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Division I
State of Washington

73257-9

No. 73257-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

ANDREW J. AIKEN,

Appellant,

and

TINA M. AIKEN,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE SUZANNE PARISIEN

BRIEF OF APPELLANT

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I. INTRODUCTION

This Court has held that capital contributions required to maintain a parent's source of income are "normal business expenses" that should be deducted from the parent's gross income under RCW 26.19.071(5)(h). *Marriage of Mull*, 61 Wn. App. 715, 722, 812 P.2d 125 (1991). Here, the father acquired his ownership interest in a corporation by executing promissory notes to acquire stock. To maintain the income from that ownership interest, the father must make mandatory payments towards the principal and interest on those notes. In calculating child support, the trial court erred by including the father's gross income from his ownership interest, without also deducting the associated cost to maintain that income. As a result, the father's transfer payment and his proportionate share of child support are inflated, because it fails to account for father's actual net income available to pay child support.

The trial court also erred by ordering the parties to contribute to the cost of any activity recommended by their son's school or healthcare provider without first allowing the parents to decide whether the activity is appropriate for the son. In making its order, the trial court improperly modified the parties' parenting plan by depriving the parents of joint decision-making on all education and

healthcare decisions for their children granted to them under the parenting plan.

Finally, the trial court erred in ordering the parties to share in the cost of “respite care” in each parent’s household, particularly when the parties already share the cost of childcare for the child from 7:00 a.m. to 8:00 p.m. during the work week. Respite care is intended to support the parent, not the child, and should not be included in the child support order.

II. ASSIGNMENT OF ERRORS

1. The trial court erred in concluding that the father’s contractual note payments, which are mandatory to produce income from his ownership interest in Sellen Construction, are not “normal business expenses,” but are instead “debt voluntarily incurred.” (CP 240)

2. The trial court erred in finding that the father’s “actual monthly net income” was \$21,904 and that his proportionate share of the parties’ net income was 70.34%. (CP 243, 246, 247, 251)

3. The trial court erred in ordering the parties to pay in proportion to their income the cost of “[e]ducational expenses including school field trips, tutoring, and other educational support recommended by Jackson’s school or health care providers” and

“[a]ctivities as recommended by [their son]’s health care providers including but not limited to skiing and swim lessons, pool passes, and Easter Seal Camps (4 weekend camps and one 7-day camp each year). Expenses for skiing include lessons, equipment, and ski pass.” (CP 247-48)

4. The trial court erred in finding that “respite care” is “directly related to support of the child” and concluding that respite care in each parent’s household should be “covered as a shared expense.” (CP 241, 248)

5. The trial court erred in entering its Order on Cross-Motions for Revision. (CP 240-41) (Appendix A)

6. The trial court erred in entering its Revised Order of Child Support. (CP 242-52) (Appendix B)

III. STATEMENT OF ISSUES

1. The father acquired a 2.2% ownership interest in Sellen Construction by taking out loans to acquire the stock. The interest and principal payments on these loans are mandatory and must be repaid or the father would be in breach and lose the income associated with his ownership interest. This Court has held that capital contributions and “buy-ins” required to maintain a parent’s source of income are “normal business expenses” that should be

deducted from the parent's gross income under RCW 26.19.071(5)(h). *Marriage of Mull*, 61 Wn. App. 715, 722, 812 P.2d 125 (1991). Did the trial court err in refusing to deduct the father's mandatory note payments as a "business expense" from the father's gross income?

2. The parties' parenting plan requires joint decision-making on all education and healthcare decisions. Did the trial court err in ordering the parties to pay in proportion to their incomes all activities recommended by the son's school and healthcare providers, regardless whether the parents agree to the appropriateness of the recommended activities, thus depriving them of decision-making authority granted under the parenting plan?

3. Did the trial court err in requiring in its child support order that the parties contribute to "respite care," which is support for the residential parent, not support for the child?

IV. STATEMENT OF FACTS

A. The parties divorced in 2010. Their youngest child, a son, has special needs.

Appellant Andrew Aiken and respondent Tina Aiken divorced on May 20, 2010. (CP 92) They have three children: two daughters,

now ages 15 (DOB 7/1999) and 13 (DOB 7/2001), and a son, now age 11 (DOB 1/2004), who has Down syndrome and autism. (CP 243)

Neither party disputes that their son has special needs, and requires constant supervision. (See CP 41, 1241) Although the son's ability to communicate is significantly impaired, he can make some of his needs known through technology, specifically the use of an iPad, which the son uses to select pictures and words, which then "speaks" for him. (CP 1242-43)

When the parties divorced in 2010, the mother was designated the primary residential parent for all three children, who were then ages 10, 8, and 6. (Sub. no. 25, Supp. CP 1322-26) The children reside with the father during weeks 1, 3, and 5 (if there is a fifth week) of each month from Thursday through Sunday. (Sub. no. 25, Supp. CP 1322; CP 1244) During weeks 2 and 4, the oldest daughter resides with the father on Wednesday overnight and the younger two children reside with the father on Thursday overnight. (Sub. no. 25, Supp. CP 1322; CP 1245) Thus, the father has the children 5 out of 14 overnights, including 28 out of 52 weekends each year. Under the parties' parenting plan, the parents have joint decision-making on all education and healthcare decisions for their children. (Sub. no. 25, Supp. CP 1327; CP 111)

The mother, trained as a lawyer, initially stayed home to care for the parties' children after the divorce. (CP 36) The father is the Chief Financial Officer for Sellen Construction ("Sellen"), where he has been employed since 2005. (CP 20-21, 37)

When the original child support order was entered, the father's monthly net income was \$13,063 after paying spousal maintenance of \$4,000 to the mother. (CP 61) The standard calculation for support was \$2,207, but the parties agreed that the father would pay monthly support of between \$3,000 and \$3,500 for the parties' three children.¹ (CP 47-48, 62) To offset the upward deviation, the parties agreed to equally share the cost of the children's extraordinary expenses, which otherwise would have been divided 77% to the father and 23% to the mother based on their proportionate shares of the combined income. (CP 49-50)

B. After the parties divorced, the mother returned to work as a lawyer. By then, the son was in school. The parties shared in the cost of a nanny, who cared for the son before school and after school until 8 p.m.

The mother gradually returned to work as a lawyer after the parties divorced. (CP 36) She started working part-time in October

¹ The transfer payment was based on the amount of maintenance then being paid to the mother.

2011, and by 2014, she was employed full-time. (CP 36) The mother's gross income in 2014 was \$142,820. (CP 39)

Upon the mother's return to full-time employment, the parties employed a nanny to provide care for the parties' son between 7:00 a.m. and 9:00 a.m. before he goes to school. (CP 1244) The nanny also cares for the son after school until 8:00 p.m. (CP 1244) The father also uses the nanny when the children reside with him, but only one day during those weeks he has the children from Thursday through Sunday, two to three times a month. (CP 1245) Under the 2010 child support order, the parties split the cost of the nanny equally. (CP 49-50, 1244)

C. By 2014, the father had acquired a 2.2% ownership interest in the company where he was employed, which he paid for by executing notes that require regular mandatory payments of interest and principal.

The father continued to work at Sellen after the parties divorced. In 2014, his base salary was \$191,580 and his bonus was \$40,737. (CP 1247) By 2014, the father owned a 2.2% ownership interest in Sellen, which he acquired through various purchases of stock. (CP 1219, 1247) The father executed promissory notes to acquire his stock. (CP 841-75, 1247) The father must make mandatory interest and principal payments on these notes, which he

pays from his personal checking account. (CP 1247) Under the terms of the notes, if the father fails to make these payments, he will be sued for breach, fired, and the corporation will redeem the shares. (CP 1248) Thus, although the father receives income from his ownership interest, the associated cost of maintaining that income is the mandatory interest and principal payments. (CP 1247) If the father fails to make these payments, he will lose his stock and the associated income from his ownership interest. (CP 1248)

The father received cash distributions from his ownership interest of \$107,621 in 2012, \$74,209 in 2013, and \$125,324 in 2014. (CP 85) During those same years, the father was also required to pay \$84,104, \$83,643, and \$111,671 towards principal and interest on the notes. (CP 85) Thus, his net cash from those distributions for those years was \$23,517 in 2012, negative (\$9,434) in 2013, and \$13,563 in 2014. (CP 1248)

D. The mother sought to modify child support in October 2014.

On October 9, 2014, the mother sought to modify child support. (CP 1-5) The mother asked the trial court to modify the child support order to, among other things, establish post-secondary support for the older daughters, who were then ages 13 and 15;

require the parties to pay the children's extraordinary expenses in proportion to their incomes; establish a new transfer payment based on the parties' current incomes; and order the parties to pay "respite care" of 35 hours per month (8 hours per week) for her household, based on her claim that caring for the son makes it difficult for her to care for the older daughters or take care of personal business. (CP 1-4, 41)

E. The trial court refused to deduct the father's mandatory note payments as a business expense, ordered the parties to pay for respite care for each household, and required the parties to pay for any activities recommended by the son's school and healthcare providers.

The parties appeared before King County Superior Court Judge Suzanne Parisien (the "trial court") on cross-motions for revision of the commissioner's ruling modifying child support.² The trial court found the father's gross monthly salary and bonus was \$19,359, and the father's gross monthly cash distribution from his ownership interest in Sellen was \$10,443. (Sub. no. 85, Supp. CP 1333; CP 243) The trial court found that the father's total gross monthly income was \$29,803, and his monthly net income was \$21,903. (Sub. no. 85, Supp. CP 1333; CP 243) Despite including the

² The court commissioner's ruling can be found at CP 135-51.

the father's income from his ownership interest, the trial court refused to deduct the mandatory note payments that the father was required to pay to maintain that income, concluding that these were not a "business expense at all, it's what we call debt voluntarily incurred." (*See* CP 218, 240; RP 54)

The trial court ordered the father to pay monthly child support of \$2,366, based on the standard calculation. (CP 244) The trial court also ordered the parties to now pay the children's extraordinary expense in proportion to their income – 70% by the father and 30% by the mother. (CP 247) Payment of the children's extraordinary expenses and work-related childcare is not insignificant since based on the mother's own estimate, the monthly cost of their son's daycare is over \$3,300, and the monthly cost of the children's activities is over \$1,260 – an annual cost of nearly \$55,000. (*See* CP 69-71)

The trial court ruled that if there was a disagreement with respect to the extracurricular activities for the parties' daughters, the parties were to resolve the dispute through arbitration. (*See* RP 55; CP 248) However, for the parties' son, the trial court ordered the parties to pay for any activities recommended by the son's school or healthcare providers, regardless whether the parties agreed to the recommendations. (*See* CP 247-48) The trial court made this

decision despite the fact that there was no evidence that there was any major conflict between the parents regarding the son's activities, ignoring the evidence that the parties agreed "well over 90% of the time." (CP 1259)

Finally, the trial court ordered that the parties share in the cost of respite care in each of their households. The trial court found that the mother was entitled to 14 hours of respite care and the father was entitled to 6 hours of respite care each month, at a cost of up to \$25 per hour. (CP 248) In doing so, the trial court revised the court commissioner's earlier ruling denying respite care that had acknowledged that it was an expense of the parent who is caring for the child to allow "some time off on the [parent's] own," not an expense of the child. (See CP 219) The trial court instead found that respite care was "directly related to childcare." (RP 56)

The father appeals. (CP 237)

V. ARGUMENT

A. Amounts paid to maintain a source of income are “business expenses” that should be deducted from the father’s gross income.

1. The father’s mandatory note payments are business expenses as they must be paid to maintain his business income.

A parent’s “net income” is determined by deducting, among other things, “normal business expenses” from the parent’s gross income. RCW 26.19.071(5)(h). “[W]hen a parent is required to make capital contributions in order to maintain his or her source of income and when such contributions are not made to evade greater support obligations, those contributions qualify as ‘normal business expenses’” that should be deducted from the parent’s gross income under RCW 26.19.071(5)(h). *Marriage of Mull*, 61 Wn. App. 715, 722, 812 P.2d 125 (1991). The trial court here erred in failing to deduct the father’s mandatory note payments, which he must pay to maintain his income from his ownership interest in Sellen.

In *Mull*, this Court held that the father’s capital contributions to his law firm and building partnership, including his “buy-in,” were “normal business expenses” that should be deducted from the

father's gross income under RCW 26.19.071(5)(h).³ This Court held that if the contributions are required to maintain the source of income, they qualify as a normal business expense that should be deducted. *Mull*, 61 Wn. App. at 722.⁴

Like the capital contributions in *Mull*, the contractual note payments here were in effect the father's "buy-in" to Sellen, and are required to maintain the business income from his ownership interest. (CP 1247) If the father fails to make these mandatory interest and principal payments, he will almost immediately lose this source of income. (CP 1247-48) But for incurring the expense, the

³ Below, the mother described the *Mull* father's capital contributions as "capital calls," in an attempt to distinguish the father's contractual loan payments here. (See CP 122-23) But nothing in *Mull* supports the argument that the father's contributions in that case were anything other than his contributions to the firm's building partnership, his "buy-in," and his contributions to the law firm. 61 Wn. App. at 721.

⁴ The reasoning in *Mull* is consistent with out-of-state authority. See also, e.g., *Mayo v. Crazovich*, 621 So. 2d 120, 123 (La. Ct. App. 1993) (father's business loans were "ordinary and necessary business expenses" to be deducted from his gross income, because "if there were no business loans . . . [the father] would have no poultry business"); *Woods v. Woods*, 95 Ohio App. 3d 222, 642 N.E.2d 45, 47-48 (1994) (court erred in failing to deduct the father's payments on a loan used to acquire a truck for his business); *Dalin v. Dalin*, 545 N.W.2d 785, 788-89 (N.D. 1996) ("expenses for the cost of producing income are deducted from the business' gross income"); *In re Woolsey*, 164 N.H. 301, 55 A.3d 977, 982 (2012) ("business expenses must be 'actually incurred and paid' . . . and 'reasonable and necessary' for producing income" to be deducted from the parent's gross income) (quoting *Dobbins v. Dobbins*, 59 A.D.2d 548, 397 N.Y.S.2d 412, 414 (App. Div.(1977)); *Whelan v. Whelan*, 74 Mass. App. Ct. 616, 908 N.E.2d 858, 866 (2009)).

father would not earn the associated income. (*See* CP 107, 1247-48)

The trial court erred in refusing to deduct these business expenses from the father's gross income.

2. **The fact that the father owns stock by virtue of his mandatory note payments “does not alter the reality” that the payments are necessary for him to continue to receive income from the stock.**

In concluding that the father's capital contributions were business expenses in *Mull*, this Court rejected an argument by the mother, similar to the one adopted by the trial court, that the father's contributions to the firm were “investments” that increased the father's “equity” in the partnership, and not normal business expenses. 61 Wn. App. at 721 (*compare to* CP 121, 218, describing the father's ownership in Sellen as a “nest egg” and the contributions as “debt voluntarily incurred” to acquire that interest). This Court acknowledged that regardless of the “likelihood that [the father] may derive a future gain from the contributions [it] does not alter [the] reality” that the contributions were required of the father to earn the income from the partnership. *Mull*, 61 Wn. App. at 721.

Likewise here, that the father may derive a “future gain” from contractual, mandatory note payments does not “alter [the] reality” that to maintain the present income, the father must continue to

make the note payments. *See Mull*, 61 Wn. App. at 721. The value of the stock in the future is speculative at best. In fact, the stock has decreased in value since 2012. (*See CP 868, 873*) There is no way of knowing what the value of the stock will be in the future; its value to the father is the income that he receives now. (CP 109) And to continue to receive that income, the father must make mandatory note payments, which the trial court should have deducted as business expenses.

3. Even if the father “voluntarily” acquired his ownership interest in Sellen, once he made the acquisition, the note payments became “mandatory.”

The trial court was apparently persuaded by the mother’s argument that the father was not required to “buy in” to Sellen Construction as a condition of his employment, viewing it as a “debt voluntarily incurred.” (CP 240; *see CP 119*) But the fact that the father may have voluntarily chosen to acquire an ownership interest in Sellen, which provides him with additional income, does not change the fact that once acquired, the payments to maintain the income from that interest were mandatory.

In *Mull*, for instance, the father was an associate at Perkins Coie when the parties divorced. 61 Wn. App. at 717. There was no

evidence that the husband was later required to become a partner in Perkins Coie, thus triggering the *required* capital contributions. *Mull*, 61 Wn. App. at 717, 721. Instead, the father was presumably offered the opportunity to become a partner, which he accepted, thus triggering the requirement that he “buy in” and make capital contributions.

This issue of “voluntary versus mandatory” was addressed in another issue raised in *Mull*. The trial court in *Mull* deducted the father’s “mandatory pension plan payments” from the father’s gross income under RCW 26.19.071(5)(c). *Mull*, 61 Wn. App. at 719 n.3 (citing Washington State Child Support Schedule Comm’n, *Washington State Child Support Schedule Std 4*, at 3 (July 1989)). The mother complained that the pension payments should not be deducted because the father voluntarily elected to participate in the firm’s pension plan. (CP 37-38) But this Court recognized that once the father “chose to participate in the pension plan, payments made into it became mandatory.” *Mull*, 61 Wn. App. at 717-18. This Court held that “absent evidence of a parent’s bad faith in electing to participate in a second pension plan that upon election becomes mandatory, and where the needs of the children are adequately met by the modified decree, it is within the trial court’s discretion to

deduct the payments [] from gross income.” *Mull*, 61 Wn. App. at 721.

Here, the mother never alleged that the father’s decision to acquire an ownership interest in Sellen was made in bad faith. And there is no evidence that if the deduction were allowed, the children’s needs could not be adequately met by the modified decree.

4. The father’s obligation to pay child support must be based on the actual income available to him.

As a practical matter, the father simply does not have all the income from his ownership interest in Sellen available to pay his child support obligation. Any income received must be used to first pay the contractual payments on the notes. (CP 844, 849, 857, 862, 867, 872) In 2013, for instance, the father’s note payments resulted in negative cash flow for the father. (CP 1248) The cash distribution from Sellen was \$74,209, but his note payment for that year was \$83,643, leaving him with a loss of \$9,434. (CP 85, 1248)

As this Court acknowledged in *Marriage of Peters*, 33 Wn. App. 48, 651 P.2d 262 (1982), a parent’s “net take-home pay” is a relevant consideration in establishing child support. There, this Court reversed the trial court’s order requiring the father to pay \$1,200 in child support when his “net take-home pay” was only

\$1,906 after a deduction for “business loans.” *Peters*, 33 Wn. App. at 53. Although it is unclear whether the “business expenses” deducted by the trial court from the father’s gross income included these business loans, it is clear that this Court considered those loans a relevant consideration in determining the father’s net income available for child support.

Likewise here, logic should prevail. For instance in 2014, the father was contractually obligated to pay \$111,671 in order to have the right to receive \$125,324. (CP 85, 1248) But for incurring this cost, he would not have received the associated income. The actual net cash flow of \$13,653 should be the amount included in his net income in 2014 for purposes of child support, not \$125,324.

The trial court erred in failing to deduct the father’s mandatory contractual note payments from his gross income as a business expense. The note payments are necessary to maintain his income, and impact the cash flow he has available to provide support.

B. The child support order depriving the parents of deciding which activities recommended by the son’s school and healthcare providers to enroll their son conflicts with the joint decision-making provision in the parties’ parenting plan.

The trial court erred in ordering the parties to pay their proportionate share of “educational expenses . . . recommended by

[the] school” and other “[a]ctivities as recommended by [the son]’s health care providers.” (CP 247-48) These expenses are associated with the son’s education and healthcare, and are subject to the joint decision-making provision of the parties’ parenting plan. (Sub. no. 25, Supp. CP 1327)

The joint decision-making provision of the parenting plan controls over any inconsistent provision in the child support order that would deprive the parents from making decisions for their son. (CP 111; Sub. no. 25, Supp. CP 1327) *See e.g. Marriage of Mansour*, 126 Wn. App. 1, 11, ¶ 25, 106 P.3d 768 (2004) (vacating provision in child support order that allowed the father to veto mother’s decision if he is required to contribute to the cost when the mother was granted sole decision-making in parenting plan). The child support order also in effect modifies the parties’ parenting plan by eliminating the parents’ joint decision-making without a pending parenting plan modification action. *Custody of Halls*, 126 Wn. App. 599, 606, 607, ¶¶ 17, 23, 109 P.3d 15 (2005) (trial court has no authority to modify parenting plan absent a pending petition for modification, an adequate cause hearing, and adequate consideration of the statutory criteria).

In addition, while the order provides examples of recommended activities, such as skiing, swim lessons, and Easter Seal Camps, it places no limit on what other activities (and associated cost) a school or healthcare provider might “recommend,” requiring the parents to consent and financially contribute to the activity. (CP 247-48) But before the trial court can obligate a parent to pay for extraordinary expenses, it must determine the necessity for and the reasonableness of those additional amounts. RCW 26.19.080(4); *Marriage of Daubert & Johnson*, 124 Wn. App. 483, 494-95, ¶ 22, 99 P.3d 401 (2004), *as amended on reconsideration* (Dec. 16, 2004), *abrogated on other grounds by McCausland v. McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007).

“In addition to necessity for and reasonableness of the amounts, the trial court must consider whether the additional amount to be paid is ‘commensurate with the parents’ income, resources and standard of living,’ in light of the totality of the financial circumstances.” *Daubert & Johnson*, 124 Wn. App. at 494-95, ¶ 22 (quoting RCW 26.19.001). By allowing the son’s school and healthcare providers to unilaterally decide what activities the son should participate in (and requiring the parents to pay the cost), the trial court is not only improperly abrogating the parents’ authority to

make those decisions under the parenting plan, but its own authority under RCW 26.19.080.

Requiring the parties to pay certain expenses for the son without allowing them to first make the decision that the son should engage in the recommended activities is particularly inappropriate when there is no evidence that the parties were unable to reach a consensus in the child's best interests in the past. In fact, the father has paid his share of every activity for the son that the mother proposed in the past few years. (CP 1255)

The trial court erred in requiring the parties to contribute to the cost of any activity recommended by the son's school and healthcare provider, as it improperly deprives the parents of their decision-making authority under the parenting plan, and usurps the court's authority under RCW 26.19.080.

C. "Respite care" is support for the residential parent, and not support of the child.

The trial court erred in requiring that the parties share in the cost of "respite care" during the child's residential time in each of their homes as part of its child support order. Child support is not intended to support a parent. It is intended to "meet a child's basic needs and to provide additional child support commensurate with

the parents' incomes, resources, and standard of living." RCW 26.19.001.

Before the trial court can order parents to share in the cost of extraordinary expenses, it must first find that such expenses are reasonable and necessary. RCW 26.19.080(4); *Marriage of Mattson*, 95 Wn. App. 592, 599, 976 P.2d 157 (1999) (holding that summer camps were a reasonable and necessary expense as it provides supervision for the children while the mother works). Here, respite care (*i.e.* non-work related daycare) is neither reasonable nor necessary. The son, who is usually in bed by 8:30 p.m., is already cared for on a daily basis during the week from 7:00 a.m. to 8:00 p.m., by the school and his nanny. (CP 113, 1244) Thus, during the week, the son is effectively supervised by other adults during almost all of his waking hours.

In addition, the son resides with the father during the majority of the weekends. (CP 1244-45) It is neither reasonable nor necessary for the father to have to subsidize the cost of additional childcare for the son during the minority weekends which he resides with the mother or after 8:00 p.m. during the week. To the extent either party wishes to hire a babysitter during his or her residential time when not working, it should be a cost borne by that parent and not the

parents jointly. Whether a parent wants more “freedom” or “time off” during her residential time is a parenting choice in her household that should not be borne by the other parent.

The father does not dispute that their son and his special needs require the parents to provide more constant and close supervision than would be required of another child his age. (CP 1243) However, in light of the amount of time that the son is already being cared for by the school, his nanny, and in the father’s home, the father should not be required to contribute to the cost of additional child care in the mother’s home.

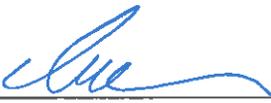
VI. CONCLUSION

This Court should reverse and remand with directions to the trial court to deduct the father’s mandatory note payments as “normal business expenses” from his gross income to determine his net income for purposes of calculating child support, to vacate the provisions of the child support order requiring the parties to share in the cost of activities recommended by the son’s school or healthcare providers, unless the parties agree on the activities, and to vacate the provision requiring the parties to share in the cost of respite care.

Dated this 26th day of June, 2015.

SMITH GOODFRIEND, P.S.

STRATA LAW GROUP, PLLC

By: 

Valerie A. Villacin
WSBA No. 34515
Catherine W. Smith
WSBA No. 9542

By: 

Shannon M. Ellmers
WSBA No. 38245

Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 26, 2015, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Shannon M. Ellmers Strata Law Group, PLLC 520 Pike Street, Suite 1205 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Carl T. Edwards Law Offices of Carl T. Edwards, P.S. 216 First Avenue South, Suite 315 Seattle, WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Shelby R. Frost Lemmel Masters Law Group PLLC 241 Madison Ave N. Bainbridge, WA 98110-1811	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 26th day of June, 2015.

V. Vigoren

Victoria K. Vigoren

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HON. SUZANNE PARI SIEN

SUPERIOR COURT OF WASHINGTON COUNTY OF KING

In re the Marriage of:
ANDREW J. AIKEN,
and
TINA M. AIKEN,
Petitioner,
Respondent.

NO. 09-3-03024-7SEA
ORDER ON CROSS-MOTIONS FOR
REVISION

THIS MATTER comes before the court on cross-motions for revision filed by each party, with both parties seeking revision of the Order of Child Support entered by the commissioner on 2/13/15. The court has considered the pleadings before the commissioner at the hearing on 2/13/15 along with both parties' motions. To the extent that either party has submitted additional responses, objections, etc., for the revision hearing, the court finds that neither party has introduced new facts or issues, and the court has limited the basis for its ruling on revision to the materials that were before the commissioner on 2/13/15.

Each party has raised two issues for consideration on revision, and the court rules as follows on each of the four issues:

1. Father's issue #1: Characterization of loan payments as normal business expenses or debt voluntarily incurred. The father's motion for revision on this issue is denied, and the Commissioner's ruling that the father's loan payments are debt voluntarily incurred is affirmed. The court finds that the loans should not be characterized as normal business expenses under RCW 26.19.071(5)(h).
2. Father's issue #2: Use of 2014 tax and income data. The parties agreed that actual income and taxes for 2014 should be used for both parties on the worksheets. The father's income and taxes on the worksheets attached to the Revised Order of Child Support signed on this date are based on the 2014 income and tax figures provided by his expert, Mr. Ben Hawcs.

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3. Mother's issue #1: Description of children's activities in ¶ 3.15 of the Order of Child Support. The commissioner's ruling is affirmed in part and revised in part. The commissioner's description of Ava and Allison's activities is affirmed and is not revised. The description of Jack's activities is revised as stated in ¶ 3.15 of the Revised Order of Child Support signed on this date. *Alison - SE*

Because extracurricular activities must be agreed as a condition for sharing expenses, and because extracurricular activities are not subject to joint decision making under the parties' Parenting Plan, disputes regarding the activities that are covered as "agreed extracurricular activities" shall be submitted to binding arbitration with an agreed arbitrator. If the parties cannot agree on an arbitrator, the dispute shall be submitted for arbitration with Cheryl Russell or Caroline Davis.

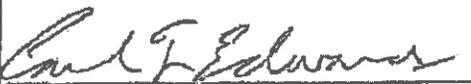
4. Mother's issue #2: Whether respite care for the parent should be covered as a shared expense under ¶ 3.15 of the Order of Child Support. The court finds that respite care for the parents is directly related to support of the child in light of the child's significant impairments. Respite care is ordered for both parents as provided in ¶ 3.15 of the Revised Order of Child Support signed on this date.

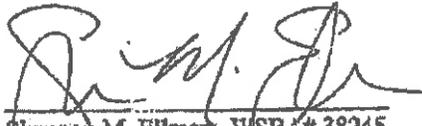
The Revised Order of Child Support signed on this date and the worksheets attached to that order are incorporated by reference as part of this Order on Cross-Motions for Revision.

Dated: 3/13/15 
Judge Suzanne Paristen

Presented by:

Approved for entry:
Notice of presentation waived:


Carl T. Edwards, WSBA# 23316
Attorney for Respondent


Shannon M. Eimers, WSBA# 38245
Attorney for Petitioner

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HON. SUZANNE PARI SIEN

SUPERIOR COURT OF WASHINGTON COUNTY OF KING

In re the Marriage of:

ANDREW AIKEN,

Petitioner,

and

TINA AIKEN,

Respondent.

No. 09-3-03024-7SEA

Revised Order of Child Support

Final Order (ORS)

Clerk's Action Required

I. Judgment Summary

1.1 Judgment Summary for Non-Medical Expenses

Does not apply.

1.2 Judgment Summary for Medical Support

Does not apply.

II. Basis

2.1 Type of Proceeding

This order is entered under a Petition for Modification of Child Support and following a trial by affidavit on 2/13/15 and a hearing on cross-motions for revision on 3/06/15.

2.2 Child Support Worksheet

The child support worksheet which has been approved by the court is attached to this order and is incorporated by reference or has been initialed and filed separately and is incorporated by reference.

2.3 Other

None.

Revised Order of Child Support (TMORS, ORS)
WPF DR 01.0500 Mandatory (06/2014)
RCW 26.09.175; 26.26.132 - Page 1

LAW OFFICES OF CARL T. EDWARDS, P.S.
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(206) 467-6400

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III. Findings and Order

It Is Ordered:

3.1 Children for Whom Support is Required

<u>Name</u>	<u>Age</u>
Alison M. Aiken	15 (7/1999)
Ava M. Aiken	13 (7/2001)
Jackson A. Aiken	11 (1/2004)

3.2 Person Paying Support (Obligor)

Name: Andrew Aiken
Birth date: 10/18/1969
Service Address: 1526 Palm Avenue SW, Seattle, WA 98166

The obligor parent must immediately file with the court and the Washington State Child Support Registry, and update as necessary, the Confidential Information Form required by RCW 26.23.050.

The obligor parent shall update the information required by paragraph 3.2 promptly after any change in the information. The duty to update the information continues as long as any monthly support remains due or any unpaid support debt remains due under this order.

For purposes of this Order of Child Support, the support obligation is based upon the following income:

A. Actual Monthly Net Income: \$ 21,904/mo.

3.3 Person Receiving Support (Obligee)

Name: Tina Aiken
Birth date: 12/19/1967
Service Address: 2559 Crostmont Place West, Seattle, WA 98199

The obligee must immediately file with the court and the Washington State Child Support Registry and update as necessary the Confidential Information Form required by RCW 26.23.050.

The obligee shall update the information required by paragraph 3.2 promptly after any change in the information. The duty to update the information continues as long as any monthly support remains due or any unpaid support debt remains due under this order.

1 For purposes of this Order of Child Support, the support obligation is based upon the
2 following income:

3 A. Actual monthly Net Income: \$ 9,237/mo.

4 The obligor may be able to seek reimbursement for day care or special child rearing
5 expenses not actually incurred. RCW 26.19.080.

6 **3.4 Service of Process**

7 *Service of process on the obligor at the address required by paragraph 3.2 or any*
8 *updated address, or on the obligee at the address required by paragraph 3.3 or any*
9 *updated address, may be allowed or accepted as adequate in any proceeding to*
establish, enforce or modify a child support order between the parties by delivery of
written notice to the obligor or obligee at the last address provided.

10 **3.5 Transfer Payment**

11 The obligor parent shall pay the following amounts per month for the following children:

<u>Name</u>	<u>Amount</u>
13 Alison M. Aiken	\$843
Ava M. Aiken	\$843
14 <u>Jackson A. Aiken</u>	<u>\$680</u>
15 Total Monthly Transfer Amount	\$2,366

16 *The obligor parent's privileges to obtain or maintain a license, certificate, registration,*
17 *permit, approval, or other similar document issued by a licensing entity evidencing*
18 *admission to or granting authority to engage in a profession, occupation, business,*
19 *industry, recreational pursuit, or the operation of a motor vehicle may be denied or*
may be suspended if the obligor parent is not in compliance with this support order as
provided in Chapter 74.20A Revised Code of Washington.

20 **3.6 Standard Calculation**

21 \$ 2,366 per month. (See Worksheet line 17.)

22 **3.7 Reasons for Deviation From Standard Calculation**

23 The child support amount ordered in paragraph 3.5 does not deviate from the standard
24 calculation.

1 **3.8 Reasons why Request for Deviation Was Denied**

2 A deviation was not requested.

3 **3.9 Starting Date and Day to Be Paid**

4 Starting Date: 3/01/15
5 Day of the month support is due: ½ on the 1st day of the month;
6 ½ on the 15th day of the month

7 **3.10 Incremental Payments**

8 Does not apply.

9 **3.11 Making Support Payments**

10 Select Enforcement and Collection, Payment Services Only, or Direct Payment:

11 Direct Payment: Support payments shall be made directly to:

12 Name: Tina Aiken
13 Mailing address: via direct deposit to an account she designates

14 A party required to make payments to the Washington State Support Registry will not
15 receive credit for a payment made to any other party or entity. The obligor parent shall
16 keep the registry informed whether he or she has access to health insurance coverage at
reasonable cost and, if so, to provide the health insurance policy information.

17 Any time the Division of Child Support is providing support enforcement services under
18 RCW 26.23.045, or if a party is applying for support enforcement services by signing the
19 application form on the bottom of the support order, the receiving parent might be
20 required to submit an accounting of how the support, including any cash medical support,
is being spent to benefit the children.

21 **3.12 Wage Withholding Action**

22 Wage withholding, by notice of payroll deduction or other income withholding action
23 under Chapter 26.18 RCW or Chapter 74.20A RCW, without further notice to the
24 obligor, is delayed until a payment is past due, because the parties have reached a written
25 agreement that the court approves that provides for an alternate arrangement.

1 **3.13 Termination of Support**

2 Support shall be paid:

3 Until Alison and Ava reach the age of 18 or as long as they remain enrolled in high
4 school, whichever occurs last, except as otherwise provided below in Paragraph 3.14.

5 Support shall be paid after the age of 18 for Jackson, if at that time he is not capable of
6 self-support, until the necessity for support ceases.

7 **3.14 Post Secondary Educational Support**

8 In the event that Alison or Ava should attend an accredited college, university, technical or
9 vocational institution after graduation from high school, responsibility for the associated costs of
such education shall be as follows:

- 10 1. The existing educational IRA funds set aside for the child(ren) shall be first used for post-
11 secondary expenses for the respective child before the parents have an obligation to pay
post-secondary expenses.
- 12 2. The child(ren) shall apply for any financial aid that is available from the school she is
13 attending, except that the children shall only be required to accept student loan up to 1/3
of the parents' combined obligation for post-secondary support.
- 14 3. The father shall pay 70.34% and the mother 29.66 %, less any of the child(ren)'s funds
15 applied and/or financial aid received by the children for the academic year, of the gross
16 cost of tuition, books, fees, room and board, expenses allowance and transportation
17 expenses, not to exceed the State's published "annual student budget for Washington
Resident – lives away from home," as amended, student at the University of Washington
regardless of the post secondary institution actually attended by the children.
- 18 4. If the child(ren) attend(s) an educational institution where the gross costs exceed those set
19 forth in ¶ 3 above, the parties' mandatory contribution shall be limited to those set for in ¶
3 above.
- 20 5. If the child(ren) attend(s) an institution wherein the gross costs are less than those set
21 forth in ¶ 3 above, the parties' mandatory contribution shall be limited to his/her
22 proportionate share of the actual costs of such institution and related costs of the
23 education's tuition, books, fees, room and board, reasonable expenses allowance and
transportation expenses, less any financial aid received by the child(ren) for the academic
year.
- 24 6. The obligation to contribute toward post-secondary support is conditioned upon the child
25 being in an accredited institution as a full-time student in good standing as it is defined by
such institution. In no event, shall the obligation for post-secondary support extend
beyond the child's 23rd birthday. Support is also conditioned upon the child(ren)'s active

1 pursuit of a course of study commensurate with the child's goals. The child(ren) shall
2 provide access to full transcripts to both parents at the end of each term. If the child(ren)
3 falls below good standing in any term, support shall continue for the next term, but shall
4 be in suspension if the child(ren)'s standing is not brought up to good standing by the end
5 of that second term. The obligation to provide support under this Order shall be
6 reinstated provided that the child(ren) is in good standing for a semester at an institution
7 contemplated by this Order. Any subsequent semester shall be paid for under this Order
8 and the terms and conditions thereof.

- 9 7. Each parent shall pay his or her respective portion directly to the school when possible, or
10 to the child when not possible (e.g. the UW budget includes a line item for an "expense
11 allowance" that would be paid directly to the child).
- 12 8. If either parent establishes, maintains or make contributions to another education savings
13 account, 529 Plan account, or similar college savings account, such parent shall receive
14 credit for post secondary education support costs paid from such account.
- 15 9. In addition, the parents shall continue to provide health insurance coverage for the
16 child(ren) as provided in ¶ 3.19 so long as they are eligible for post-secondary support.
- 17 10. Post-secondary education shall be limited to undergraduate education.

18 **3.15 Payment for Expenses not Included in the Transfer Payment**

19 The father shall pay 70.34 % and the mother 29.66 % of the following expenses incurred
20 on behalf of the children listed in Paragraph 3.1:

21 The following expenses shall be shared for Alison and Ava:

- 22 Work-related daycare;
- 23 Agreed educational expenses; and
- 24 Agreed extracurricular activity expenses.

25 The following expenses shall be shared for Jackson:

- 26 Work-related day care including care for times when a parent has to work
27 evenings or weekends to meet the responsibilities of his or her job.
- 28 Educational expenses including school field trips, tutoring, and other educational
29 support recommended by Jackson's school or health care providers
- 30 Activities as recommended by Jackson's health care providers including but not
31 limited to skiing and swim lessons, pool passes, and Easter Seal Camps (4

1 weekend camps and one 7--day camp each year). Expenses for skiing include
2 lessons, equipment, and ski pass.

3 Up to 14 hours per calendar month of respite care in the mother's household
4 during her non-working hours, and up to 6 hours per calendar month of respite
5 care in the father's household during his non-working hours, not to exceed \$25
6 per hour.

7 For all children: If the parties cannot reach agreement as to whether the expenses for any
8 given activity should be shared under this paragraph, the dispute shall be submitted to
9 binding arbitration with an agreed arbitrator. If the parties cannot agree on an arbitrator,
10 they shall use the first available of Cheryl Russell or Caroline Davis.

11 The parties shall exchange requests for reimbursement of expenses by the 5th of the
12 month following the month in which the expenses were incurred. The other party shall
13 reimburse his or her share of those expenses by check delivered to the other party by the
14 15th of the month. Failure to submit a request for reimbursement by the 5th does not
15 waive the right to request reimbursement; however, the other party shall not be required
16 to provide reimbursement until ten days after the request was submitted.

17 Payments shall be made to the provider of the service if possible, otherwise, to the parent
18 who incurred the expense.

19 **3.16 Periodic Adjustment**

20 Does not apply.

21 **3.17 Income Tax Exemptions**

22 Tax exemptions for the children shall be allocated as follows:

23 Alison to Andrew, Ava to Tina, alternate Jackson with Andrew claiming him in even
24 numbered years and Tina in odd numbered years.

25 The parents shall sign the federal income tax dependency exemption waiver.

3.18 Medical Support – Health Insurance

Each parent shall provide health insurance coverage for the children listed in paragraph
3.1, as follows:

**3.18.1 Health Insurance (either check box A(1), or check box A(2) and complete
sections B and C. Section D applies in all cases.)**

A. A. Evidence

(2) There is sufficient evidence for the court to determine which parent must provide coverage and which parent must contribute a sum certain. Fill in B and C below.

B. Findings about insurance:

The court makes the following findings:

ANDREW AIKEN (Parent's Name)	TINA AIKEN (Parent's Name)	Check at least one of the following findings for each parent.
[X]		Insurance coverage for the children is available <u>and</u> accessible to this parent at \$49/mo cost (children's portion of the premium, only).
	[X]	Insurance coverage for the children is available <u>but not</u> accessible to this parent at \$577/mo. cost (children's portion of the premium, only, based on mother's representation).

C. Parties' obligations:

The court makes the following orders:

ANDREW AIKEN (Parent's Name)	TINA AIKEN (Parent's Name)	Check at least one of the following options for each parent.
[X]		This parent shall provide health insurance coverage for the children that is available through employment or is union-related even though the cost of such coverage <u>exceeds</u> 25% of this parent's basic support obligation. It is in the best interests of the children to provide such coverage despite the cost <i>because</i> : the children have high medical expenses.
	[X]	This parent's contribution to the health insurance premium is calculated in the Worksheet and included in the transfer payment.

D. Both parties' obligation:

If the children are receiving state financed medical coverage, the Division of Child Support may enforce the responsible parent's monthly premium.

The parent(s) shall maintain health insurance coverage, if available for the children listed in paragraph 3.1, until further order of the court or until health insurance is no longer available through the parents' employer or union and no

1 conversion privileges exist to continue coverage following termination of
2 employment.

3 A parent who is required under this order to provide health insurance coverage is
4 liable for any covered health care costs for which that parent receives direct
5 payment from an insurer.

6 A parent who is required under this order to provide health insurance coverage
7 shall provide proof that such coverage is available or not available within 20 days
8 of the entry of this order to the other parent or the Washington State Support
9 Registry if the parent has been notified or ordered to make payments to the
10 Washington State Support Registry.

11 If proof that health insurance coverage is available or not available is not provided
12 within 20 days, the parent seeking enforcement or the Department of Social and
13 Health Services may seek direct enforcement of the coverage through the other
14 parent's employer or union without further notice to the other parent as provided
15 under Chapter 26.18 RCW.

16 You may have separate obligations to provide health insurance coverage for the
17 children under federal law.

18 3.13.2 Change of Circumstances and Enforcement

19 A parent required to provide health insurance coverage must notify both the Division of
20 Child Support and the other parent when coverage terminates.

21 If the parents' circumstances change, or if the court has not specified how medical
22 support shall be provided, the parents' medical support obligations will be enforced as
23 provided in RCW 26.18.170. If a parent does not provide proof of accessible coverage
24 for the children through private insurance, a parent may be required to satisfy his or her
25 medical support obligation by doing one of the following, listed in order of priority:

- 26 1) Providing or maintaining health insurance coverage through the parent's employment or
27 union at a cost not to exceed 25% of that parent's basic support obligation;
- 28 2) Contributing the parent's proportionate share of a monthly premium being paid by the
29 other parent for health insurance coverage for the children listed in paragraph 3.1 of this
30 order, not to exceed 25% of the obligated parent's basic support obligation; or
- 31 3) Contributing the parent's proportionate share of a monthly premium paid by the state if
32 the children receives state-financed medical coverage through DSHS or IJCA (Health
33 Care Authority) under RCW 74.09 for which there is an assignment.

34 A parent seeking to enforce the obligation to provide health insurance coverage may
35 apply for support enforcement services from the Division of Child Support; file a motion

1 for contempt (use form WPF DRPSCU 05.0100, Motion/Declaration for an Order to
2 Show Cause re Contempt); or file a petition.

3 **3.19 Uninsured Medical Expenses**

4 Both parents have an obligation to pay their share of uninsured medical expenses.
5 The father shall pay 70.34 % of uninsured medical expenses (unless stated
6 otherwise, the petitioner's proportional share of income from the Worksheet, line
7 6) and the mother shall pay 29.66 % of uninsured medical expenses (unless stated
8 otherwise, the respondent's proportional share of income from the Worksheet,
9 line 6).

10 Uninsured medical expenses for Jack are subject to agreement (per the parenting plan) as
11 a condition precedent to cost-sharing under 3.19. Uninsured medical expenses include
12 communication devices/iPad and applications for same, ABA therapy (duration and
13 frequency subject to agreement of the parties), and speech therapy (subject to review the
14 parties), and other expenses agreed by the parents.

15 Uninsured medical expenses for all children include uninsured dental, medical, eyecare,
16 pharmaceutical, and individual counseling/therapy expenses. If a parent wishes to pursue
17 joint counseling with any child, 50% of the cost shall be paid by that parent and the
18 remaining 50% shall be paid by the parties in proportion to income.

19 **3.20 Back Child Support**

20 No back child support is owed at this time.

21 **3.21 Past Due Unpaid Medical Support**

22 Unpaid medical support that may be owed is not affected by this order.

23 **3.22 Other Unpaid Obligations**

24 Other obligations that may be owed are not affected by this order.

25 **3.23 Other**

Life Insurance. The Petitioner shall maintain any and all policies of life insurance now
in effect and awarded to him or such policies as become available or are now available
through employment, in full force, value unimpaired for the benefit of the Respondent
and for the children of the parties for so long as the Petitioner's basic monthly child
support obligation and/or post secondary education expense obligation are in effect,
naming the children as beneficiaries or the Respondent as trustee for them in a face
amount sufficient to cover any unpaid future child support or education obligations, but
not less than \$500,000 at the time this order is entered. If Petitioner does not currently

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have any or sufficient life insurance in effect, he shall obtain a policy that complies with the requirements of this paragraph within thirty (30) days of entry of this order, and provide proof to Respondent of same within ten (10) days of obtaining the policy. If for any reason life insurance is insufficient to cover these obligations, they shall be a claim against Petitioner's estate.

Dated: 3/13/15



Judge Suzanne Parisien

Presented by:


Carl T. Edwards, WSBA# 23316
Attorney for Respondent

Approved for entry:
Notice of presentation waived:


Shannon M. Elmers, WSBA# 38245
Attorney for Petitioner