102741-9

No. 85271-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JAMES KIM

Petitioner,

v.

KUM KIM

Respondent.

PETITION FOR REVIEW

James K. Kim,
8718 S Tacoma Way, Ste A2
Lakewood, WA 98499
Petitioner Pro Se

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A. IDENTITY OF PETITIONER

Petitioner James Kim seeks review.

B. COURT OF APPEALS DECISION

Division I filed its opinion on November 27, 2023 and denied reconsideration on December 22, 2023. The Court of Appeals decision at issue is found in **Exhibit A** to the *Petition.*

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals erred by ruling that the Petitioner would not have been able to "prove his entitlement to a modification. The motion was for an Order of Default and not for Judgment on Order of Default. The order should have been granted notwithstanding CR 55(b)(3). The judgment would have been granted absent the ensuing bias discussed below.
2. Bias led to incorrect weighing of the evidence that resulted in denial of the Petition to Modify. The trial court and the Court of Appeals erred by ruling that

Petitioner did not show that the ruling on the petition "would not have happened but for" the denial of the motions for default. This ignores the fact that the Respondent did not even appear or file and pleadings until after the last of the motions for default were denied. The rejection of Petitioner's declarations while accepting the Respondent's assertions at face value without any evidence to support those assertions can only be due to bias against the Petitioner.

D. STATEMENT OF THE CASE

This case is about whether the Petitioner's change in income warrants a modification of spousal support. Unfortunately, key in this case is whether the trial court misidentified a filing and subsequently considered the Petitioner's representations and filings under a mistaken assumption based on that misidentification. The trial court considered the Petitioner's evidence under this mistaken assumption and denied Petitioner's motions for default and subsequently

ruled that the evidence was not sufficient to show a change in circumstances.

E. ARGUMENT FOR REVIEW

Review should be accepted to address the trial court's denial of motions for order of default based on first, on misunderstanding of a filing, and subsequently, the outright error on the evidence despite the Petitioner's explanations on his motions.

The Court of Appeals, states in its opinion that orders prejudicially affected that ruling on the petition only if it "would not have happened but for" the denials of his motions for default.[1] This, however, ignores the fact that the motions were denied due to error in fact, that the Respondent had not appeared and was therefore not entitled to notice of the motion for default. First, we cannot now say that the Respondent would have appeared even if the motions for default were granted. The Court of Appeals misstates the Commissioner's order for

[1] *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002).

financial documents. The order was for the Petitioner to provide his historical income information and for the Respondent to file her financial documents. This order was part of a order continuing the trial, at Petitioner's request to have the Respondent file her financial documents. This cannot be taken or mislabeled as in "interlocutory ruling that it did not have sufficient information to proceed based on the materials Kim filed with his petition. That order does not support the position that the Petitioner would not have been able to "prove his entitlement", which is not for a typical judgment in which there would be damages or monies owed by the defaulting party. Further, this would be for the actual judgment, not an order of default. Also, had the motion for default been granted, the trial court would likely have permitted Petitioner to return with additional information as needed, not denied without affording him the opportunity return with needed information if the court did not deem the information on file to be insufficient. More importantly, had the court not erroneously concluded that the

Petitioner lied on his motions for default in stating that the Respondent did not appear, it would have taken a negative view of the Petitioner's financial declaration. The tax returns that were filed with the court show that (i) as they were joint returns, they would include all income by the Petitioner's spouse; and (ii) that the business income was the couple's sole income source.

The Petitioner's Financial declaration was rejected, at least partly based on erroneous conclusion that the adult family member's income could not be zero, without examining the joint tax returns that clearly show that the business income is the sole income for both Petitioner and his spouse, the adult family member. The trial court and the Court of Appeals clearly accepted respondent's unsupported declarations at face value without any examination as to the basis of the declarations. This is a clear case of bias against the Petitioner, an error of fact. While appeals courts would not normally reweigh the evidence of substitute its judgment for that of the trial court, it would do

so if the trial court's decision was entered on manifestly unreasonable or clearly untenable grounds. This rejection of the Petitioner's financial declaration based at least in part on the trial court's unreasonable and untenable disbelief of the fact that the Petitioner's spouse did not have any separate income despite the joint tax returns showing that to be the case.[2]

A modification order is reviewed for substantial supporting evidence and for legal error. *In re Marriage of Stern*, 68 Wn. App. 922, 929, 846 P.2d 1387 (1993). Petitioner's financial declaration, bank statements, and joint tax returns clearly show that he is unable to pay due to the change in circumstances that he did not foresee. This is substantial supporting evidence that was disregarded in error. This error in fact cannot be said not to have affected subsequent weighing of the evidence during the trial by affidavit. That bias continued in the denial of

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[2] In reviewing that decision, we do not reweigh the evidence or substitute our judgment for that of the trial court. *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996). Instead, we reverse only if the trial court's decision was "entered on grounds either manifestly unreasonable or clearly untenable." *Ochsner*, 47 Wn. App. at 525.

Petitioner's Motion for Revision and the Appellate Court's ruling. The finding of fact was not based on objective, non-biased review of the evidence, including the fact despite the fact that Petitioner has limited income and resources. Petitioner's income fell immediately since the divorce and failed to keep up with inflation. This is a substantial change of circumstances that was not within the contemplation of the parties at the time the decree was entered."[3] Such income made it financially impossible for the Petitioner to pay, especially as it was income for a family of three (3), not just the Petitioner as was the case at the time of the divorce.

The courts below did not examine the other spouse's needs to make a determination of the other spouse[4]. Expressly adopted commissioner's ruling despite the apparent explicit bias which made the basis untenable. It would be a grave miscarriage of

[3] Maintenance may be modified only upon the showing of a substantial change of circumstances that was not within the contemplation of the parties at the time the decree was entered." *In re Marriage of Ochsner*, 47 Wn. App. 520, 524, 736 P.2d 292 (1987); RCW 26.09.170(1)

[4] A "change of circumstances" refers to "the financial ability of the obligor spouse to pay vis-à-vis the necessities of the other spouse." *Id. In re Marriage of Fairchild*, 148 Wn. App. 828, 831, 207 P.3d 449 (2009)

justice to deny his Petition to Modify to have him pay support when he is financially unable to do so. Review is merited.

F. CONCLUSION

This case raises two issues. Specifically, that the trial court clearly and unreasonably ruling that the Respondent was entitled to notice of the motion for default despite explanations by the Petitioner. This unfortunately translates to the trial court considering the Petitioner to be incredible and that his filings are untruthful. This apparent bias led to the finding that the Petitioner is not entitled to a modification. This is an unjust finding and Petitioner prays that the Court grant his Petition for Review to rectify this injustice.

Dated this 19th day of January, 2024
[Certified RAP 18.17(c)(10) compliant at under 1,400 words.]

Respectfully submitted

/s/ James K. Kim
James K. Kim, Petitioner Pro Se

EXHIBIT A

FILED
11/27/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of: JAMES KIM, Appellant, And KUM KIM (A/K/A: SARAH JUNG), Respondent.	No. 85271-0-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — James Kim appeals from the trial court's denial of his petition to modify a spousal maintenance order. Finding no error, we affirm.

FACTS

Kim's marriage to Sarah Jung[1] was dissolved on May 3, 2004. The dissolution court found, based on an agreement of the parties, that "[t]here is a need for spousal maintenance in the amount of $3,000.00 per month for basic living expenses" and ordered Kim to pay that amount until Jung's remarriage, when the monthly amount would decrease to $2,000.00.

In April 2022, Kim filed a petition to modify the spousal maintenance order. He alleged that his "income decreased significantly since 2003 to under $72,000

[1] The record indicates that Jung changed her name from Kum Kim to Sarah Jung at some point subsequent to the 2004 dissolution and James Kim recognized the name change by including it as an AKA designation in the caption of his petition to modify spousal maintenance. Accordingly, we refer to the respondent by her current last name.

in 2021" and his "[c]urrent business income over the past 3 months is approximately $16,000."

In November 2022, Jung filed a response to Kim's modification petition and asked that it be denied. The trial court subsequently entered an order indicating that "[b]ased on the evidence provided, [it] d[id] not have sufficient information to move forward with this matter." It issued a revised case schedule and directed the parties to comply with King County Local Family Law Rules (LFLR) 10 and 14, which require, among other things, that the party petitioning for a modification of spousal maintenance file and serve a financial declaration and certain financial documents.

In February 2023, Kim filed a trial memorandum in which he represented that his historical income, as a sole legal practitioner, was as follows:

2003	$78,008.00	
2004	$65,690.00	
2017	$34,587.00	
2018	$43,066.00	
2019	$91,789.00	Includes $2550 for non-legal service
2020	$64,533.00	
2021	$71,683.00	

Kim also filed copies of his 2017, 2018, and 2019 tax returns and documentation concerning a $350,000.00 loan from the Small Business Administration.

The matter proceeded to a trial by affidavit before a commissioner. The commissioner concluded that Kim did not satisfy his burden to show a substantial change of circumstances and denied his petition. Kim moved for revision, which the trial court denied; the court also clarified that the commissioner's ruling did not preclude Kim from "seeking modification based on evidence not previously

available or if circumstances change further."

Kim timely appealed.

ANALYSIS

Kim contends that the trial court erred on revision by denying his modification petition. We disagree.

"In the absence of a provision in a separation agreement to the contrary, maintenance . . . may be modified . . . only upon the showing of a substantial change of circumstances that was not within the contemplation of the parties at the time the decree was entered." *In re Marriage of Ochsner*, 47 Wn. App. 520, 524, 736 P.2d 292 (1987); RCW 26.09.170(1). A "change of circumstances" refers to "the financial ability of the obligor spouse to pay vis-à-vis the necessities of the other spouse." *Id.* "The determination whether a substantial and material change has occurred which justifies modification of maintenance . . . is within the discretion of the trial court." *Id.* at 524-25.

Here, based on Kim's notice of appeal, our review in this case is limited to the superior court's decision on revision which expressly adopted the commissioner's decision denying Kim's modification petition. *In re Marriage of Fairchild*, 148 Wn. App. 828, 831, 207 P.3d 449 (2009). In reviewing that decision, we do not reweigh the evidence or substitute our judgment for that of the trial court. *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996). Instead, we reverse only if the trial court's decision was "entered on grounds either manifestly unreasonable or clearly untenable." *Ochsner*, 47 Wn. App. at 525.

The trial court had a tenable basis to conclude that Kim failed to show a

substantial change of circumstances. There was evidence that Kim's income in 2021 was comparable to his income in 2004—and, indeed, significantly higher in 2019. Although Kim argued that it had decreased when adjusted for inflation, as the trial court noted, that argument "cuts both ways given that the amount of maintenance is not rising with inflation either." The trial court also observed Kim did not identify any evidence of his expenses around the time of the original decree. Notably, Kim relied on RCW 26.09.170(9)(a) in the trial court, but that statute governs periodic adjustments *to child support*, which, unlike modifications to spousal maintenance, do not require a showing of a substantial change of circumstances.[2] Whether because of this misdirected reliance on an inapplicable statute or some other reason, Kim did not fully develop the record with regard to the asserted change in his ability to pay maintenance. Also, despite the trial court's directive that the parties comply with LFLR 10, the record does not include Kim's tax returns for the prior two years as required by LFLR 10(b)(2), or any account statements from financial institutions as required by LFLR 10(b)(4). Furthermore, Kim speculated that Jung was financially stable and no longer needed maintenance, but this was disputed. And, while the trial court found Jung's financial declaration "suspect," it correctly noted that it was Kim's burden, not Jung's, to prove a substantial change in circumstances justifying modification. *In re Marriage of Arvey*, 77 Wn. App. 817, 820, 894 P.2d 1346 (1995).

Kim contends, with regard to his historical expenses, that it would be "unreasonable to expect someone to keep such records for . . . 18 years." But the

[2] As the trial court pointed out, that statute does not apply here, and Kim does not rely on it now on appeal.

trial court did not suggest that evidence of historical expenditures could only take the form of records. Kim also argues that "[h]ad the court properly viewed the evidence . . . , it would have determined that there was sufficient evidence showing a substantial change in circumstances even without his expenses in 2004." However, he cites no authority for the proposition that the trial court was required to find a substantial change of circumstances despite its determination that the record was deficient with regard to Kim's historical expenses, which inform whether there has been a substantial change in his ability to pay. Nor does Kim cite any authority that would have required the trial court to accept his financial declaration at face value, particularly in light of Jung's response declaration wherein she attested that Kim had enough income to afford luxury cars and golf memberships. *See Harrison v. Whitt*, 40 Wn. App. 178-79, 698 P.2d 87 (1985) ("Where evidence is conflicting, the trier of fact may believe the testimony of some witnesses and disbelieve the testimony of others."). Kim essentially asks us to reweigh the evidence and find it more persuasive than the trial court did, but we decline to do so. *See Snyder v. Haynes*, 152 Wn. App. 774, 779, 217 P.3d 787 (2009) ("We defer to the trial court's determinations on the persuasiveness of the evidence.").

Kim next contends the trial court erred by failing to consider the statutory maintenance factors set out in RCW 26.09.090. But those factors are considered only after the party seeking modification has shown a substantial change of circumstances. *See In re Marriage of Spreen*, 107 Wn. App. 341, 347 n.4, 28 P.3d 769 (2001) ("[O]nce the court finds that changed circumstances warrant a modification, the issues of amount and duration are the same as in the original

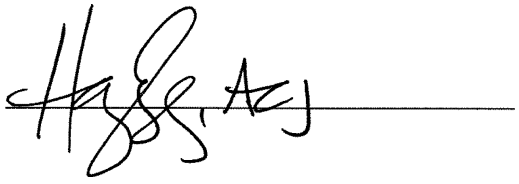
dissolution."). Kim fails to demonstrate that the trial court erred when it denied his modification petition.

As a final matter, Kim notes that, before trial, he moved for an order finding Jung in default on three separate occasions and each motion was denied. Kim devotes much of his briefing to arguing that Jung should have been found in default. But the orders denying Kim's motions for default were not designated in Kim's notice of appeal and are reviewable only if they prejudicially affected the decision designated in the notice, i.e., the denial of Kim's modification petition. RAP 2.4(b). The orders prejudicially affected that ruling on the petition only if it "would not have happened but for" the denials of his motions for default. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002).

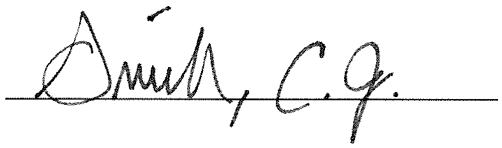
Here, because Kim served Jung by mail, Kim would have needed to prove his entitlement to a modification even if Jung had been found in default. CR 55(b)(3). Kim does not show that he would have done so, particularly in light of the trial court's interlocutory ruling that it did not have sufficient information to proceed based on the materials Kim filed with his petition. Kim attempts to draw a link between the denial orders and the denial of his modification petition by asserting that the former "presumably led to the trial court's apparent tacit bias against [him]" during the modification trial. But we "presum[e] that a trial judge properly discharged [their] official duties without bias or prejudice," and "[t]he party seeking to overcome that presumption must provide *specific facts* establishing bias." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004)

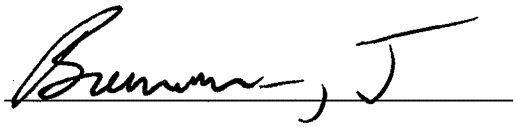
(emphasis added). Kim does not address, much less overcome, this presumption; he speculates the trial court was biased based on its rulings, but judicial rulings alone, even those that turn out to be erroneous, "almost never constitute a valid showing of bias." *Id.*; *Bus. Servs. of Am. II, Inc. v. Wafertech LLC*, 159 Wn. App. 591, 600, 245 P.3d 257 (2011) (error of law is not evidence of a trial judge's actual or potential bias). Kim fails to show that the trial court's decision to deny his modification petition was prejudicially affected by the denial orders and, thus, we do not reach them.[3] *Cf. Franz v. Lance*, 119 Wn.2d 780, 782, 836 P.2d 832 (1992) (timely appeal from order imposing sanctions brought underlying judgment up for appeal where sanctions award would "stand or fall" based on the judgment).

Affirmed.



WE CONCUR:





[3] To the extent Kim argues the trial court erred by not revising the denial orders, that argument fails because Kim did not timely seek revision of those orders. *See* RCW 2.24.050 (establishing demand for revision must be made within 10 days from the entry of the order or judgment of the court commissioner).

THEMIS LAW

January 20, 2024 - 8:04 AM

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