

69436-7

69436-7

No. 69436-7-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

In re the Marriage of
SHELLY P. ALDRIDGE,
Respondent,
v.
R. DEAN ALDRIDGE,
Appellant.

FILED
NOV 13 2013
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE
PM 4:51

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Deborah D. Fleck)

APPELLANT'S OPENING BRIEF

Jason W. Anderson
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020
Attorneys for Appellant

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL	3
A. Assignments of Error.	3
B. Statement of Issues.	4
III. STATEMENT OF THE CASE.....	5
A. When the Parties Divorced, the Trial Court Ordered Dean Aldridge to Pay Child Support and Maintenance.	5
B. Dean and His New Spouse, Dr. Brenda Sides-Aldridge, Entered into Prenuptial and Separate Property Agreements.	6
C. Dr. Sides Owns and Operates a Company, Aldridge Enterprises, as Her Separate Property.....	7
D. Dean’s Recent Income Was Strictly from Residual Insurance Commissions and a Now-Defunct Direct-Marketing Venture.	8
E. Shelly Aldridge Filed a Petition to Modify Child Support and Proposed Worksheets that Attributed Dr. Sides’ Company’s Income to Dean and Double Counted over \$51,000 in Income.....	10
1. Dean’s Proposed Worksheets.	11
2. Shelly’s Proposed Worksheets.....	11
F. The Family Court Commissioner Adopted Dean’s Proposed Worksheets.....	13

	<u>Page</u>
G. The Superior Court Judge Revised the Commissioner’s Orders and Adopted Shelly’s Proposed Worksheets.....	14
IV. ARGUMENT.....	16
A. Standards of Review.....	16
B. Summary of Method for Determining Child Support.....	17
C. The Trial Court Erred in Determining the Basic Support Obligation.....	19
1. The Trial Court Abused Its Discretion in Attributing Half of Dr. Sides’ Company’s Income to Dean.....	19
2. Even Assuming It Were Permissible to Attribute to Dean Any of Aldridge Enterprises’ Profits, the Trial Court Erred in Computing the Company’s Income.....	21
D. The Trial Court Erred in Allocating Special Expenses for Extra-Curricular Activities.....	23
1. The Trial Court Abused Its Discretion in (a) Failing to Find the Expenses Were Necessary or Reasonable and (b) Allocating Them 100% to Dean.....	23
2. The Trial Court Erred in Considering Dr. Sides’ Income and Resources to Justify an Upward Deviation.....	25
E. Any Remand Should Be to the Superior Court Judge Currently Assigned to This Case.....	30
V. CONCLUSION.....	30

APPENDICES:

- A. Memorandum of Decision (CP 244-50) (finding of fact numbers added)
- B. RCW 26.19.071
- C. RCW 26.19.075
- D. RCW 26.19.080
- E. Index to Clerk's Papers

TABLE OF AUTHORITIES

Washington Cases	<u>Page(s)</u>
<i>Brandli v. Talley</i> , 98 Wn. App. 521, 991 P.2d 94 (1999).....	27, 28, 29
<i>Friedlander v. Friedlander</i> , 80 Wn.2d 293, 494 P.2d 208 (1972).....	21
<i>Harmon v. Dep’t of Soc. & Health Svcs.</i> , 134 Wn.2d 523, 951 P.2d 770 (1998).....	1, 19, 21, 26, 29
<i>In re Yeamans</i> , 117 Wn. App. 593, 72 P.3d 775 (2003).....	23, 24
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	20
<i>Marriage of Booth</i> , 114 Wn.2d 772, 791 P.2d 519 (1990).....	16
<i>Marriage of Casey</i> , 88 Wn. App. 662, 967 P.2d 982 (1997).....	24
<i>Marriage of Clarke</i> , 112 Wn. App. 370, 48 P.3d 1032 (2002).....	19
<i>Marriage of Daubert</i> , 124 Wn. App. 483, 99 P.3d 401 (2004).....	24, 29
<i>Marriage of Glass</i> , 67 Wn. App. 378, 835 P.2d 1054 (1992).....	28
<i>Marriage of Jonas</i> , 57 Wn. App. 339, 788 P.2d 12 (1990).	20
<i>Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	17
<i>Marriage of McCausland</i> , 159 Wn.2d 607, 152 P.3d 1013 (2007).....	16, 17, 18, 24

	<u>Page(s)</u>
<i>Marriage of Moody</i> , 137 Wn.2d 979, 976 P.2d 1240 (1999).....	16, 25
<i>Marriage of Rideout</i> , 150 Wn.2d 337, 77 P.3d 1174 (2003).....	17
<i>Marriage of Scanlon</i> , 109 Wn. App. 167, 34 P.3d 877 (2001)	19, 23, 24, 25
<i>Murphy v. Miller</i> , 85 Wn. App. 345, 932 P.2d 722 (1997).....	23
<i>Paternity of Hewitt</i> , 98 Wn. App. 85, 988 P.2d 496 (1999).....	25
<i>State v. Ramer</i> , 151 Wn.2d 106, 86 P.3d 132 (2004).....	16, 25
<i>State v. Wicker</i> , 105 Wn. App. 428, 20 P.3d 1007 (2001).....	25
<i>Wash. State Physicians Ins. Exch. v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	17

Constitutional Provisions, Statutes, and Court Rules

King County Local Civil Rule 7(b)(7).....	14
King County Local Civil Rule 7(b)(8).....	14
RAP 8.1(c)(3).....	15
RCW 26.09.011(9).....	18
RCW 26.16.010	21
RCW 26.19	17
RCW 26.19.001	17
RCW 26.19.011(1).....	17

	<u>Page(s)</u>
RCW 26.19.011(8).....	18
RCW 26.19.020	17, 18
RCW 26.19.035(1)(c)	17
RCW 26.19.071	19
RCW 26.19.071(1).....	19, 21
RCW 26.19.071(4).....	19
RCW 26.19.071(4)(a)	1, 4, 19, 21, 22
RCW 26.19.075	18, 25
RCW 26.19.075(1)(a)(i).....	5, 14, 25, 26, 27, 28, 29
RCW 26.19.080	4
RCW 26.19.080(1).....	18, 23
RCW 26.19.080(2).....	18
RCW 26.19.080(3).....	2, 18, 23, 24
RCW 26.19.080(4).....	2, 18, 23, 24
1987 WASH. LAWS ch. 440, §§ 1-2	20

Other Authorities

Wash. State Child Support Sched. Comm'n, <i>Final Report</i> at 8 (Nov. 1987, as revised May 1988)	1, 21, 26, 29
---	---------------

I. INTRODUCTION

Just before Appellant Dean Aldridge was to stop paying maintenance to Respondent Shelly Aldridge, Shelly sought modification of child support primarily on the basis that Dean allegedly had substantial resources available to him as a result of his marriage to a new spouse—a basis ruled out by statute. On revision of a commissioner’s ruling, the trial court committed at least five errors in interpreting and applying the statutes and in computing income, resulting in an excessive support obligation.

First, the legislature has barred consideration of a new spouse’s income or resources in determining the basic support obligation, intending to “avoid creating economic disincentives for remarriage.”¹ See RCW 26.19.071(4)(a). Nevertheless, the trial court considered the income of Dean’s new spouse, Brenda Sides-Aldridge, N.D., in determining his basic support obligation, adding to his income half the profits from Aldridge Enterprises, a company Dr. Sides owns as her separate property.

Second, even if consideration of a new spouse’s income in determining the basic support obligation were not barred, the trial court

¹ *Harmon v. Dep’t of Soc. & Health Svcs.*, 134 Wn.2d 523, 540, 951 P.2d 770 (1998), quoting Wash. State Child Support Sched. Comm’n, *Final Report* at 8 (Nov. 1987, as revised May 1988).

compounded this error by adopting calculations that overstated the resulting income figure by more than 30%. The trial court purported to use an average of 2010 and 2011 company profits, but counted Dean's personal 2010 income as company revenue (the company had none in 2010) and double counted most of Dean's personal 2011 income as income to *both* Dean and the company.

Third, not only did the trial court err in determining the basic support obligation, it added special expenses of over \$12,000 per year for soccer and basketball based on past voluntary payment without finding the expenses necessary or reasonable for the future, as required by RCW 26.19.080(4).

Fourth, the court imposed 100% of the special expenses on Dean when RCW 26.19.080(3) requires that special expenses be allocated in proportion to each parent's income. The trial court justified this as an upward deviation, but the court has no discretion to deviate with respect to special expenses unless it first deviates with respect to the basic support obligation, which it did not do.

Fifth and finally, even assuming the court had discretion to deviate upward, it abused its discretion in considering Dr. Sides' income and resources to justify the deviation and in deviating solely on that basis.

Unlike in determining the basic support obligation, a court may consider a new spouse's income in deciding whether to deviate, but only to deny a downward deviation—not to deviate *upward*.

Each of these decisions was based on an erroneous view of the applicable law or, in the case of the erroneous calculations, not based on substantial evidence, and was therefore an abuse of discretion. This Court should vacate the trial court's orders on revision and remand with directions to reinstate the commissioner's rulings except with respect to special expenses. The special expenses must be evaluated for necessity and reasonableness and then, if ordered, allocated in proportion to the parties' relative incomes. Because the case has been reassigned, the remand should be to the currently assigned superior court judge.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error.

1. Dean assigns error to the trial court's entry of the Findings/Conclusions on Petition for Modification of Child Support (CP 240-41).
2. Dean assigns error to the trial court's entry of the Order Granting Petitioner's Motion for Revision (CP 242-43), including the decisions to modify support and deviate upward.
3. Dean assigns error to the trial court's entry of the Memorandum of Decision (CP 244-50).
4. Dean assigns error to the trial court's entry of the Final Modified Order of Child Support (CP 251-63).

5. Dean assigns error to the following findings of fact as numbered in the copy of the Memorandum of Decision attached as Appendix A to this brief: 10, 11, 13, 23, 25, 26, 27, 28, 31, 36, 37, 41. *See Findings/Conclusions on Petition for Modification of Child Support (incorporating by reference findings of fact contained in Memorandum of Decision), CP 240-41.*
6. Dean assigns error to the finding that his residential time has not appreciably changed since entry of the Parenting Plan. CP 254.

B. Statement of Issues.

1. Computation of Basic Support Obligation.

- a. Where RCW 26.19.071(4)(a) bars consideration of a new spouse's income in determining the basic child-support obligation, did the trial court abuse its discretion in attributing to Dean half the profits of his new spouse's company in determining his income for purposes of the basic support obligation? (Assignments of error 1-5.)
- b. Even assuming it were permissible to attribute to Dean any of the profits of his new spouse's company, did the trial court err in computing the company's income where it counted Dean's personal income as company revenue, resulting in double counting of income? (Assignments of error 1-5.)

2. Upward Deviation for Special Expenses Only.

- a. Where RCW 26.19.080 requires that any special expenses be necessary and reasonable, did the trial court err in imposing responsibility for over \$12,000 per year in extracurricular expenses based on past voluntary payment without finding the expenses necessary or reasonable for the future? (Assignments of error 1-6.)
- b. Where RCW 26.19.080 requires proportional allocation of special expenses according to the parents' relative incomes, except as an upward deviation where the court first deviates with respect to the basic support obligation, did the trial court abuse its discretion in imposing 100% of the cost on Dean as an upward deviation where it did not deviate with respect to the basic support obligation? (Assignments of error 1-6.)

- c. Even assuming it were permissible to deviate upward for special expenses when the court did not first deviate with respect to the basic support obligation, where a new spouse's income may not be the sole reason for deviation, and where RCW 26.19.075(1)(a)(i) only permits consideration of a new spouse's income to deny a downward deviation and not to grant an *upward* deviation, did the trial court abuse its discretion in deviating upward based on Dean's new spouse's income and resources? (Assignments of error 1-6.)

III. STATEMENT OF THE CASE

A. **When the Parties Divorced, the Trial Court Ordered Dean Aldridge to Pay Child Support and Maintenance.**

Dean and Shelly Aldridge married in 1998 and had one child together, Brianna. CP 3-4. They separated in 2005, and the marriage was dissolved by a decree entered in February 2007, when Brianna was seven. CP 4, 7, 27. Dean was required to pay \$787.61 per month for five years as maintenance and child support of \$712.39 per month. CP 18, 28-29, 33. The child support was determined based on Dean's imputed monthly net income of \$5,469 and Shelly's monthly net income of \$2,101, and ordered according to the standard calculation, without deviation. CP 17-18, 22-23. The order stated this could not be changed for five years. CP 18.

The parenting plan provided for joint decision-making authority and split residential time. CP 8-13, 40-45.² The residential schedule had Brianna spend about a third of her time with Dean and two thirds with

² The original parenting plan was clarified by agreement in 2008, resulting in entry of an amended parenting plan. CP 37-50.

Shelly. CP 37-38, 40-43. In addition to child support, Dean was voluntarily paying club dues and related athletic expenses for Brianna, a talented soccer and basketball player, which averaged over \$12,000 per year in 2010-2011 and were \$11,459 in just the first *quarter* of 2012. CP 69, 102.³ Dean also voluntarily paid health-insurance premiums for Brianna, which totaled \$110 per month. CP 98, 100.

B. Dean and His New Spouse, Dr. Brenda Sides-Aldridge, Entered into Prenuptial and Separate Property Agreements.

In July 2007, Dean married a new spouse, Brenda Sides-Aldridge, N.D. Before their marriage, Dean and Dr. Sides entered into prenuptial and separate-property agreements. CP 92, 775-79. These agreements provide that *all* assets or liabilities created or acquired before or after the marriage by either spouse belong to that spouse as his or her separate property. *Id.* Dean and Dr. Sides have no jointly owned assets or accounts, and Dean has no access to Dr. Sides' bank or brokerage accounts. CP 101, 771-72. When Dean's name was incorrectly placed on the titles of certain vehicles purchased by Dr. Sides, Dean and Dr. Sides promptly corrected the errors and signed an agreement confirming the ownership status of the assets. CP 167-70.

³ Dean paid \$9,826 for Brianna's activities in 2010, \$15,885 in 2011, and \$11,458 through March 2011. CP 102.

There is no evidence that Dean and Dr. Sides' arrangements had anything to do with Dean's obligation to support Brianna or were made for an improper purpose. *See* CP 92-93. At her father's insistence, Dr. Sides had entered into prenuptial and separate-property agreements with her former husband. CP 92. Although her father was deceased when she married Dean, Dr. Sides entered into similar agreements with Dean to protect her assets, including an inheritance from her father. CP 92-93.

Dean and Dr. Sides have two children in addition to Brianna, who joins the family during Dean's residential time. Dean's 22-year-old nephew and his terminally-ill father also live with them. CP 109. The family lives in a home owned by Dr. Sides that she purchased before marrying Dean. CP 64, 81-83, 102. Dr. Sides owes more on her mortgage than the property is worth, and she liquidated various assets to stay afloat during the recession. CP 64, 91, 94.

C. Dr. Sides Owns and Operates a Company, Aldridge Enterprises, as Her Separate Property.

Dr. Sides is a licensed naturopathic doctor who does not currently practice but sells nutritional supplements. CP 65-66, 93-94; *see also* RP 28. She owns and operates a limited liability company called Aldridge Enterprises, which sells Vemma Nutrition products. CP 65-66, 85-89, 93, 580. Dean and Dr. Sides were both members of Aldridge Enterprises

when it was a shell company with no assets. CP 66, 94, 100. When Dr. Sides started her Vemma business, she decided to use the existing company. CP 66, 94, 100. To maintain her separate estate under the separate-property agreement, Dr. Sides could not invest in the company except under her sole ownership. CP 66, 94, 100. Dean thus surrendered all his shares to Dr. Sides effective August 2011, the regular renewal date for company registration, and she became the sole member of the LLC. CP 66, 85, 88, 94, 100. This was before the company had any assets and several months before Shelly filed her petition to modify child support. CP 53, 854-55.

D. Dean's Recent Income Was Strictly from Residual Insurance Commissions and a Now-Defunct Direct-Marketing Venture.

Dean worked as an insurance producer until approximately 2006. CP 65. Dean still receives some residual commissions for insurance policies he sold for Genworth Life Insurance Company and American Family Life Assurance Company (AFLAC). CP 101.

Starting in 2009, Dean developed a direct-marketing business with Shaklee Corp., a manufacturer and distributor of nutritional supplements. CP 66, 781-85. Dean reported the following earned income in 2010:

Shaklee Corp.	\$74,385
AFLAC	\$10,795
Genworth Life Insurance Co.	\$1,291
J&M Burke Enterprises	\$1,986
Total	\$88,457

CP 621-23. In addition to his earned income, Shaklee loaned Dean \$337,622 in 2009-2011 to help build his business. CP 99, 781-86. Because the loans were to be forgiven if Dean met certain goals, his tax accountant recommended he claim the loans, less expenses, on a 2010 tax return. CP 67, 99. Dean thus reported \$165,524 of the loans as income and reported a total income of \$253,981 in 2010. CP 67, 99, 586. But Dean ultimately did not reach the Shaklee goals and terminated his relationship with Shaklee in 2011. CP 67, 99-100. Shaklee has since demanded repayment of all loans, and thus more than half the amount Dean reported as income in 2010 must be repaid. CP 67, 99-100, 788-90.

Aldridge Enterprises had no income in 2010. CP 94, 100; *see also* CP 621-23 (no IRS form 1099 for Aldridge Enterprises).

In 2011, Dean received the following income:

Shaklee Corp.	\$51,122
Genworth Life Insurance Co.	\$1,335
AFLAC	\$9,389
Total	\$61,846

CP 577, 578, 842. On Dean and Dr. Sides' 2011 tax return, the \$51,122.40 in Shaklee income paid to Dean was mistakenly reported as

income to Aldridge Enterprises. CP 533, 577 (IRS form 1099 issued to Dean). Aldridge Enterprises thus reported the following income in 2011:

Shaklee Corp.	\$51,122
Sundays, Inc.	\$59,970
Vemma Nutrition Co.	16,777
Total	\$127,869

CP 533 (line 1b), 577, 579, 580. The mistakenly reported Shaklee income was 40% of the reported income of Aldridge Enterprises in 2011 and should have been reported as Dean's income. Aldridge Enterprises was never part of Dean's relationship with Shaklee. CP 66; *see also* CP 781-90.

E. Shelly Aldridge Filed a Petition to Modify Child Support and Proposed Worksheets that Attributed Dr. Sides' Company's Income to Dean and Double Counted over \$51,000 in Income.

In January 2012, a month before Dean's maintenance obligation was to end, Shelly filed her petition to modify child support on the basis that the parties' incomes and relative wealth had changed and Brianna had reached age 12. CP 33, 54. In a financial declaration filed with her petition, Shelly reported that her monthly income as a dental assistant had increased to \$3,750, and she claimed expenses exceeding her net income by over \$450. CP 56-61, 295-96. Dean did not dispute Shelly's income or expenses. CP 99. Shelly initially asserted that Dean's monthly income

was \$10,000—a claim she would later inflate to over \$12,000. CP 57, 301, 405.

1. Dean’s Proposed Worksheets.

Dean had received less than \$5,000 in income in 2012 as of June. CP 65, 837-38. Although Dean no longer had any Shaklee income, owed a substantial debt to Shaklee, and his residual insurance commission income decreases over time, he nevertheless proposed that the court determine his current income based on the total of his 1099-reported earnings in 2011—a total of almost \$62,000 from Shaklee, Genworth, and AFLAC. CP 65, 99. Dividing that income by 12 months resulted in \$5,153 per month. CP 99. Calculating child support based on Dean’s proposed worksheets would result in his share of the basic support obligation being \$843. CP 433. After applying credits for health care and special expenses, his transfer payment would be \$564 per month. CP 434.

Dean requested a downward deviation based on the residential schedule, under which Brianna was with him 125 nights per year—over 30% of the time. CP 100, 414-15.

2. Shelly’s Proposed Worksheets.

Shelly alleged Dean was “hiding” his true income and that, in addition to the income on Dean’s 1099s from 2011, the court should

attribute to Dean half the average profits of Aldridge Enterprises in 2010 and 2011. CP 296-99, 941-42. Shelly asserted Aldridge Enterprises made \$231,408 in 2010 and \$114,474 in 2011, resulting in a two-year average of \$177,916. CP 941-42. She then made certain deductions for business expenses resulting in average net profits of \$141,516. *Id.* She divided this amount in half and then by twelve months, resulting in \$5,896 per month that she argued should be attributed to Dean, *in addition to* his 2011 average monthly income of \$5,153. CP 300-01, 941-42.

Dean argued that Aldridge Enterprises is Dr. Sides' separate property, so its income may not be attributed to him. CP 413. In addition, there were two significant problems with Shelly's calculations. First, Aldridge Enterprises had *zero* income in 2010. CP 94, 100; *see also* CP 621-23. The 2010 income referenced by Shelly was the gross income reported by Dean personally in 2010 (including the loans he must repay)—*not* by Aldridge Enterprises. *See* CP 586 (line 7). Second, Shelly double-counted the \$51,122 Shaklee paid Dean in 2011 by also including it in the 2011 income of Aldridge Enterprises. CP 99, 533, 577.

Calculating child support based on the inflated income amounts in Shelly's proposed worksheets would result in a basic support obligation for Dean of \$1,399 per month. CP 162-64.

F. The Family Court Commissioner Adopted Dean's Proposed Worksheets.

A family court commissioner, Richard A. Gallaher, found that Dean was voluntarily underemployed, but not for the purpose of reducing child support, and that Dean's proposed worksheets represented "a reasonable estimate of his current earning capacity." CP 175. The commissioner adopted Dean's proposed worksheets based on monthly gross income of \$5,153 imputed to Dean and \$3,750 income to Shelly. CP 180-85, 189. This resulted in a basic support obligation for Dean of \$800 per month. CP 180, 182, 193.

The commissioner found that a downward deviation based on Dean's residential time would not create an economic hardship in Shelly's home. CP 175. The commissioner granted Dean a downward deviation of \$263 based on residential credit, resulting in a transfer payment of \$537 per month. CP 184-85, 192. The commissioner allocated educational expenses proportionally according to the parents' incomes, but imposed upon Dean 100% of special expenses for sports. CP 175, 198. The commissioner found Dean voluntarily incurred the expenses for Brianna's extracurricular activities and that he should continue to be responsible for 100% of such expenses. CP 175. The commissioner denied Shelly's request for an award of attorney's fees. CP 174.

G. The Superior Court Judge Revised the Commissioner's Orders and Adopted Shelly's Proposed Worksheets.

Shelly moved to revise Commissioner Gallaher's orders under King County Local Civil Rule 7(b)(8), based on the record presented to the commissioner. CP 206-08.⁴ At a hearing on the motion, Judge Fleck explained her belief that, because Dean requested a *downward* deviation, she could consider Dr. Sides' wealth and resources to grant an *upward* deviation to Shelly under RCW 26.19.075(1)(a)(i). RP 45-51. The court stated it would consider Dr. Sides' assets "regardless of a prenuptial agreement" or "technical ownership issues" with respect to Aldridge Enterprises. RP 51, 53. The court requested supplemental submissions, primarily to give Shelly's counsel the opportunity to provide support for his assertions regarding Dean's income. RP 53-54.

The trial court subsequently issued a memorandum decision and entered orders adopting Shelly's computations and proposed worksheets. CP 240-65. The court stated, "Calculating the father's earnings as [Shelly's counsel] has done is reasonable and I have adopted his worksheets, affording [Dean] the business deductions (for child support purposes) reflected in the Memorandum of Points & Authorities submitted by Mr. Buckingham dated August 16, 2012." CP 248.

⁴ Shelly's motion incorrectly cited King County Local Civil Rule 7(b)(7). CP 206.

The trial court set Dean's basic support obligation at \$1,336 per month—\$536 (or 67%) more than the basic support set by the commissioner. CP 243, 253. The court denied the downward deviation the commissioner had granted. CP 243. The court ordered Dean to continue to pay 100% of expenses for Brianna's extracurricular activities "as a child support deviation upward," without specifying any amount or finding the expenses necessary or reasonable. CP 243, 250. Even without considering these expenses, the total monthly support amount the court ordered Dean to pay is \$799 (or 50%) more than that ordered by the commissioner.⁵

The trial court made its order of support retroactive to the filing of the petition in January 2012 and entered a judgment against Dean for nearly \$5,000 in back support. CP 251. The court also ordered Dean to pay \$5,000 of Shelly's attorney's fees based on need and ability to pay. CP 250, 251. Dean timely appealed from the trial court's orders. CP 266-67. Since entry of those orders, Dean has paid to Shelly the monthly transfer payment ordered by the commissioner and paid the \$799.35 difference between that amount and the amount ordered by Judge Fleck into the superior court registry as authorized by RAP 8.1(c)(3). Dean has

⁵ None of the support amounts ordered for Brianna took into account Dean's other two children.

continued to pay all the extracurricular expenses, as he had always voluntarily done.

IV. ARGUMENT

A. Standards of Review.

Where, as here, the evidence before the commissioner did not include live testimony, the superior court judge's review of the record on a motion to revise is de novo. *Marriage of Moody*, 137 Wn.2d 979, 993, 976 P.2d 1240 (1999). All evidence and issues presented to the commissioner are before the judge for review. *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004), citing *Moody*, 137 Wn.2d at 993. An appeal to this Court is from the judge's decision on revision. *Id.*

Interpretation of a statute is a question of law this Court reviews de novo. *Marriage of McCausland*, 159 Wn.2d 607, 615, 152 P.3d 1013 (2007). This Court reviews the discretionary decisions reflected in a child-support order for an abuse of discretion. *Marriage of Booth*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons:

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is

based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). A decision based on an erroneous view of the law is necessarily an abuse of discretion. *Wash. State Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). This Court will vacate a finding of fact if it is not supported by substantial evidence. *Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003).

B. Summary of Method for Determining Child Support.

The uniform child support schedule and standards in chapter 26.19 RCW apply to all proceedings in which child support is determined or modified. RCW 26.19.035(1)(c). In establishing a uniform schedule, the legislature intended “to insure that child support orders are adequate to meet a child’s basic needs and to provide additional child support commensurate with the parents’ income, resources, and standard of living.” RCW 26.19.001. It also intended to insure that the child support obligation is “equitably apportioned between the parents.” *Id.*

The first step in setting child support is to determine the “basic child support obligation” based on the parents’ combined monthly net income and the number and ages of the children. RCW 26.19.011(1), 020; *McCausland*, 159 Wn.2d at 611. An economic table sets forth the

presumptive obligation for a combined monthly net income of up to \$12,000. RCW 26.19.020.

Next, the court must determine the gross support obligation by adding health care, day care, and other special expenses the court deems necessary and reasonable. RCW 26.19.080(2)-(4). These expenses are not included in the basic support obligation set forth in the economic table. RCW 26.19.080(2), (3). The court must allocate the gross support obligation and special expenses between the parents based on each parent's share of the combined monthly net income. RCW 26.19.080(1)-(3).

Next, the court must credit each parent any amounts he or she pays directly to third parties for goods and services such as health care or day care for the child. This results in the "standard calculation." RCW 26.19.011(8). The court may then deviate upward or downward from the standard calculation upon entry of written findings of fact, subject to the limitations of RCW 26.19.075. The standard calculation, subject to any deviation, is the basis for the "support transfer payment"—the amount the court orders one parent to pay another. RCW 26.09.011(9).

C. The Trial Court Erred in Determining the Basic Support Obligation.

1. The Trial Court Abused Its Discretion in Attributing Half of Dr. Sides' Company's Income to Dean.

The court must determine each parent's current income for purposes of computing the basic support obligation. *See* RCW 26.19.071. The statute forbids consideration of a new spouse's income in determining the basic support obligation:

The following income and resources shall be disclosed but ***shall not be included*** in gross income:

- (a) ***Income of a new spouse*** or new domestic partner or income of other adults in the household[.]

...

RCW 26.19.071(4)(a) (emphasis added); *see also* RCW 26.19.071(1) (“Income and resources of any other person shall not be included in calculating the basic support obligation.”); *Harmon v. Dep't of Soc. & Health Svcs.*, 134 Wn.2d 523, 540, 951 P.2d 770 (1998) (“A new spouse's, or step parent's, income...may not be used to calculate the presumptive basic support obligation.”).⁶ The court has no discretion with regard to the factors to be considered in determining incomes and must

⁶ *See also Marriage of Clarke*, 112 Wn. App. 370, 377, 48 P.3d 1032 (2002) (holding that the trial court properly disregarded a new spouse's income for purposes of calculating support), *overruled on other grounds by Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007); *Marriage of Scanlon*, 109 Wn. App. 167, 175, 34 P.3d 877 (2001) (observing that separate income of a new spouse must be excluded from worksheets under RCW 26.19.071(4)).

follow the statute. *Marriage of Jonas*, 57 Wn. App. 339, 340, 788 P.2d 12 (1990).

RCW 26.19.071 unambiguously bars consideration of a new spouse's income. Where a statute is plain and unambiguous, its meaning must be derived from its text alone. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). Only if a statute is ambiguous will the court resort to principles of statutory construction, legislative history, and case law to assist in interpreting it. *Id.* at 21. A statute is ambiguous if it can reasonably be interpreted in more than one way and not merely because different interpretations are conceivable. *Id.* at 20-21.

Even if RCW 26.19.071 were ambiguous, the legislative history confirms the legislature's intent to exclude income of a new spouse. In 1987, the legislature created the Washington State Child Support Schedule Commission, directing it to recommend a child support schedule and standards for applying the schedule. 1987 WASH. LAWS ch. 440, §§ 1-2. The legislature directed the Commission to establish standards for, among other things, the "sources of income on which support amounts shall be based." *Id.* § 2. The Commission reported to the legislature that it was guided in part by the principle that the child support schedule "should not create extraneous negative effects on the major life decisions of either

parent. The schedule should avoid creating economic disincentives for remarriage.” Wash. State Child Support Sched. Comm’n, *Final Report* at 8 (Nov. 1987, as revised May 1988). The legislature accepted the Commission’s recommendations in adopting RCW 26.19.071(1) and (4)(a). See *Harmon*, 134 Wn.2d at 539-40.

The trial court erred in including the income of Dr. Sides’ company when computing Dean’s basic support obligation. Profits from a business owned by one spouse as separate property are that spouse’s separate property. RCW 26.16.010; *Friedlander v. Friedlander*, 80 Wn.2d 293, 294, 494 P.2d 208 (1972). All shares of Aldridge Enterprises were Dr. Sides’ separate property (she was its sole member), CP 85, 94, 100, and thus so was its income. *Id.* Dr. Sides is a “new spouse” under RCW 26.19.071(4)(a), and her income was thus was not subject to consideration in determining the basic support obligation. This Court should reverse.

2. Even Assuming It Were Permissible to Attribute to Dean Any of Aldridge Enterprises’ Profits, the Trial Court Erred in Computing the Company’s Income.

Even if Aldridge Enterprises were a community asset that produced income attributable to Dean, which it is not, the trial court adopted Shelly’s erroneous calculation of the company’s income. CP 248.

As a result, when the court purported to use an average of Aldridge Enterprises' 2010-11 income, the court counted Dean's personal 2010 reported income (including the \$165,000 in loans that must be repaid) as the company's income. *See* CP 586, 941-42. The court also double counted over \$51,000 of Dean's personal 2011 income as income to *both* Dean and the company. *See* CP 99, 533, 577, 941-42. The net result was to overstate Dean's income by over 30%, or \$2,699 per month.

The company's income was zero in 2010 and \$76,747 in 2011. CP 99, 100, 579, 580. Assuming half the 2011 income should be attributed to Dean notwithstanding RCW 26.19.071(4)(a), that amount is \$38,373, or \$3,197 per month. The trial court found that Dean had monthly wages and salaries of \$5,153 and business income of \$5,896, a total of \$11,049. CP 259. Correcting for the computation errors, his gross monthly income could not have been more than \$5,153 wages and salaries plus \$3,197 business income, a total of \$8,350.

The trial court's findings regarding Dean's income were not based on substantial evidence. Therefore, even assuming it were permissible to consider the income of Dr. Sides' company in determining the basic support obligation, this Court should nevertheless reverse and remand for recalculation of Dean's income and, thus, his support obligation.

D. The Trial Court Erred in Allocating Special Expenses for Extra-Curricular Activities.

1. The Trial Court Abused Its Discretion in (a) Failing to Find the Expenses Were Necessary or Reasonable and (b) Allocating Them 100% to Dean.

The trial court may add to the basic support obligation special child-rearing expenses it finds necessary and reasonable. RCW 26.19.080(3), (4). The statute provides that such expenses “shall be shared by the parents in the same proportion as the basic child support obligation.” RCW 26.19.080(3). The basic child-support obligation is allocated based on each parent’s share of the combined monthly net income. RCW 26.19.080(1). Therefore, special expenses must be allocated likewise. RCW 26.19.080(1), (3); *see also In re Yeamans*, 117 Wn. App. 593, 599-600, 72 P.3d 775 (2003); *Marriage of Scanlon*, 109 Wn. App. 167, 178-79, 34 P.3d 877 (2001).⁷

Here, the trial court, like the commissioner, ordered that Dean is 100% responsible for extracurricular expenses. CP 243, 250. This was error for two reasons. **First**, the trial court did not specify an amount of extracurricular expenses or that they are necessary and reasonable. *See* CP 243, 250, 260. It is an abuse of discretion to increase a parent’s support

⁷ *See also Murphy v. Miller*, 85 Wn. App. 345, 349, 932 P.2d 722 (1997) (holding that the trial court only had discretion to determine whether special expenses were necessary and reasonable and abused its discretion in imposing the expenses on one parent).

obligation based on past expenditures without finding future necessity of the expenditures. RCW 26.19.080(4); *Marriage of Daubert*, 124 Wn. App. 483, 497-98, 99 P.3d 401 (2004), *overruled on other grounds by McCausland*, 159 Wn.2d 607. **Second**, even assuming the expenses were necessary and reasonable, they were required to be allocated proportionally under RCW 26.19.080(3). *Yeamans*, 117 Wn. App. at 600; *Scanlon*, 109 Wn. App. at 178-79. It is an abuse of discretion to increase one parent's current support obligation based on past voluntary payment of expenses. *Scanlon*, 109 Wn. App. at 178-79.

There is only one exception to the proportional allocation requirement, and it does not apply here: where the court first deviates with respect to the basic support obligation, it may likewise deviate from proportionate allocation of special expenses. *Yeamans*, 117 Wn. App. at 600-01, citing *Marriage of Casey*, 88 Wn. App. 662, 667, 967 P.2d 982 (1997). This court explained in *Yeamans*:

The *Casey* exception **only** permits a court to deviate from extraordinary expenses if it **first** deviates from the basic support obligation. It follows that if a court does not deviate from the basic support obligation, then it cannot deviate from the extraordinary expenses.

Id. at 601 (emphasis added). Here, the trial court did not deviate with respect to the basic support obligation. Therefore, it lacked discretion to

deviate with respect to special expenses. *Id.*; *Scanlon*, 109 Wn. App. at 178-79.⁸ This Court should reverse the decision to impose 100% of the extra-curricular expenses upon Dean.⁹

2. The Trial Court Erred in Considering Dr. Sides' Income and Resources to Justify an Upward Deviation.

Even assuming the trial court had discretion to deviate with respect to special expenses when it did not deviate with respect to the basic support obligation, the court abused its discretion in considering Dr. Sides' income and resources to justify the deviation.

Deviation is governed by RCW 26.19.075. Unlike in determining the basic support obligation, the court may consider income of a new spouse in deciding whether to deviate from the standard calculation, but only “if the parent who is married to the new spouse...is asking for a deviation based on any other reason.” RCW 26.19.075(1)(a)(i) (emphasis added). The statute continues: “Income of a new spouse...is not, by

⁸ See also *Paternity of Hewitt*, 98 Wn. App. 85, 88–89, 988 P.2d 496 (1999) (holding that the trial court abused its discretion in imposing 100% of special expenses on one parent where the court did not first deviate with respect to the basic support obligation).

⁹ Dean was not required to move to revise the commissioner's ruling on the issue of proportional allocation to preserve it for appellate review. The superior court on revision reviews all the evidence and issues presented to the commissioner. *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004), citing *Marriage of Moody*, 137 Wn.2d 979, 993, 976 P.2d 1240 (1999), and *State v. Wicker*, 105 Wn. App. 428, 422, 20 P.3d 1007 (2001). The record shows that the issue was before the commissioner and was decided by the court on revision.

itself, a sufficient reason for deviation.” *Id.* Here, the benefit to Dean from Dr. Sides’ income and resources was the only reason given for deviation. This was contrary to RCW 26.19.075(1)(a)(i).

Furthermore, Dean is “the parent who is married to the new spouse.” Although Dean requested and Commissioner Gallaher granted a *downward* deviation based on residential credit, Dean’s request provided no lawful basis for Judge Fleck to deviate *upward* based on Dr. Sides’ income and resources. A new spouse’s income may only be considered to *deny* a request for downward deviation by “the parent who is married to the new spouse”—and not to deviate upward in favor of the other spouse. Had the legislature intended otherwise, it would have permitted consideration of a new spouse’s income and resources as a basis for deviation regardless of which spouse requested deviation. Consistent with its intent to “avoid creating economic disincentives for remarriage,” the legislature did not do that. *See* RCW 26.19.075(1)(a)(i); *Harmon*, 134 Wn.2d at 539-40, quoting Wash. State Child Support Sched. Comm’n, *Final Report* at 8.

The purpose of RCW 26.19.075(1)(a)(i) is to ensure that a parent married to a new spouse does not receive a downward deviation in spite of substantial wealth in the household. Otherwise, for example, a parent

married to a new spouse might obtain a downward deviation on the basis that he or she voluntarily has little or no income—a circumstance enabled by the new spouse’s wealth or income. The statute is not meant to discourage parents from remarrying or seeking downward deviations by allowing upward deviations that otherwise could not be sought or granted, nor does it compel that result.

To justify its decision, the trial court relied on *Brandli v. Talley*, 98 Wn. App. 521, 991 P.2d 94 (1999) (per curiam). *See* RP 45. There, the father, Mr. Talley, filed a petition to modify support and requested upward deviation on the basis that the mother, Ms. Brandli, had married a wealthy new spouse. *Id.* at 522-23. There was no prenuptial agreement, and the mother listed her new husband’s \$3.5 million investment account under her “available assets.” *Id.* at 527. The trial court refused to consider the new spouse’s income and resources, presumably because Mr. Talley—the parent who requested the deviation—was not “the parent who is married to the new spouse” under RCW 26.19.075(1)(a)(i). *Id.* This Court reversed and held it would have been appropriate to consider the new

spouse's income in deciding whether to grant Mr. Talley's request for upward deviation. *Id.* at 527.¹⁰

Brandli appears to be contrary to RCW 26.19.075(1)(a)(i) and wrongly decided because the parent who requested deviation was not “the parent married to the new spouse.” Nevertheless, this Court need not overrule or modify *Brandli* here for two reasons. First, as discussed above, the trial court here lacked discretion to deviate with respect to special expenses when it did not deviate with respect to the basic support obligation, so this Court may reverse without reaching the new-spouse income issue. Second, *Brandli* is factually distinguishable because (1) there was no prenuptial agreement, (2) the respondent there listed her new spouse's substantial investment account under her “available assets,” and (3) the petitioner there requested an upward deviation, which Shelly never

¹⁰ In arriving at its holding in *Brandli*, this Court cited and discussed *Marriage of Glass*, 67 Wn. App. 378, 835 P.2d 1054 (1992), where an upward deviation was affirmed. But *Glass* is distinguishable from this case. The father filed a petition to modify support based on a reduction in his income. *Id.* at 383. The court deviated upward because the father's net monthly earnings represented only a portion of his financial resources, his income reduction was temporary, and the mother was “struggling to make ends meet” in her household. *Id.* at 385-88. Unlike here, none of the reasons for deviation had anything to do with the income or resources of the father's new spouse. In addition, the trial court here did not find that the mother was having any difficulty meeting expenses in her household.

did here.¹¹ See CP 53-54, 110-11. The trial court abused its discretion in considering Dr. Sides' income and resources to grant an upward deviation to Shelly.¹²

The trial court did not find here that Brianna was lacking anything or that the mother could not meet the expenses for Brianna in her household. This Court observed in a case subsequent to *Brandli* that “[c]hild support is not intended to equalize the standard of living of the parents’ households. That is the function of maintenance.” *Daubert*, 124 Wn. App. at 498 n.2. This Court should reiterate that principle here and hold that, under RCW 26.19.071(1)(a)(i), a trial court may not consider a new spouse’s income or resources to deviate upward.

¹¹ Even assuming Shelly had requested an upward deviation, that would not have provided a basis to consider Dr. Sides’ income because Shelly was not “the parent who is married to the new spouse.” RCW 26.19.075(1)(a)(i).

¹² In granting the upward deviation, the trial court apparently relied on dicta in *Brandli* suggesting that a trial court may properly consider the “benefit” to a parent from a new spouse’s wealth in deciding whether to deviate, even if the parent lacks a personal ownership stake in that wealth. RP 45-53; see *Brandli*, 98 Wn. App. at 527. But requiring a parent to pay more based on the “benefit” to him or her from a new spouse’s wealth in effect requires the new spouse to bear the support burden. This is not only contrary to the statute itself, RCW 26.19.075(1)(a)(i), but contravenes the underlying legislative intent by “creating economic disincentives for remarriage.” *Harmon*, 134 Wn.2d at 540, quoting Wash. State Child Support Sched. Comm’n, *Final Report* at 8.

E. Any Remand Should Be to the Superior Court Judge Currently Assigned to This Case.

The parties' case in superior court is no longer assigned to Judge Fleck. After Judge Fleck entered her orders on revision, Dean's petition to modify the parenting plan remained pending. Although that matter was assigned to Judge Fleck, she had made no rulings. CP 858. Dean filed a motion for change of judge based on an affidavit of prejudice, which Judge Fleck granted over Shelly's objection. CP 858-60, 861-65, 935. The docket indicates that the entire case was then was reassigned to Judge Andrea Darvas. Shelly did not appeal from the change of judge. The child-support matter should be remanded to Judge Darvas or such other judge is assigned to the case at the time of remand, and not to Judge Fleck.

V. CONCLUSION

The trial court abused its discretion in that its rulings were based on an erroneous view of the law and not based on substantial evidence. This Court should vacate the trial court's orders on revision, including the award of attorney's fees and back support, and remand to the current assigned judge with directions to reinstate the commissioner's rulings except with respect to special expenses, which must be evaluated for necessity and reasonableness and then allocated in proportion to the

parties' relative incomes. Each side should bear its own fees and costs on appeal.

Respectfully submitted this 13th day of February, 2013.

CARNEY BADLEY SPELLMAN, P.S.

By 

Jason W. Anderson, WSBA No. 30512
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020
Attorneys for Appellant

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB 13 PM 4:52

APPENDIX

A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

FILED
KING COUNTY WASHINGTON

SEP 18 2012

SUPERIOR COURT CLERK
BAMONA HARKINS
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SHELLY P. ALDRIDGE,
Plaintiff/Petitioner,

and

R. DEAN ALDRIDGE,
Defendant/Respondent.

No. 05-3-08675-4 KNT

MEMORANDUM OF DECISION

This matter came on before the undersigned upon the motion of petitioner for revision of Commissioner's order entered July 20, 2012. Petitioner appeared through her attorney, Boyd Buckingham; respondent appeared through his attorney Frances Turean.

① These parents were divorced approximately six years ago. ② They are the parents of Brianna, now 13 years old. ③ The father was a relatively high income earner and was required to pay both child support of \$712.39 per month and spousal maintenance of

MEMORANDUM OF DECISION - 1

1 \$787.61. ⁴ At the time of the dissolution, income of \$7,500 was imputed to the father. ⁵ The
2 mother was earning \$2,101 per month net at that time.

3 ⁶ The father remarried to Dr. Brenda Sides who is independently wealthy. ⁷ They have two
4 children. ⁸ Rather than continuing in his field of experience and expertise, the insurance
5 business, the father has begun more than one business since the parties' separation and/or
6 with his new wife. ⁹ He states currently he is not taking a salary and is assisting his wife in
7 building a new business in the past few months. ¹⁰ Previously, he worked with her on a
8 Shaklee business he or they started. ¹¹ He has had the luxury of doing so, because he does
9 not have to worry about earning an income, given his wife's assets and perhaps her earning
10 capacity.
11

12 ¹² The mother brought this petition to modify child support on the basis of the
13 following changes in circumstances:

- 14 1) Incomes have changed (\$2,500 before for her; \$7500 imputed to father initially)
- 15 2) Brianna is now 13; the child support schedule increases at age 12
- 16 3) The economic table changed in 2008

17 ¹³ The mother also seeks an upward deviation.

18 ¹⁴ The father's response asserted there was no basis in fact for a modification, and
19 requested dismissal of the mother's petition. ¹⁵ In the alternative, it requested that the petition
20 be modified to a motion for adjustment basing child support on the father's child support
21 worksheets, which were not filed in connection with the response. ¹⁶ In his trial brief for the trial
22 by affidavit, the father requested through his attorney and agent a downward deviation based
23 on the number of overnights he asserted the child was with him.

1 ⁽¹⁷⁾ The father thereafter filed a petition to modify the parenting plan to reflect an additional
2 24 overnights, and to adjust child support accordingly. ⁽¹⁸⁾ That matter has a trial date in March,
3 2013.

4 ⁽¹⁹⁾ Each parent questions actions of the other. ⁽²⁰⁾ The father mentions that the mother
5 initiated this action shortly after the time her spousal maintenance ended and the mother
6 mentions that the father recently placed his interest in the business or businesses in his
7 wife's name.
8

9 Child support is modifiable based upon a substantial change in circumstances. RCW
10 26.09.170 ⁽²¹⁾ In this case, the substantial changes in circumstances include that there has
11 been no prior modification or adjustment, despite the father's substantially improved lifestyle,
12 the parties incomes have changed, Brianna has moved to the new age category with the
13 higher level of support, and the economic table itself changed in 2008.

14 In establishing child support, the legislature has set out its intent in RCW 26.19.001:

15 The legislature intends, in establishing a child support schedule, to insure
16 that child support orders are adequate to meet a child's basic needs and to
17 provide additional child support commensurate with the *parents' income,*
18 *resources, and standard of living.* The legislature also intends that the child
19 support obligation should be *equitably* apportioned between the parents.

20 ⁽²²⁾ The mother is now earning \$3,750 gross and \$3,231 net per month.

21 ⁽²³⁾ Determining the income of the father is more difficult. ⁽²⁴⁾ He states he works 35 hours/week in
22 one document and 40 hours/week in another document. However, I have several concerns:

23 ⁽²⁵⁾ 1) Five years ago, income of \$7,500/month was imputed to him. Therefore, there is a
24 prior judicial determination or agreement by the parties reflected in a child support order
25 that the father has a higher earning capacity (or \$90,000) than he is currently asserting
26 and far higher than the mother's. It would be reasonable to conclude that his earnings
should have increased beyond \$90,000/year for a young man in his prime earnings
years over the past six years.

MEMORANDUM OF DECISION - 3

1 ⁽²⁶⁾
2 2) Since the initial order of child support, the father has remarried, had two more children,
3 and is living a luxurious lifestyle, while he asserts, he is not earning much money.

4 ⁽²⁷⁾
5 3) Because of his wife's wealth and apparently her earnings, the father has not had to
6 further develop his earning capacity to contribute to the support of his daughter.

7 ⁽²⁸⁾
8 4) The father is able to afford for himself a luxurious lifestyle that his daughter is able to
9 enjoy when she is with him. His current family's lifestyle may also be inferred from their
10 listed *monthly expenses* which are fairly close to his former wife's *annual net income*.

11 ⁽²⁹⁾
12 In terms of the father's calculation of his income, he utilizes the deductions allowed by
13 the income tax code to determine his income. Mr. Aldridge and Dr. Sides are entitled to take
14 advantage of the tax code for purposes of calculating their income tax obligations. That is a
15 separate issue though from what a court considers in terms of calculating their 1) actual
16 onerously earned income, 2) income from businesses or investments, and 3) what business
17 or other deductions are appropriate for purposes of determining income for child support
18 purposes.

19 ⁽³⁰⁾
20 Here the father's wife, Dr. Sides, acknowledges that she has significant separate
21 property wealth, and understandably sought to protect herself and her assets, having been
22 married before, with a prenuptial agreement. Although such protection may be available
23 should she and Mr. Aldridge separate or divorce, the prenuptial agreement does not
24 preclude a court's consideration of her wealth for purposes of establishing child support for
25 her husband's child born before her marriage to Mr. Aldridge.

26 The child support statute provides that when calculating the basic child support
obligation, the court shall use only the income of the parents of the children at issue. The
same statute, RCW 26.19.071(1), also states, however, that a court shall consider *all of the
income and resources of each parent's household* before deciding what each parent's actual

1 child support obligation is. "In other words, the court must consider the income and
2 resources of the parents, as well as their spouses, before deciding whether to deviate from
3 the basic child support obligations." Brandli v. Talley, 98 Wn.App. 521 (1999). See also
4 RCW 26.19.075(2).

5 (31) Calculating the father's earnings as Mr. Buckingham has done is reasonable and I have
6 adopted his worksheets, affording him the business deductions (for child support purposes)
7 reflected in the Memorandum of Points & Authorities submitted by Mr. Buckingham dated
8 August 16, 2012. (32) Using these figures, the basic child support obligation of the father to the
9 mother is \$1336, by granting the father a deduction for income taxes even though he did not
10 recently pay income taxes because of loss carryovers.
11

12 RCW 26.19.035 and RCW 26.19.075(2) and (3) provide that in setting child support, a
13 court must enter written findings of fact upon which the order is based as well as reasons for
14 any deviation or denial of a request for deviation.

15 (33) In this case, which is factually quite similar to Brandli v. Talley, the mother is working
16 fulltime in her field and has a relatively modest lifestyle. There is no indication that she is
17 falling into debt in her household. Whether the mother can meet her expenses or her needs
18 is not the standard in establishing child support. (34) The mother's onerously earned income,
19 together with the current level of child support, is arguably enough to meet the child's basic
20 needs. Brianna is entitled to more than that. Child support should cover the child's basic
21 needs, but the child is also entitled to additional child support commensurate with the
22 parents' income, resources, and standard of living and the obligation should be apportioned
23 in an equitable manner between the parents.
24
25
26

MEMORANDUM OF DECISION - 5

1 ³⁶ Here, the father has a wealthy lifestyle, living in a home of significant value, with
2 expensive vehicles and sporting equipment, etc. and household expenses exceeding
3 \$31,000 per month, leading to the inference of substantial resources and/or income in his
4 household. ³⁷ Specifically, the father lists \$31,348 in *monthly expenses* that are reflective of
5 significant wealth and perhaps significant income.

- 6 ³⁸
- 7 1) \$6,355 in mortgage
 - 8 2) \$3,347 in utilities (more than mother earns in a month)
 - 9 3) \$5,650 in food
 - 4) \$3,404 cars
 - 5) \$3,468 in miscellaneous expenses (including boat expenses associated with a roughly
quarter million dollar boat that may now have been sold)

10 As stated above, both the resources and the income of a spouse, regardless of a
11 prenuptial agreement, must be considered by the court when considering a deviation. ³⁹ The
12 father requested a deviation downward and the commissioner granted it based on the
13 residential schedule, even though the residential schedule has not changed or not changed
14 very much from what was originally set. ⁴⁰ Because of that request, I am able to consider the
15 income of Dr. Sides as well; this effectively almost doubles the income in the father's
16 household as a part of the consideration for deviation. RCW 26.19.075(1)(a)(i). ⁴¹ The father
17 also has a far greater earning capacity, should he choose to exercise it and continue to
18 develop it than the mother does. See, e.g., In re Crosetto, 82 Wn.App. 545 (1996); In re
19 Marriage of Glass, 67 Wn.App. 378 (1992).

20
21 Because of the disparity in earnings, the income and wealth in the father's household,
22 the modest standard of living the mother is able to afford for the child based on her earnings
23 plus the basic child support contribution from the father, and the father's greater earning
24

1 capacity that he is currently not utilizing, an upward deviation is appropriate in this case. See
2 Brandli v. Talley, supra.¹ This level of child support is retroactive to the date of filing this
3 petition.

4 (42)
5 The father is providing the funding for the extracurricular activities for Brianna. He shall
6 continue to be required to pay for those expenses as a child support deviation, in addition to
7 paying the transfer payment of \$1,336 per month.

8 The mother also requests attorneys' fees. Pursuant to RCW 26.09.140, based on the
9 needs of the mother in light of her earnings and expenses, the ability of the father to pay
10 discussed above, and the fee affidavit supplied by her attorney, the father shall pay the
11 mother the sum of \$5,000 in attorneys' fees.

12 DATED this 18 day of Sept 2012

13 
14 JUDGE DEBORAH D. FLECK

15
16
17
18
19
20
21
22
23
24 ¹ Although income is not imputed to the father at this time, this order does not preclude a future court from again
25 imputing income to the father. The father may be underemployed presently, and he may be underemployed in
26 the future because of points 1-4 on pages 3-4 herein or for other reasons.

APPENDIX

B

Effective: June 15, 2011

West's Revised Code of Washington Annotated Currentness

Title 26. Domestic Relations (Refs & Annos)

Chapter 26.19. Child Support Schedule (Refs & Annos)

→ → **26.19.071. Standards for determination of income**

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

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

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

(a) Salaries;

(b) Wages;

(c) Commissions;

(d) Deferred compensation;

(e) Overtime, except as excluded for income in subsection (4) (i) of this section;

(f) Contract-related benefits;

(g) Income from second jobs, except as excluded for income in subsection (4) (i) of this section;

(h) Dividends;

- (i) Interest;
- (j) Trust income;
- (k) Severance pay;
- (l) Annuities;
- (m) Capital gains;
- (n) Pension retirement benefits;
- (o) Workers' compensation;
- (p) Unemployment benefits;
- (q) Maintenance actually received;
- (r) Bonuses;
- (s) Social security benefits;
- (t) Disability insurance benefits; and
- (u) Income from self-employment, rent, royalties, contracts, proprietorship of a business, or joint ownership of a partnership or closely held corporation.

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

- (a) Income of a new spouse or new domestic partner or income of other adults in the household;
- (b) Child support received from other relationships;
- (c) Gifts and prizes;

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

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

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

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

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

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

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

(a) Full-time earnings at the current rate of pay;

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

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

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

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

CREDIT(S)

[2011 1st sp.s. c 36 § 14, eff. June 15, 2011; 2010 1st sp.s. c 8 § 14, eff. March 29, 2010; 2009 c 84 § 3, eff. Oct. 1, 2009; 2008 c 6 § 1038, eff. June 12, 2008; 1997 c 59 § 4; 1993 c 358 § 4; 1991 sp.s. c 28 § 5.]

Current with all 2012 Legislation and Chapters 1, 2, and 3 from the 2013 Regular Session

© 2013 Thomson Reuters.

APPENDIX

C

Effective: October 1, 2009

West's Revised Code of Washington Annotated Currentness

Title 26. Domestic Relations (Refs & Annos)

Chapter 26.19. Child Support Schedule (Refs & Annos)

→→ **26.19.075. Standards for deviation from the standard calculation**

(1) Reasons for deviation from the standard calculation include but are not limited to the following:

(a) **Sources of income and tax planning.** The court may deviate from the standard calculation after consideration of the following:

(i) Income of a new spouse or new domestic partner if the parent who is married to the new spouse or in a partnership with a new domestic partner is asking for a deviation based on any other reason. Income of a new spouse or new domestic partner is not, by itself, a sufficient reason for deviation;

(ii) Income of other adults in the household if the parent who is living with the other adult is asking for a deviation based on any other reason. Income of the other adults in the household is not, by itself, a sufficient reason for deviation;

(iii) Child support actually received from other relationships;

(iv) Gifts;

(v) Prizes;

(vi) Possession of wealth, including but not limited to savings, investments, real estate holdings and business interests, vehicles, boats, pensions, bank accounts, insurance plans, or other assets;

(vii) Extraordinary income of a child;

(viii) Tax planning considerations. A deviation for tax planning may be granted only if the child would not receive a lesser economic benefit due to the tax planning; or

(ix) Income that has been excluded under *RCW 26.19.071(4)(h) if the person earning that income asks for a de-

viation for any other reason.

(b) **Nonrecurring income.** The court may deviate from the standard calculation based on a finding that a particular source of income included in the calculation of the basic support obligation is not a recurring source of income. Depending on the circumstances, nonrecurring income may include overtime, contract-related benefits, bonuses, or income from second jobs. Deviations for nonrecurring income shall be based on a review of the nonrecurring income received in the previous two calendar years.

(c) **Debt and high expenses.** The court may deviate from the standard calculation after consideration of the following expenses:

(i) Extraordinary debt not voluntarily incurred;

(ii) A significant disparity in the living costs of the parents due to conditions beyond their control;

(iii) Special needs of disabled children;

(iv) Special medical, educational, or psychological needs of the children; or

(v) Costs incurred or anticipated to be incurred by the parents in compliance with court-ordered reunification efforts under chapter 13.34 RCW or under a voluntary placement agreement with an agency supervising the child.

(d) **Residential schedule.** The court may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment. The court may not deviate on that basis if the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child or if the child is receiving temporary assistance for needy families. When determining the amount of the deviation, the court shall consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the parent making the support transfer payment.

(e) **Children from other relationships.** The court may deviate from the standard calculation when either or both of the parents before the court have children from other relationships to whom the parent owes a duty of support.

(i) The child support schedule shall be applied to the mother, father, and children of the family before the court to determine the presumptive amount of support.

(ii) Children from other relationships shall not be counted in the number of children for purposes of determining

the basic support obligation and the standard calculation.

(iii) When considering a deviation from the standard calculation for children from other relationships, the court may consider only other children to whom the parent owes a duty of support. The court may consider court-ordered payments of child support for children from other relationships only to the extent that the support is actually paid.

(iv) When the court has determined that either or both parents have children from other relationships, deviations under this section shall be based on consideration of the total circumstances of both households. All child support obligations paid, received, and owed for all children shall be disclosed and considered.

(2) All income and resources of the parties before the court, new spouses or new domestic partners, and other adults in the households shall be disclosed and considered as provided in this section. The presumptive amount of support shall be determined according to the child support schedule. Unless specific reasons for deviation are set forth in the written findings of fact and are supported by the evidence, the court shall order each parent to pay the amount of support determined by using the standard calculation.

(3) The court shall enter findings that specify reasons for any deviation or any denial of a party's request for any deviation from the standard calculation made by the court. The court shall not consider reasons for deviation until the court determines the standard calculation for each parent.

(4) When reasons exist for deviation, the court shall exercise discretion in considering the extent to which the factors would affect the support obligation.

(5) Agreement of the parties is not by itself adequate reason for any deviations from the standard calculation.

CREDIT(S)

[2009 c 84 § 4, eff. Oct. 1, 2009; 2008 c 6 § 1039, eff. June 12, 2008; 1997 c 59 § 5; 1993 c 358 § 5; 1991 sp.s. c 28 § 6.]

Current with all 2012 Legislation and Chapters 1, 2, and 3 from the 2013 Regular Session

© 2013 Thomson Reuters.

END OF DOCUMENT

APPENDIX

D

Effective: October 1, 2009

West's Revised Code of Washington Annotated Currentness

Title 26. Domestic Relations (Refs & Annos)

Chapter 26.19. Child Support Schedule (Refs & Annos)

→→ 26.19.080. Allocation of child support obligation between parents--Court-ordered day care or special child rearing expenses

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

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

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

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

CREDIT(S)

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

APPENDIX

E

ALDRIDGE v. ALDRIDGE
ALD011.0001
INDEX TO CLERK'S PAPERS

Tab #	Sub #	Date Filed	Document	Clerk's Papers Pages
1.	1	12/23/05	Summons & Petition for Dissolution	1-6
2.	69	02/16/07	Parenting Plan (Final Order)	7-15
3.	70	02/16/07	Order for Support (Final)	16-26
4.	71	02/16/07	Decree of Dissolution	27-31
5.	74	02/16/07	Findings of Fact & Conclusions of Law	32-36
6.	82	10/31/08	Agreed Order re Clarification of Parenting Plan	37-38
7.	83	10/31/08	Parenting Plan (Final Order)	39-50
8.	84	01/30/12	Summons for Modification	51-52
9.	85	01/30/12	Petition/Motion to Modify Support	53-55
10.	87	01/30/12	Financial Declaration of Petitioner	56-61
11.	88	04/26/12	Petitioner's Sealed Financial Source Documents	437-523
	94		Response to Petition	968-970
12.	120	04/26/12	Respondent's Trial Brief	410-416
13.	121	04/26/12	Declaration of Randy Dean Aldridge re Modification of Child Support	417-423
14.	122	04/26/12	Financial Declaration Respondent	424-436
15.	122A	04/26/12	Sealed Financial Source Documents	524-790
16.	131	06/14/12	Trial Declaration of Shelly Aldridge re Support Modification	294-409
17.	132	06/14/12	Petitioner's Sealed Financial Source Documents	791-833
18.	133	06/21/12	Declaration of Randy Dean Aldridge	62-91
19.	134	06/21/12	Declaration of Brenda Sides	92-96
20.	135	06/21/12	Sealed Financial Source Documents	834-844
21.	138	07/09/12	Declaration of Randy Dean Aldridge	97-103
22.	140	07/11/12	Declaration of Shelly Aldridge	104-166
23.	141	07/17/12	Declaration of Randy Dean Aldridge	167-170
24.	142	07/17/12	Sealed Financial Source Documents	845-855
25.	143	07/19/12	Declaration of Shelly Aldridge	171-172
26.	144	07/23/12	Findings of Fact & Conclusions of Law	173-175
27.	147	07/23/12	Order on Modification Support	176-177
28.	148	07/23/12	Reply Declaration of Shelly Aldridge	178-179
29.	149	07/23/12	Child Support Worksheet	180-185
30.	149A	07/23/12	Order for Support	186-205
31.	151	07/26/12	Petitioner's Motion for Revision	206-208
32.	154	08/21/12	Respondent's Memorandum of Legal Authorities	209-217
33.	155	08/24/12	Response to Memorandum of Points and	218-239

Tab #	Sub #	Date Filed	Document	Clerk's Papers Pages
			Authorities	
34.	156	09/18/12	Findings of Fact & Conclusions of Law	240-241
35.	157	09/18/12	Order Revising Ruling	242-243
36.	158	09/18/12	Memorandum of Authorities/Decision	244-250
37.	159	09/18/12	Order for Support/Modified	251-263
38.	160	09/18/12	Order for Support/Modified	264-265
39.	163	10/11/12	Declaration of Dean Aldridge in Support of Motion for Change of Judge	856-857
40.	164	10/11/12	Respondent's Motion for Change of Judge	858-860
41.	166	10/12/12	Notice of Appeal to Court of Appeal	266-293
42.	168	10/17/12	Objection to Motion for Change of Judge	861-896
43.	170	10/18/12	Respondent's Reply to Objection to Motion for Change of Judgment	897-934
44.	173	10/24/12	Order granting Respondent's Motion for Change of Date	935
45.	196	01/09/13	Stipulation & Order to Conform the Record	936-967

NO. 69436-7-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

SHELLY P. ALDRIDGE,

Respondent,

vs.

R. DEAN ALDRIDGE,

Appellant.

DECLARATION 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 date stated below, I caused to be delivered in the manner indicated a copy of *Appellant's Opening Brief*, the *Verbatim Report of Proceedings* and *Declaration of Service* on the following parties:

Boyd F. Buckingham 321 Burnett Ave. S Suite 200 Renton, WA 98057 bbuckingham@boydbuckingham.com	<input checked="" type="checkbox"/> <u>U.S. Mail, postage prepaid</u> <input type="checkbox"/> <u>Messenger</u> <input type="checkbox"/> <u>Fax</u> <input checked="" type="checkbox"/> <u>Email</u>
---	---

Lisa DuFour Carol Bailey & Associates, PLLC 901 5 th Avenue, Ste. 2800 Seattle, WA 98164 LDuFour@integrativefamilylaw.com	<u>X U.S. Mail, postage prepaid</u> <u>Messenger</u> <u>Fax</u> <u>X Email</u>
--	---

DATED this 13th day of February, 2013.



Patti Saiden, Legal Assistant