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COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

In re the Marriage of:

JULIE DAVIS,

Respondent/Cross-Appellant,

vs.

PAUL DAVIS,

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR WHATCOM COUNTY
SUPERIOR COURT COMMISSIONER MARTHA V. GROSS

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION1

II. CONDITIONAL CROSS-REPLY ARGUMENT1

 A. The trial court erred in basing the adjusted child support order on the father’s income as found for the original child support order when there was more accurate and current information available.1

 B. This court should award attorney fees to the mother on appeal..... 5

III. CONCLUSION 6

TABLE OF AUTHORITIES

STATE CASES

Marriage of Davis, 2014 WL 1289445 (Mar. 31, 2014) 5, 6

Marriage of Payne, 82 Wn. App. 147, 916 P.2d 968 (1996) 1

STATUTES

RCW 26.09.140 6

RCW 26.19.071 1

I. INTRODUCTION

Respondent/Cross-Appellant Julie Davis asks this Court to address the trial court's error in refusing to consider the appellant/cross-respondent Paul Davis' current income when adjusting the child support order only if this Court remands on any of the issues raised by appellant. Otherwise, the respondent asks this Court to affirm the trial court's order in its entirety and finally end the ongoing litigation between the parties, which with this second appeal by appellant has continued for nearly two years after the parties' marriage was dissolved. The respondent also asks this Court to award her attorney fees on appeal, based on her need and the appellant's ability to pay.

II. CONDITIONAL CROSS-REPLY ARGUMENT

A. The trial court erred in basing the adjusted child support order on the father's income as found for the original child support order when there was more accurate and current information available.

As this Court has held, when a parent's income has changed, "past earnings [are] no longer of primary relevance," and the trial court should consider the parent's current and future income to establish child support. *Marriage of Payne*, 82 Wn. App. 147, 152, 916 P.2d 968 (1996); *See also* RCW 26.19.071(1) ("all income and

resources of each parent's household shall be disclosed and considered by the court"). Here, the trial court erred by relying on a previous determination of the father's income in adjusting child support when there was evidence that the father's income had increased since the earlier child support order was entered.

The previous order of child support was based on the father's gross monthly income of \$13,719. But the father had more recently signed a loan application attesting that the "information provided in this application is true and correct,"¹ and stating his gross monthly income was now \$16,202.96. (CP 32A², 43) Although the father attempted to disavow the income as set forth in his loan application at the time of the adjustment hearing, the father still claimed his gross monthly income was \$14,436 - \$700 more than was established in the earlier child support order. (*Compare* CP 23 *with* CP 50, 57)

¹ In signing the loan application, the father also acknowledged that he "fully understand[s] that it is a Federal crime punishable by fine or imprisonment, or both, to knowingly make any false statements concerning any of the above facts." (CP 32A)

² The appellant appears to describe the loan application as "the mother's illegible evidence," (Cross-Response Br. 11), but there is nothing illegible about it. The loan application clearly states that his monthly base income is \$11,291.68, and his monthly commissions are \$4,911.28. (CP 32A)

The cross-respondent claims that the mother “did not dispute” the father’s income as established for the earlier child support order (Cross-Resp. Br. 11), as if this were a reason to not base the current child support order on his current income. But that is not true. As her counsel argued, the mother never knew what the father “actually made ‘cause he’s really never really given the Court a straight answer about his – about his income.” (RP 8)

In any event, in making its decision, the trial court did not rely on the “best evidence,” nor did it find that the father’s loan application was “erroneous,”³ as alleged by cross-respondent. (Cross-Resp. Br. 11-12) In fact, the trial court stated that it believed that the father’s income had increased – based on the father’s own admission - and that the income as stated in his loan application was the “most current information”:

Looking-okay, first of all, his income, he has a very substantial income. He is the one that reported his income six months after the trial at considerably more than he said he would be earning. He’s the one that reports his income in June of this year, the most current information, it said he makes 16,000 a month.

³ In his brief, appellant claims he is dyslexic (Cross-Resp. Br. 12, fn. 3), but he never alleged that his purported dyslexia was the reason that he stated under the penalty of perjury that his monthly income increased by over \$2,400 since the prior child support order was entered.

(RP 28) Despite this, the trial court erroneously based the adjusted child support order on the income established in the earlier child support order without any explanation as to why it should not be based on the “most current information”:

In any event, he makes considerably more than was anticipated. I’m going to use the percentages that Judge Uhrig used for the same reasons.⁴

(RP 29)

If there was any error by the trial court in adjusting child support, it was in its failure to use the father’s current income at the time of the hearing as stated in his loan application, which was over \$2,400 more than what the court found eight months earlier. While the mother agrees that “no additional fact-finding [is] desirable” (Cross-Resp. Br. 12), because of the long drawn out litigation, in the event this court remands for any reason, it should direct the trial court to establish the father’s child support obligation based on his current income, as set out in a loan application submitted only two months before the hearing.

⁴ The only “reason” given for the father’s income as set forth in the earlier child support order was that it was the father’s “actual income.” (CP 13) However, based on the sworn loan application, we now know that the father’s “actual income” is over \$2,400 more than the trial court previously found.

B. This court should award attorney fees to the mother on appeal.

As this court previously determined, the wife is entitled to her fees based on her need and the father's ability to pay. *Marriage of Davis*, 2014 WL 1289445 (Mar. 31, 2014). Even accepting the parties' incomes as found by the trial court, the father makes nearly twice as much as the wife, including her spousal maintenance, which is set to either terminate or be reduced by half in three months. (See CP 7, 116) This maintenance award was intended to assist the mother while she obtains her degree to transition from being a stay-at-home mother to a full-time worker. (See CP 7-8; *Marriage of Davis*, 2014 WL 1289445 (Mar. 31, 2014) The mother should not be forced to use her maintenance or her property award to pay attorney fees to defend against the father's *second* appeal in the less than two years since their divorce was finalized.

Cross-respondent complains about both the maintenance and property awards as a reason for this Court to deny the mother's attorney fees. (Cross-Resp. Br. 12-13) But this Court rejected these arguments when it affirmed the trial court's Decree of Dissolution in its entirety and awarded attorney fees to the mother for having to

respond to his meritless complaints. (*Marriage of Davis*, 2014 WL 1289445 (Mar. 31, 2014))

Cross-respondent also complains that despite his admitted “substantial income” of over \$173,232 annually, he has to pay less than half of that to provide “support of his family.” (Cross-Resp. Br. 13; *see also* CP 50, 57) In other words, he has more than \$93,000 available for him alone, while purportedly providing support for three in the amount of \$84,000. Further, while the father has a monthly surplus of \$1,040, the mother has a monthly deficit of more than \$1,000, which will only increase when her spousal maintenance is either reduced or terminated in three months. (*Compare* CP 71 *with* CP 171) The father should pay the mother’s attorney fees under RCW 26.09.140 based on her need and his ability to pay.

III. CONCLUSION

This Court should affirm the trial court’s order in its entirety. In the event this court remands on any issue raised by the father, it should direct the trial court to establish child support based on his current income at the time that it adjusted child support. This Court should also award attorney fees to the mother.

Dated this 26th day of June, 2014.

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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, 2014, I arranged for service of the foregoing Reply Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 26th day of June, 2014.



Victoria K. Vigoren