")

Mother because she is voluntarily underemployed part time. As the prevailing party, this Court should grant Father's request for attorney fees pursuant to RCW 26.26.140, and should deny Mother's improper request for attorney fees pursuant to RCW 26.09.140 because that statute does not apply to this case.

DATED this 5th day of September, 2012.

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

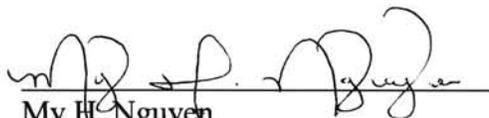
On the below written date, I caused delivery of a true copy of Douglas MacKenzie's Reply Brief to the following individuals via U.S. Mail:

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