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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHEILA M. SKUSEK nka HERMAN,

Appellants

vs.

FREDERICK SKUSEK,

Respondent.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
97-3-01414-9

BRIEF OF APPELLANT

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ORIGINAL

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2. The trial court erred in adopting the father's worksheets in violation of RCW 26.19.071 by using incorrect income figures, and excluding income that should have been included.

3. The trial court erred in granting a deviation due to the "bad economy" and ignoring the father's burden of proof to obtain any such deviation under RCW 26.19.075.

4. The trial court erred in granting an incremental increase without following the statute that requires a finding of significant hardship before permitting an incremental payment plan (RCW 26.09.170), and changing the starting date despite admission of the starting date alleged in the petition.

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2. Did the trial court err in adopting the father's worksheets by using a net figure for gross, by using the incorrect pension income, by striking business income and interest income, and then including long distance

transportation expenses in the worksheets?

3. Did the trial court err in granting a deviation due to the "bad economy", by ignoring the burden of production under the statute, and failing to review the last 24 months of income?

4. Did the trial court err in granting an incremental increase when there was no significant hardship to the father, there was no offer of significant hardship to the father, and when the father admitted in his legal response, which was never amended, to a starting date of January 16, 2008?

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I. INTRODUCTION

This is a case about child support. This appeal stems from a decision by the trial court to modify a 10 year old Order of Child Support from $540.78 per month to only $760.98 per month. The case involves issues of the trial court's failing to recognize the father's true income, permitting a deviation in his income without proof, ignoring statutory requirements affecting child support decisions, and failing to award attorney's fees.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in revising the Commissioner's ruling and reducing father's child support obligation to $760.98 per month when the record reflects child support should have been either $1,341.32 per month or $998.00 per month.

2. The trial court erred in adopting the father's worksheets in violation of RCW 26.19.071 by using incorrect income figures, and excluding income that should have been included.

3. The trial court erred in granting a deviation due to the "bad economy" and ignoring the father's burden of proof to obtain any such deviation under RCW 26.19.075.

4. The trial court erred in granting an incremental increase without following the statute that requires a finding of significant hardship

before permitting an incremental payment plan (RCW 26.09.170), and changing the starting date despite admission of the starting date alleged in the petition.

5. The trial court erred in not awarding attorney's fees.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in revising the Commissioner's ruling and reducing father's child support obligation to $760.98 per month when the record reflects child support should have been either $1,341.32 per month or $998.00 per month, when the father did not provide proof of his income and deductions, and when the father claimed long distance transportation expenses in the worksheets?

2. Did the trial court err in adopting the father's worksheets by using a net figure for gross, by using the incorrect pension income, by striking business income and interest income, and then including long distance transportation expenses in the worksheets?

3. Did the trial court err in granting a deviation due to the "bad economy", by ignoring the burden of production under the statute, and failing to review the last 24 months of income?

4. Did the trial court err in granting an incremental increase when there was no significant hardship to the father, there was no offer of significant hardship to the father, and when the father admitted in his legal

response, which was never amended, to a starting date of January 16, 2008?

5. Did the trial court err in failing to grant mother her requested attorney's fees when the father earns substantially more, has greater assets and earning ability, and otherwise, was intransigent in providing information to the mother and the court?

IV. STATEMENT OF THE CASE

The parties, Sheila Herman (now Sheila Skusek) and Frederick Skusek were married and had two twin boys – Mason and Dylan, born 4/29/93. CP 2, 12. Before the twin boys were age 5, the parties had separated and the husband filed for a dissolution, which was final on the twin boys' 5th birthday - April 29, 1998. CP 12.

The Order of Child Support stated that Mr. Skusek (hereinafter often referred to as the "father" or "Fred") was to transfer $540.78 per month to the mother, Mrs. Skusek (hereinafter often referred to as the "mother" or "Sheila") for the 5 year old twin boys. CP 14. The worksheets attached to the Order of Child Support stated that Mr. Skusek's income was about $2,263.00 gross per month (or about $27,156.00 per year). CP 20.

Over the next 10 years, the father's income substantially increased, including years when he earned over $62,000 and $63,000. CP 43, 35,

134. However, his child support never changed. CP 134. Also, the twin boys obviously grew and became much more expensive, but the father's court-ordered child support remained at $540.78 per month. CP 134. There was some allegation that Fred voluntarily increased his support by $125.00 per month for a short time, but that stopped and was disputed. CP 367.

When the boys were 14, Mrs. Skusek (now Mrs. Herman) asked the State for assistance with a modification of child support in July/August, 2007. CP 32-33. She envisioned a relatively simply modification since the boys had moved age brackets (from the 0-11 group to the 12-18 group), incomes has changed, and there had been no modification for about 10 years.

Eventually, on or about January 16, 2008, the State filed a Petition for Modification of Child Support. CP 28-31. Both father and mother were served with the Summons and Petition. CP 24. All parties admitted that the child support amount needed to be modified.

The Petition specifically stated, under ¶ 1.6, that the starting date of the modified child support order should be the date on which the petition was filed, January 16, 2008. CP 29. Both parties responded to the Petition and both admitted that a modification was appropriate. CP 39-40, Specifically, Mr. Skusek (father) admitted in his Response to ¶ 1.6 of the

Petition, i.e., that the starting date shall be the date the petition was filed. CP 39.

As part of his response, Mr. Skusek filed his 2005 and 2006 tax returns, showing his adjusted gross income as follows:

2005: $63,938.00
2006: $62,358.00

CP 43, 45. However, despite having a completed tax return as early as 2/11/08, Mr. Skusek would not provide the 2007 tax return until 12/4/08. CP 401-407.

However, Mr. Skusek stated in his proposed worksheets as part of his response, under oath, that [b]ecause of higher gas prices, I would like to ask the court that the weekends I have my boys, their mother make arrangements to meet me halfway." CP 58. Also, in his Response, he stated under ¶ 2 in his Request for Relief, that the Court should modify the prior order of child support including his request for "meeting halfway travel when boys visit father." CP 40.

In addition to admitting ¶ 1.6 in the Petition about the starting date, in his Response, Mr. Skusek affirmatively stated, "[x] other: If the modification is granted, the starting date of the modified child support order should be the date the petition was filed. ... 1/15/08." CP 40. This is signed on 1/19/08 by Mr. Skusek.

As part of mother's response, she submitted the required financial information, including 2006 and 2007 tax returns, 6 months of pay stubs and bank statements. CP 74-109. She also admitted the starting date should be the date the petition was filed. CP 65-66.

Mr. Skusek was 56 when these proceedings started and was 57 at the time of the modification hearing on December 8, 2008. He tried to claim that he was retired as a way to avoid his full obligation to his two teenage sons. CP 368-370. Mr. Skusek, however, is not retired and has an obligation to support his two teenage sons. He did not provide all of his information or a full explanation of his income, financial information, deposits, or other, leaving Mrs. Skusek and her attorney with an incomplete picture to analyze the proper child support. What he did finally provide was late and incomplete, leaving the mother with little time to go over it. Not only was it due 12/2/08 at Noon for the court hearing, and received 12/4/08 (CP 401-427), but it was requested in discovery in March, 2008 (CP 318-319), and again in his deposition in October, 2008 (CP 266-317).

With formal discovery requests issued in March, 2008, Mr. Skusek delayed responding until June 13, 2008 (CP 329), and his responses were incomplete and sloppy. CP 318-329. The complete financial information of Mr. Skusek was requested, but not provided.

Mr. Skusek admitted to doing 3 cash jobs from June 2007 through his answers in June, 2008, but did not provide information on these jobs, nor did he provide the last 2 years, which would include June, 2006 through June, 2008. CP 322. When asked if he had other sources of income, he stated, "no." CP 325 (Interrogatory No. 15). When asked to produce tax returns, Mr. Skusek stated, "See attached tax returns," yet he only attached 2005 and 2006, without providing 2007. CP 322, 325. When asked to produce other financial documents, Mr. Skusek said he would "supplement when located." CP 327.

The financial information was requested of him specifically in discovery and again in his deposition on October 28, 2008. For one example, the mother requested his social security earning statement because this would show his history of earnings, and show that he is voluntarily underemployed in 2008 compared to prior years. In his deposition, page 45, he stated such statements were at home:

> 45
> 7 Q. Were you able to find the Social Security statement?
> 8 A. No. I thought I had it. Sorry. It's at home.
> 9 Q. I'll go ahead and just request a copy of that from you as
> 10 part of this deposition.

CP 311. He never provided them.

In his response to discovery, Request for Production No. 7, when asked to produce financial statements he had prepared in the last 3 years, he stated, "will supplement when located." CP 327 (Deposition Exhibit 1, Interrogatory No. 18 and Request for Production No. 7). Those were never produced either.

Mr. Skusek also did not produce sufficient pay stubs or was dilatory in producing them. His first submission, filed February 7, 2008, included 4 pay stubs dated 11/26/07, 12/4/07, 12/18/07, and 1/15/08. Before the hearing of 12/8/08, and after his deposition and discovery requests, Mr. Skusek did not produce pay stubs through 11/30/08, but instead a print out of 1/1/08 to 9/23/08, which was suspect itself because (a) it added up to 482.50 hours, but the "homemade/typewritten" print out says 551.50 hours, and (b) this is his son's business records, not under oath. CP 388-389. This was submitted to the court on 12/3/08. CP 388-389. Also, just before the hearing, after Mrs. Skusek submitted her pleadings on time, Mr. Skusek provided pay stubs dated 10/18/08 through 11/10/08, less than a month's worth. CP 408.

Also, prior to the hearing, Mrs. Skusek did not have Mr. Skusek's current bank statements as required. CP 146. On December 2, 2008, just 4 court days before the 12/8/08 hearing, Sheila declared, "we do not have his 2007 tax return and up to date bank statements either." CP 146. This

was true as the 2007 tax return was not submitted until 12/4/08. CP 401-406.

Mr. Skusek's late submissions revealed that he was working about 12.7 hours per week. Mr. Skusek filed a print out signed by Skusek Masonry, Inc. which is his son's business. CP 388-389. It stated 551.50 hours for 38 weeks, but the total adds up to 482.50 hours as follows:

January – 39 hours
February – 31.5 hours
March – 102 hours
May – 88.5 hours
June – 40 hours
July – 55 hours
August – 32 hours
September – 94.5 hours
Total: 482.50

CP 388-389. 482.50 hours in 38 weeks is an average of 12.7 hours per week. Sheila Herman stated that she understood his right to "retire" or only work part-time, but he still had 2 teenage boys to support, and the $540.00 per month he has paid did not cover 2 boys. CP 429. She went on to state, "[h]e should be imputed at what he used to earn, which was well over the $19,968 he claims he makes per year (he uses $1,664.00 per month in his worksheets, which is $19,968 per year). According to the print out (not pay stubs), he is already at $22,021.50 year-to-date through 9/23/08." CP 428.

If the trial court had averaged his last 3 years tax returns (2005-2007), he should be at $58,198 per year, or **$4,849.83** per month:

2007 - $48,298.00 (line 37, adjusted gross income, 1040)
2006 - $62,358 (line 37, adjusted gross income, 1040)
2005 - $63,398 (line 37, adjusted gross income, 1040)
TOTAL: $174,594 – average per year = $58,198.00, average **$4,849.83** per month

This averaging $4,849.83. CP 430, 440.

Before the hearing, the mother further averred as follows: "Mr. Skusek should have income imputed to him based on full-time work, not 12.7 hours per week. His hourly rate appears to be $39.93. In his deposition and declaration, he states he earns $40.00 per hour (page 17 – "right now my son pays me $40 an hour."). CP 430, 283.

If the trial court had used a 40 hour work week, he would be earning $83,200 per year. ($40 x 40 x 52). If the trial court had used a 35 hour work week, he would be earning $72,800 per year. If the trial court had used a 30 hour work week, he would be earning $62,400 per year. These are all higher figures than averaging his last 3 years, which works out to an average of $58,198 per year. CP 430.

Prior to the hearing, Mr. Skusek stated under oath that for his retirement (line 1e), it should be $1,532.04 in his worksheets, mixing net and gross amounts. CP 380. The trial court adopted this incorrect number. CP 505. The State had used $1,282.00, which was only one of

his pensions, but amended their proposed number to $1,615.00 after reading his deposition. CP 443. The correct number should have been the gross amount -- **$1,615.05** ($333.00 for the International and $1,282.05 for the NW). CP 430, 298 (page 32 of Mr. Skusek's Deposition).

Mr. Skusek had tried to make some claim that in the past, he had made an extra $100 per month and then $125 per month extra voluntary payment. CP 367. However, that was irrelevant and in the past, not to mention disputed. Mrs. Skusek clarified these points: "He claims in 2001 he started paying $100 and then $125 extra. This was for extracurricular activities and music lessons, and/or extraordinary health care here and there, which did not cover the full cost or his 60% of these expenses (his proportional share under the Original Worksheet, 3.15). The checks he attaches are from January, 2006 to May, 2007." CP 430-431.

Although Fred Skusek admitted to engaging in side jobs and receiving cash for them, he was not forthcoming about dates and amounts. He disregarded his obligation to report this income. He claimed it was "non-recurring," but in order to make this claim, he would have had to have shown 2 calendar years worth of cash side jobs to prove it was non-recurring. He provided no such information. Instead, he said, vaguely, they were "few and far between." CP 370. He admitted to a recent one in his deposition:

22

21 Q. Oh. I was going to ask you about that. What does that
22 mean, "cash jobs"?
23 A. I knew you were.
24 Q. Well, what was your answer you knew you were going to say?
25 A. It's just someone will call me and say they need a light

23

1 post or they need a fireplace or something like that. It's
2 not very often, but it happens.
3 Q. When's the last time it happened?
4 A. I can't remember. Six months ago maybe.
5 Q. Do you remember what the job was?
6 A. It was a patio.
7 Q. Does "cash" mean you don't receive a pay stub --
8 A. Correct.
9 Q. -- or a W-2?
10 A. Correct.
11 Q. Do you know who the individuals were that you did the patio
12 for?
13 A. I don't remember his name.
14 Q. Do you remember what city he lived in?
15 A. Tacoma.
16 Q. Do you know how much cash you charged him -- or how much
17 cash did he give you for the job?
18 A. You know, I can't remember.
19 Q. Do you have an approximate?
20 A. I would say -- it was about 1,200, 1,000.
21 Q. 1,200 --
22 A. 1,200 or -- 1,000 or 1,200.

CP 288-289 (See Deposition, pages 22-23).

Mrs. Skusek was able to prove that Mr. Skusek had a good lifestyle while only paying this $540.78 monthly obligation. As she stated, he had plenty of cash to go on several trips. Fred claimed it was all paid for by points and his mileage plans. CP 432. In discovery, Mrs. Skusek requested a copy of this information and it was never provided.

Mr. Skusek also wanted a credit for travel expenses in the worksheets. The Commissioner denied this request, but on revision, since the trial court just "adopted" his proposed worksheets, this amount was included (See line 9c and 14b of the worksheets). CP 506-507. As Mrs. Skusek pointed out, the father frequently did not take the boys his 2 times per month due to his personal travel, or if his visits with the boys conflicted with his own personal interests. CP 432.

As the record reflected, Mr. Skusek works now for his son. When asked about deposits in his bank accounts, he was elusive at best. Mrs. Skusek's attorney asked him about several deposits and most of the time his response was that he was not sure the source of the deposit, or he sold some "stuff," or he cashed in a CD; including 5 figure deposits (such as $27,311, $14,415, $35,152, $15,188, and $19,175 to name a few):

<u>$27,311.34 deposit in June 2005</u>

26

8 Q. I'm going to ask you a question about this bank statement.
9 There appears to be a deposit in the savings account of

10 27,311.34.
11 A. Uh-huh.
12 Q. You have to say yes.
13 A. Yes.
14 Q. Do you recognize that? Do you know what that is?
15 A. It's been over three years ago. I have no idea.
16 Q. Was it a source of income, or did you cash in some bonds or
17 stocks?
18 A. I'm not sure.

$14,415 deposit, he states:

27

1 There is a deposit in your checking of $14,415.30. The same
2 question, what is that?
3 A. I have no idea.
4 Q. Do you know of any other person who contributes to your
5 checking or savings accounts?
6 A. None.
7 Q. Would that have been a deposit you made?
8 A. Yes.
9 Q. If you look down at checking activity, it looks like there's
10 a breakdown of $14,415.30. For example, August -- down here
11 on the bottom.
12 A. Uh-huh.
13 Q. Do any of those checks help refresh your recollection as to
14 what they were, what the source of those checks were?
15 A. No.
16 Q. Or I should say what the source of those deposits were?
17 A. No.
18 Q. Is there someone who would know other than you?
19 A. No.

CP 292-293. Mrs. Skusek's attorney outlined the responses to these questions about substantial deposits occurring in his bank statements to the

court. CP 136-140. (See also deposition, pages 26-34, CP 292-300, and Exhibits 2-7 thereto, CP 330-353).

When the matter went to hearing, the State filed the motion and submitted proposed worksheets. CP 126-130. The State suggested using only $2,524.00 gross per month for father's income (line 1a). CP 126. However, Fred's 2005 tax return showed gross income of $63,938 (average of $5,328 per month) and his 2006 tax return showed gross income of $62,358 (average of $5,196 per month). CP 43, 45.

As stated by the mother 4 court days before the hearing: "Mr. Skusek is less than forthcoming. We asked him for financial records and then never provided them. We asked for updated "paystubs" and haven't received them:

21

15 Q. Maybe it hasn't gotten to me yet. I'll go ahead and request
16 obviously just current pay -- whatever you call these, pay
17 stubs.
18 A. Well, I had a -- from the bookkeeper for Skusek Masonry gave
19 a -- what do you call it? An up to date.
20 Q. Are you talking about Stacey?
21 A. Yes.

We asked for updated bank statements and those were never provided:

34

4 Q. I'd request as part of this deposition just in the future if
5 you could produce the May 2008 to October 2008 bank

6 statements. The last one I received was May of 2008, so I'm

7 just asking that it be supplemented.

8 A. Uh-huh.

We also requested updated social security statement showing a history of wages:

45

7 Q. Were you able to find the Social Security statement?

8 A. No. I thought I had it. Sorry. It's at home.

9 Q. I'll go ahead and just request a copy of that from you as

10 part of this deposition.

CP 145-149, (See also Deposition, pages 21, 34 and 45, CP 287, 300, 311).

Despite his claim that he paid "extra," (CP 367), the mother refuted this and pointed out that the father had only been responsible for $540.78 per month for 10 years although it should have been around $1,200-$1,300 per month based on his income. CP 148. As she pointed out, also, Mr. Skusek stopped paying anything towards trumpet or other stuff for the boys in 2007. CP 148.

Prior to the hearing, the mother requested attorney's fees. CP 141, 150. Part of the basis for the request for attorney's fees was Mr. Skusek's intransigence. CP 141. He had failed to provide much of the records needed to fully assess the case prior to deadlines and submission of court pleadings, and he never had an explanation for his income shortages. CP 141. Mr. Skusek was asked to produce several records in his deposition in

October, 2008 (CP 267-317), and he either did not produce them or produced them late, including bank statements, up-to-date pay stubs, social security tax statements showing his income dating back over the years, his Alaska Airline mileage plan, and other proof.

At the time of the hearing on 12/8/08, Ms. Herman had paid $2,648.90 in fees and costs to date and had a balance of $1,394.00 through November. CP 141. Her attorney estimated another $750 to $1,000 to finalize this through hearing, for a total of around $4,792.90 in total fees and costs through the 12/8/08 hearing. CP 141. After the 12/8/08 hearing, substantial additional fees have been incurred for the revision hearing and now this appeal. Most of her attorney's time was spent on trying to track down and analyze Mr. Skusek's income figures and bank statements. CP 141. These fees and costs were necessary and reasonable to represent Ms. Herman in this matter. CP 141.

When the matter came before the court, before Commissioner Edward Haarmann (See Verbatim Transcript I, "RP1:"), on December 8, 2008, the court resolved the issues presented by (a) providing Mr. Skusek a health care credit [see line 8a of the worksheets - $119.00], (b) denying the father's requested transportation expense credit [see line 9c of worksheets], and (c) denying any incremental increase [see ¶¶s 3.9 and 3.10 of Order of Child Support]. CP 452, 457. The net result of the

court's 12/8/08 ruling was that Mr. Skusek pay $998 per month effective January 16, 2008. CP 449-460; RPI: 29-30

On or about December 18, 2008, Mr. Skusek filed a revision motion under RCW 2.24.050 and Pierce County Local Rule (PCLR) 7(g). CP 466-468. On revision, Mr. Skusek sought to revise four (4) things, combined in 6 arguments (CP 467-468): (1) the inclusion of $97.00 as interest income and $500 as business income [see worksheet, lines 1b and 1c – CP 456], (2) failure to provide him long distance transportation expenses [see worksheet, line 9c – CP 457], (3) the start date of January 16, 2008 [see Order of Child Support, ¶ 3.9 – CP 452], and (4) the failure to grant an incremental increase [see Order of Child Support, ¶ 3.10 – CP 452]. In summary, the revision motion specified that Mr. Skusek did not want to pay the $998.00, and he felt that income was included that he did not earn, and his income should be lower.

Pierce County has a local rule, which specifically states that all motions for revision "shall state with specificity any portion of the commissioner's order ... to be revised, identifying those portions by paragraph or page and line numbers. Any portion not so specified shall be binding as if no revision motion has been made." PCLR 7(g)(3).

In our case, Mr. Skusek did not specify that he sought to revise the other income figures in the worksheets, specifically gross income of

$2,511.00 and other income of $1,615.00 [See worksheets line 1a and 1e respectively – CP 456], yet the trial court on revision revised the entire worksheets by adopting Mr. Skusek's worksheets in whole. RPII: 12-13. When counsel for Mrs. Skusek objected, pointing out that his revision did not include all of the numbers in the worksheets (RPII: 14), the trial court stated, "[t]hose are the ones I looked at. Those are the ones I'm adopting." RPII: 13.

On January 9, 2009, on revision, the trial court, Judge Katherine Stolz, "adopted" father's worksheets and ruled that child support shall be amended to $760.98 per month and shall not start until July 15, 2008. CP 501-502.

This appeal followed.

V. ARGUMENT

This Court should reverse the trial court and direct it to enter an Order of Child Support that comports with the applicable statutes, including, in summary, a transfer payment of $1,341.32 per month effective January 16, 2008.

5.1 Standard of Review – *De Novo.*

Only the superior court's decision is at issue because "once the superior court makes a decision on revision, the appeal is from the

superior court's decision, not the commissioner's." *State v. Hoffman,* 115 Wn.App. 91, 101, 60 P.3d 1261 (2003).

Furthermore, because only documentary evidence was considered, and testimony was not taken below, the standard of review is *de novo.* This appellate court is in as good a position as the trial court was to review written submissions. *See, e.g., Progressive Animal Welfare Soc'y v. Univ. of Wn.,* 125 Wn.2d 243, 252, 884 P.2d 592 (1994); *Smith v. Skagit County,* 75 Wn.2d 715, 718, 453 P.2d 832 (1969); *In re Marriage of Flynn,* 94 Wn.App. 185, 190, 972 P.2d 500 (1999); *Danielson v. City of Seattle,* 45 Wn.App. 235, 240, 724 P.2d 1115 (1986), *aff'd,* 108 Wn.2d 788, 742 P.2d 717 (1987).

Indeed, the rule relating to *de novo* review applies when the trial court has not *seen* or heard testimony requiring it to assess the credibility of the witnesses. *Progressive Animal Welfare Soc'y,* 125 Wn.2d at 252, 884 P.2d 592.

In our case, the trial court did not see or hear testimony. Instead, this was a hearing based on written submissions of both parties, mostly including the requirement to submit financial information. Where a trial court considers only documents, such as parties' declarations, in reaching its decision, the appellate court may review such cases *de novo* because that court is in the same position as the trial court to review written

submissions. *See, e.g., Smith v. Skagit County*, 75 Wn.2d 715, 718-19, 453 P.2d 832 (1969). *See In re Marriage of Rideout*, 150 Wn.2d 337, 350-351, 77 P.3d 1174, 1179 - 1180 (Wn.,2003)

Under RCW 2.24.050, a party may request a revision of a superior court commissioner's order 'upon demand made by written motion, filed with the clerk of the superior court, within ten days after ... entry.' *In re Marriage of Robertson,* 113 Wn.App. 711, 714-15, 54 P.3d 708 (2002). When considering a commissioner's ruling on revision, the superior court reviews the commissioner's findings of fact and conclusions of law *de novo* on the record. *State v. Ramer,* 151 Wn.2d 106, 113, 86 P.3d 132 (2004); RCW 2.24.050. The appellate court reviews the documentary evidence *de novo* as well, and is authorized to determine its own facts based on the record before the trial court. *In re Marriage of Dodd,* 120 Wn.App. 638, 644, 86 P.3d 801 (2004)

In our case, the records consists of 549 pages of pleadings, and 2 transcripts, which are marked and referenced herein as "RPI" and "RPII" and attached in the Appendix hereto as:

RPI: Verbatim Transcript of Recorded Proceedings Before Commissioner Edward Haarmann, December 8, 2008 (Pages 1-32).

RPII: Verbatim Report of Proceedings Before The Honorable Katherine M. Stolz, January 9, 2009 (pages 1-15).

(See attached Appendices).

In our case, a review of the record (CP1-549), and the proceedings (RPI: 1-32 and RPII: 1-15) reveals that the trial court erred in failing to order the appropriate child support monthly obligation with the appropriate starting date, as well as failing to grant attorney's fees to the mother.

5.2 The Trial Court Erred When Adopting Father's Worksheets.

When assessing child support, the court must consider all income of the parties and use what are commonly referred to as the "Child Support Schedule Worksheets." The use of the work sheets is mandatory. See RCW 26.19.035(3). *In re Marriage of Lamp*, 123 Wn. App. 1042 (2004).

On January 9, 2009, the trial court erred and the worksheets were not properly completed. CP 505-509.

According to RCW 26.19.035, "[t]he court shall not accept incomplete worksheets or worksheets that vary from the worksheets developed by the administrative office of the courts." RCW 26.19.035.

The trial court must adhere to the following procedure in setting child support obligations: (1) compute the total income of the parents, RCW 26.19.071; (2) determine the standard child support level from the economic table, RCW 26.19.020; (3) decide whether to deviate from the

standard calculation based on specific statutory factors, RCW 26.19.075; and (4) allocate the support obligation to each parent based on each parent's share of the combined net income, RCW 26.19.080. *In re Marriage of Maples,* 78 Wn.App. 696, 700, 899 P.2d 1 (1995).

In our case, there was no dispute about the mother's income – it was imputed based on her age at $2,051.00 net per month. CP 35, 55, 111. This is the number the commissioner utilized in his ruling on December 8, 2008 (CP 457), and there was no revision or appeal of this issue. Instead, the main issue during the modification proceeding was Fred's gross and net income. Therefore, on this appeal, one of the main disputes involves how the trial court computed Fred's net monthly income.

In order to review this matter, this Court should consult RCW 26.19.071. A parent's monthly gross income is determined by considering all income, as verified by tax returns from the preceding two years and current pay stubs. RCW 26.19.071(1)-(2). RCW 26.19.071 details what income sources are included in and excluded from gross monthly income, specifies what expenses shall be disclosed and deducted from gross income to arrive at net income, and discusses imputation of income to parents in certain circumstances.

RCW 26.19.071(6) governs when and how income should be imputed to a parent: "[t]he 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 the 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."

In our case, the trial court adopted worksheets that did not comply with the statute. First, when at the hearing on December 8, 2008, the father submitted worksheets that did not make sense; he put his net income under the line entry of line 1a for gross income. CP 380-385. Even his attorney admitted at argument that it was his net, $1,664.00, that was put under line 1a – "... this is on his work sheets. Where it says wages and salaries in parentheses – this is in 1A – this is his net. It's not his gross. It's his net." (RPI: 10, lines 21-25). On or about November 6, 2008, the State of Washington had submitted worksheets showing his gross income on line 1a as $2,524.00 for gross income and on line 1e as $1,282 for his other income (retirement). CP 126. The mother had submitted worksheets showing his gross income on line 1a as $4,849.83 and on line 1e as $1,615.05 for his other income (retirement). CP 436. On or about

December 5, 2008, the State of Washington amended its proposed worksheets to reflect the proper retirement at $1,615.05 per month (line 1e) and included his "side jobs" of $500 per month based on Fred's deposition testimony (line 1c). CP 443-447.

The court commissioner adopted the State's worksheets. CP 460, RPI: 29. The trial court, on revision, adopted the father's worksheets, using the income figures the father submitted. CP 509. This was reversible error.

Case law above dictates making findings to support the income figures used by the court. Here, the trial court just stated, on the record, when asked what income the trial court is using in granting the revision (RPII: 12-13), "Well, I'm striking the side jobs. I'm striking the interest income and – I am adopting his." (RPII: 13). The trial court did not make any requisite finding as to Mr. Skusek's true income. By adopting "his" worksheets, the trial court was accepting the incorrect numbers for gross income, retirement income, side jobs, and interest income.

In the case of *In re the Marriage of Peterson*, 80 Wn. App. 148, 906 P.2d 1009 (1995), the appellate court reversed and remanded a case for recalculation of child support because the parent was gainfully employed on a full-time basis and the trial made no finding that the parent was purposely underemployed to reduce his child support obligation.

Peterson, 80 Wn.App. at 155. *See also In re Marriage of Shellenberger*, 80 Wn.App. 71, 73-74, 906 P.2d 968 (1995) (reversing trial court's imputation of income to father and order of child support where the court made no findings regarding Shellenberger's age, physical and emotional health, training, skills, work experience, etc. to support conclusion that he was voluntarily underemployed).

In our case, there was no finding on these issues. However, the record supported the mother's proposed worksheets. Since the statute requires submission of tax returns, and although Mr. Skusek did not submit his 2007 tax return until 4 days before the hearing on December 4, 2008 (CP 401-403), the average income for Mr. Skusek the last 3 years was $58,198.00 per year. CP 440. Mr. Skusek's 2007 tax return was signed 2/11/08 (CP 403), was requested in discovery and in his deposition (which took place on October 28, 2008 – CP 267), but was not produced until just before the hearing after all parties submitted initial pleadings. CP 401-404. When Mrs. Skusek submitted her financial information for the hearing on 12/2/08, she only had a W-2 for Fred Skusek for 2007. CP 157.

The trial court erred in adopting Mr. Skusek's worksheets for several reasons. Even despite a lack of findings, reviewing this matter *de*

novo, the trial court should have adopted either the mother's proposed worksheets (CP 436-440), or the State's worksheets (CP 443-447). The trial court cannot provide and did not provide any explanation for using $1,664.00 for Mr. Skusek's line 1a gross income, or the $1,532.04 for his line 1e income. Both numbers are erroneous. Mr. Skusek's gross income was at least $2,511 per month (per the State), but otherwise on average was $4,849.83 per month (per the mother). He had recurring interest income (line 1b), and recurring other side jobs (line 1c). His retirement monthly income was $1,615.05 per Mr. Skusek's deposition, page 32 (CP 298) and per the State's calculation (CP 441).

Also, there is no support for using $1,532.04 on line 1e for his income. This would be his net amount he receives (1,199.04 and 333.00). (CP 298. There are no other findings or explanatory information in the record despite counsel's urging to the contrary. RPII: 12-13.

The trial court erred in not using the correct income and worksheets reflecting Mr. Fred Skusek's income. He was fully employed or could have been, but chose to retire well before retirement age. Therefore, the trial court should reverse and remand for entry of the appropriate worksheets herein. RCW 26.19.071(1) provides that "[a]ll 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." "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." RCW 26.19.071(2). "A trial court's failure to include all sources of income not excluded by statute is reversible error." *In re the Marriage of Bucklin*, 70 Wn. App. 837, 855 P.2d 1197 (1993).

Financial verification is still necessary. Therefore, the court is required to verify income. *Bucklin*, 70 Wn.App. at 840, 855 P.2d 1197. RCW 26.19.071(1) expressly dictates that "[a]ll 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." In subsection (2), the statute provides that "[t]ax returns for the preceding two years and current paystubs shall be provided to verify income and deductions." RCW 26.19.071(2). Income and deductions that do not appear on tax returns or paystubs shall be verified by "[o]ther sufficient verification." RCW 26.19.071(2).

Thus, the statute requires the court to consider all income and verify such income based on current paystubs, tax records from the preceding two years, or other sufficient verification.

The trial court failed to do so and erred in its ruling.

5.3 The Trial Court Erred in Failing to Include Other Income.

In our case, the trial court just simply stated that it was striking side jobs and interest income without analysis. This violated the statutes governing child support calculations. Before the commissioner, the father's attorney attempted to switch the burden of proof to the mother to prove his recurring income, by stating that ... "[t]he statute's clear. You have to have recurring income for you to do anything with that, to apply that income. You have to find that. The Court has to say based on the evidence there's recurring income and we're going to include that." (RPI: 25, lines 8-13). Essentially, Mr. Skusek was trying to be rewarded for failing to disclose all of his other income and mentioning only that it was "far and few between" and hadn't occurred in a while. (CP 288-289). Also, in his discovery responses, he stated that he had done 3 cash side jobs in the last year (June, 2007 to June, 2008). CP 322.

RCW 26.19.075 is clear as counsel stated, but does not shift the burden to the mother to prove it is recurring. RCW 26.19.071(2) requires the father, the only person with knowledge of his "side cash jobs,' to

provide verification of this income. It states, "[i]Income and deductions that do not appear on tax returns or paystubs shall be verified by "[o]ther sufficient verification." RCW 26.19.071(2).

RCW 26.19.075 provides that with regard to nonrecurring income:

> (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***.

RCW 26.19.075 (emphasis added).

In our case, the trial court erred here by not following the mandatory statute. The father merely stated that he did not do side jobs anymore and did not have that income. The trial court excluded ("struck") such income despite evidence of the side jobs without reviewing the past 2 years, let alone any review of the record. Mr. Skusek had stated in his deposition, pages 22-23 (CP 288-289):

22

21 What does that
22 mean, "cash jobs"?
23 A. I knew you were.
24 Q. Well, what was your answer you knew you were going to say?
25 A. It's just someone will call me and say they need a light

23

1 post or they need a fireplace or something like that. It's
2 not very often, but it happens.
3 Q. When's the last time it happened?
4 A. I can't remember. Six months ago maybe.
5 Q. Do you remember what the job was?
6 A. It was a patio.
7 Q. Does "cash" mean you don't receive a pay stub --
8 A. Correct.
9 Q. -- or a W-2?
10 A. Correct.
11 Q. Do you know who the individuals were that you did the patio
12 for?
13 A. I don't remember his name.
14 Q. Do you remember what city he lived in?
15 A. Tacoma.
16 Q. Do you know how much cash you charged him -- or how much
17 cash did he give you for the job?
18 A. You know, I can't remember.
19 Q. Do you have an approximate?
20 A. I would say -- it was about 1,200, 1,000.
21 Q. 1,200 --
22 A. 1,200 or -- 1,000 or 1,200.

(CP 288-289).

The trial court failed to assess two things (a) the father's lack of production of information on this item, which was his burden of proof, and (b) what he earned in the previous two calendar years. As to the first, the father failed to produce information about his "side jobs." He should not be rewarded for the same. His attorney arguing that including this amount is merely speculation goes to the heart of the issue – the father should have produced those figures and amount for the past 2 years if he wanted it not

to "count" or if he wanted the trial court to exclude this income by deeming it "nonrecurring."

As to the second, the court only looked at the "economy" recently, not the past 2 years as required by statute. The court stated, "I do think the economy has substantially altered conditions rather abruptly since everybody that has investments is looking at the fact that they're no longer worth very much." RPII: 12. The trial court went further and stated, "[m]y brother worked construction." RPII: 12.

This commentary demonstrates the trial court's erroneous ruling and logic, and failure to follow the statute. The trial court can only ignore RCW 26.19.071 and "strike" income of an obligated parent if it looks at the past two calendar years. This is particularly important in this case because the father had received a 'windfall" by virtue of the fact that child support was still set at a rate from 1998 when the children were age 5, and he was earning $27,000 per year. A recent downswing in the economy in late 2008, beginning of 2009, does not permit the court to deviate in the worksheets, especially when it is the father's burden here to show the income is non-recurring.

Therefore, this Court should reverse with instructions for the trial court to include line 1c business income of $500 per month as proposed by the State of Washington, or should reverse and remand requiring the father

to produce two (2) years of verification of his side cash jobs for 2007 and 2008. Also, the trial court erred in excluding verifiable interest income that was recurring in the past 2 years. Finally, it was error to include a long-distance transportation expense in the worksheets under line 9c. CP 506.

5.4 The Trial Court Erred in Granting an Incremental Increase.

RCW 26.09.170 only permits an incremental increase when there is an increase in child support of thirty percent or more and a showing of significant hardship. The second element – significant hardship – was missing in this case. Also, the trial court, despite an admission in the pleadings as to the starting date of January 16, 2008, provided a new starting date on revision of July 16, 2008. CP 502.

RCW 26.09.170 (9) (c) provides that if there is an adjustment or modification of child support "by more than thirty percent and the change would cause significant hardship, the court may implement the change in two equal increments, one at the time of the entry of the order and the second six months from the entry of the order."

In our case, there are at least two (2) legal reasons the trial court erred in changing the starting date from January 16, 2008 to July 15, 2008, giving the father here essentially another 6 month reprieve from the increased child support: (1) under CR 8, the father admitted the starting

date should be January 16, 2008 (CP 39-40) and (2) the father did not meet his burden and the trial court did not make a finding on whether such an increase would cause a significant hardship.

As to the first reason, the father admitted in his Response that the starting date should be January 16, 2008. CP 39-40. He never amended this Response, nor did he seek to amend it after all the evidence was presented. Instead, for the first time, at oral argument on December 8, 2008, after the court's ruling, father's attorney stated, "I'm asking the Court for an incremental increase." RPI: 29, lines 20-23. Counsel did not move to amend his pleadings and did not address the legal averment that all prior pleadings "admitted" the starting date of January 16, 2008.

CR 8(d) provides:

> **(d) Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

CR 8(d).

In our case, ¶ 1.6 in the moving petition sought a starting date of January 16, 2008, the date the petition was filed. CP 28-29. Mr. Skusek responded with "[x] admitted" and further in his request for relief asked for January 15, 2008 as the starting date. CP 39-40. The mother similarly admitted ¶ 1.6 of the moving petition. CP 65-66. No party ever moved to

amend any pleadings at any time. Therefore, changing the starting date to July, 2008 was reversible error.

Even ignoring this, under RCW 26.09.170(9)(c), if the trial court intended to make the increase in two increments, then the trial court would have to have found "significant hardship." Not only did the trial court fail to do so, but it would have had a difficult time doing so on this record whereby Mr. Skusek was enjoying a lifestyle of earning over $60,000 for multiple years while paying child support for children that were in a higher age bracket since 4/29/02 (age 12 in 2002), at a rate of someone who was obligated for children under 12 with earning of $27,000 per year. With his unexplained deposits during 2005-2008 of $14,000, $15,000, $19,000, $27,000 and $35,000 (CP 292-300), it is doubtful that an increase in child support to $998 would cause Fred Skusek a significant hardship. No significant hardship was or could have been found. In fact, one was not even plead or argued.

Therefore, this Court should reverse and remand with clarification that the correct Order of Child Support shall start the new obligation on January 16, 2008.

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5.5 The Trial Court Should Have Awarded Fees to Mother.

Attorneys' fees should have been awarded to the mother based on need and ability to pay and due to Mr. Skusek's intransigence. First, under RCW 26.09.140:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith,.... Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

RCW 26.09.140.

This Court has discretion to award attorney fees in such an action based on a balancing of one party's needs against the other party's ability to pay. *In re Marriage of Lilly,* 75 Wn.App. 715, 720, 880 P.2d 40 (1994). In deciding whether to award attorney fees here, this Court should examine the arguable merit of the issues on appeal and the resources of the respective parties. *In re Marriage of Booth,* 114 Wn.2d 772, 791 P.2d 519 (1990).

First, this appeal involves meritorious issues. Appellant, Sheila Skusek, has only received child support of $540.78 for over 10 years for two twin boys who grew from 5 years old to 15. Granted, her failure to seek modification or adjustment over the years is her fault, but she did not

seek back support, only a new, modified amount. When she finally does avail herself of the statutory remedies when the boys are 14 (in 2007 – CP 32-33), the statutes were not followed and the trial court cited to the "economy" as a basis to enter a very low child support amount for two boys based on these incomes. It was error for the trial court to strike father's income in violation of statutory mandates and ignore the father's other and real income, while also ignoring the mother's worksheets and the State's worksheets, CP 501. Increases support only to $760.98 is reversible error. Also, considering the financial declarations of the parties [Sheila's at CP 67-73; Fred's at CP 59-64] and past earning abilities, Mr. Skusek is in a much better position to pay attorney's fees. In fact, according to both of Mr. Skusek's financial declarations, he has paid nothing in attorney's fees to date. CP 64, 378. Ms. Sheila Skusek had incurred $4,792.90 through 12/2/08. CP 141. Mr. Skusek has been cashing in CDs, has many unexplained substantial deposits, while taking trips and vacations, including listing over $13,000 in liquid assets. CP 376. He also lists very few creditors. CP 378. Ms. Skusek has no liquid assets and has several creditors. CP 69-71. Therefore, she is not equally capable of paying her own attorney fees. The mother here has made a showing of financial need, while demonstrating the father's ability to pay.

In addition, a court may award attorney fees on the basis that one party's intransigence caused the other party to incur additional legal fees. Attorney fees based on intransigence have been awarded where a party engaged in obstruction and foot dragging or made the proceeding unduly difficult and costly. *In re Marriage of Bobbitt,* 135 Wn.App. 8, 30, 144 P.3d 306 (2006); *In re Marriage of Greenlee,* 65 Wn.App. 703, 708-09, 829 P.2d 1120 (1992).

In our case, there was substantial intransigence. Despite having a 2007 tax return dated 2/11/08, Ms. Skusek issued discovery requests to Mr. Skusek on or about March 14, 2008. CP 318-319. Mr. Skusek had in his possession at that time a 2007 tax return, but he refused to produce it until 4 days before the final hearing in December, 2008. CP 401-407. Mr. Skusek's responses to discovery were evasive and incomplete (CP 320-329), requiring his deposition. CP 266-317. When questioned about substantial deposits in his deposition, he mostly could not recall or explain these deposits, ranging from $14-15,000 to $27,000 and $35,000. Despite Mr. Skusek's obligation of providing verification of income that would not show up on W-2s or tax related documents, as required by RCW 26.19.071(2), Mr. Skusek did not provide such information and then tried to benefit from it by having his attorney say that there are not really any

side cash jobs to report on the worksheets. Again, it was father's responsibility to provide "[o]ther sufficient verification ... for income and deductions which do not appear on tax returns or paystubs." RCW 26.19.071(2). He failed to do so. The court should not then conclude that his "other income" is zero.

In our case, there was substantial intransigence. The trial court failed to rule on the matter either way. Mrs. Skusek supplied more than sufficient information of father's intransigence. CP 428-429. Mrs. Skusek's efforts to track down his income and information also was expensive, which she outlined prior to the rulings of the court, including documenting her then attorney's fees through December 2, 2008 of about $4,792.00. CP 141.

Intransigence includes foot dragging, obstruction, making unsubstantiated allegations that cause one party to incur unnecessary legal fees, discovery abuses, making trial unduly difficult, and unnecessarily increasing legal costs. *See In re Marriage of Burrill,* 113 Wn.App. 863, 873, 56 P.3d 993 (2002).

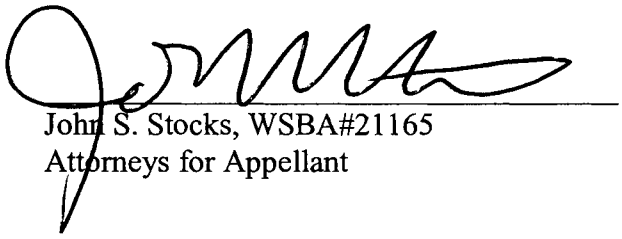
This Court should reverse with instructions for the trial court to award attorney's fees and costs to the mother, Sheila Herman, and should award fees and costs on this appeal.

VI. CONCLUSION

Upon review of this matter *de novo*, this Court should reverse and rule that child support should be $1,341.32 per month as proposed by the mother (CP 436-440), or at least $998.00 per month as proposed by the State (CP 443-447). This Court should direct entry of the appropriate worksheets with correct income figures and deductions. Finally, this Court should reverse the trial court and award attorney's fees and costs to the mother.

Respectfully submitted this of 27th day of April, 2009.

VAN SICLEN, STOCKS & FIRKINS



John S. Stocks, WSBA#21165
Attorneys for Appellant

I, Jacquie Ninnemann, declare under penalty of perjury of the laws of the State of Washington that the following statements are true and correct and based on personal knowledge:

I certify that I caused one copy of the foregoing Brief of Appellant to be served on the following parties of record and/or interest parties by ABC Legal Messenger to the following:

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COURT OF APPEALS
DIVISION II
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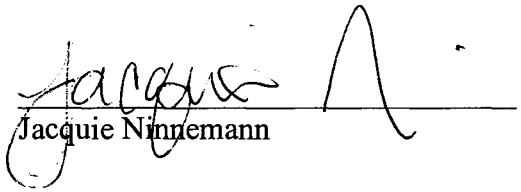
STATE OF WASHINGTON
BY _____
DEPUTY

DATED this 27th day of April, 2009 in Auburn, Washington.



Jacquie Ninnemann

Appendix I – RPI

Verbatim Transcript of Recorded Proceedings Before
Commissioner Edward Haarmann, December 8, 2008 (Pages 1-32)

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

In Re the Marriage of:	)	
	)	
FREDERICK SKUSEK,	)	
	)	Court of Appeals
Petitioner,	)	No. 38778-6-II
	)	
and	)	Pierce County No.
	)	97-3-01414-9
SHEILA M. SKUSEK NKA HERMAN,	)	
	)	
Respondent.	)	

VERBATIM TRANSCRIPT OF RECORDED PROCEEDINGS
BEFORE COMMISSIONER EDWARD HAARMANN
Monday, December 8, 2008

APPEARANCES

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License No. 2054

Copy to Client
Date: 3/12/09
DB

1 THE COURT: Next matter a Frederick Skusek
2 and Sheila Herman.
3 UNIDENTIFIED SPEAKER: Court want to take a
4 deep breath?
5 MS. KIRKPATRICK: Yes, Your Honor. Susan
6 Kirkpatrick for the State. John Stocks is here for his
7 client, the mother. Joe Lombino is here for his
8 client, the father. This is here for modification of
9 child support, Cause No. 97-3-01414-9. This was a
10 request by the mother from a 1998 Pierce County
11 dissolution action. There are two twins. They are now
12 15. They were five when the original order was
13 entered.
14 State is requesting that child support be $998 a
15 month, an upward modification from the original
16 $540.78. Mother's income was imputed by age: $2,051 a
17 month. She's a homemaker. I imputed father's income
18 from four different sources. He has a doctor's report
19 that he's limited in working his occupation as a brick
20 mason at full capacity, but he can do some work.
21 I used his gross actual salary for 2008, which was
22 $2,511 a month; his pension, $1,615 a, month. I did a
23 three-year average, 2005, 2006, 2007 from his tax
24 returns of his interest. That's $97 a month.
25 And then I imputed six jobs on the side at $1,000

1 apiece, which would make for $500 a month. He had said
2 in his interrogatories that he does do jobs on the side
3 that he's capable of doing. The last two examples he
4 gave was a patio and a tile job. One was in lieu of
5 staying at a home while he was on vacation. This was a
6 gross of $4,723. I used his taxes. Had a household 2
7 based on his 2007 tax return for a net of $3,993 a
8 month.
9 State's asking that child support start January
10 16, 2008, when the case was filed with an underpayment.
11 MR. STOCKS: I guess I'll go next. Who do
12 you -- okay. I'll go next. I'm the mother's attorney.
13 I think the Court has to choose between three work
14 sheets here, and I can tell you globally so you
15 understand the impact. Our work sheet is about $250
16 more than the State's, and their -- father's work sheet
17 is about $250 less than the State's. So I would
18 promote our work sheet for the following reasons.
19 One is in our work sheets we used a higher gross
20 monthly amount, because we looked at his last two
21 years' full income --
22 THE COURT: Yours is the 6,579? Is that
23 yours?
24 MR. STOCKS: Total, yes. And you notice ours
25 doesn't have the business income that the State has.

1 There's kind of a mixture here on the father's income,
2 and if the Court went with the -- what I would say is
3 the second best work sheet, the State, I think the
4 problem with theirs is the health care of $119 a month.
5 And that's probably the main thing I want to address.
6 Now, we put it in our work sheet because we
7 figured he could provide proof later. But I think at
8 this stage at this hearing when this case has been
9 sitting for 12 months that he had his opportunity to
10 prove that. And what he's done is he's provided a
11 printout from his work saying what it could cost or
12 what it would cost, but there's no proof that he has
13 made that payment in any way. I've looked at all his
14 pay stubs, and they're these handwritten pay stubs that
15 don't have any medical or dental or vision deduction.
16 And then these statements come from his son's business.
17 In my experience with this, the reason we give the
18 father -- in this case the father -- a benefit or a
19 credit is because he's shelling out this $119 a month.
20 We agree on the amount. It's $119. I just think
21 there's lack of proof before you.
22 So I think you have two decisions on that issue on
23 line 8A. Either give him the credit like both sides
24 may want here and require him to provide proof that
25 he's actually out of pocket that $119, or don't give

1 him the credit because he failed to meet his burden of
2 proof there.
3 The rest of the issues I think -- that I think the
4 father is going to dispute is his -- oh, I wanted
5 to -- wanted to object to his work sheet or attack it,
6 so to speak, because I think it's the worst of the
7 three. He put $1,600 a month for his gross income and
8 multiplied it by 12. That's less than $20,000 a year.
9 His year to date through September is over $22,000. So
10 I don't know where his attorney or him -- or he comes
11 up with this $1,664 for his gross income. I can't
12 figure it out. I multiply it by 12. I divide
13 things -- it's just -- the work sheet has a problem.
14 He also mixes a gross and a net retirement amount
15 in the gross column of his work sheets. And so we have
16 no way of deciding which one to take taxes out of. So
17 that number should be rejected. In other words, he put
18 $1532 under his other income for his retirement. And
19 it's -- it's clearly $1,615. He states that in his
20 interrogatory answers that we attached, the gross
21 amounts, and his deposition. And he admits that the
22 one pension is a net amount of $1,199. It's gross
23 1,252 plus the $333.
24 He also doesn't include interest income and he
25 doesn't say anything about his cash jobs. From the

1 legal standpoint on the cash jobs, I think for the
2 father here to justify not counting that, he would need
3 to show us two calendar years under the statute to say
4 this is not recurring. Instead he just writes a
5 declaration, which is late, saying, Well, it's not
6 recurring, so I'm not really going to tell anybody
7 really much about it. Except in deposition one was
8 $1,200 six months ago and another one was a -- I guess
9 a barter situation. But that's insufficient for the
10 Court to say it's nonrecurring. The statute requires
11 24 years [sic]. So the Court can look at these cash
12 jobs and decide are those recurring or not recurring
13 over the last two years.
14 We did request attorney fees in this case because
15 I think there's a need on my client's part. She has
16 income imputed to her. She does have a husband and a
17 house, and I think this new husband has filled in some
18 of the gaps where things haven't been paid. One of the
19 cases that he mentioned how there's -- a particular
20 person got a break because he's paying 25 a month for
21 two and a half years. I think similarly, although not
22 a bigger break, Mr. Skusek here has had a break because
23 for ten years he's paid $540 a month, and there's a
24 dispute about whether he's paid some extra here or
25 there for extracurricular. But he's paid $540 a month

1 for children that went from age 5 to 15 during years
2 where he's making $70- -- $65,000 a year, according to
3 his employment records.
4 Now, we're not asking you to go back and
5 retroactively impute, you know, back child support
6 here. We're not. We're asking January 16th forward,
7 which, by the way, both parties admitted in their
8 response to the petition that that should be the
9 effective starting date. So I don't think that should
10 be an issue today.
11 But some of the intransigents includes not
12 providing all the records so we can see the entire
13 picture of Mr. Skusek. This is a person who's 57 who
14 may have some injuries that limits his work, but he's
15 certainly still living a lifestyle and spending money
16 that suggests he has enough income to pay a higher
17 child support amount.
18 We do not believe there's been a request for an
19 incremental increase. I may not have understood
20 counsel's comment underpayment.
21 MS. KIRKPATRICK: Oh, I'm asking that it
22 start last January. Therefore, since $998 --
23 MR. STOCKS: Okay.
24 MS. KIRKPATRICK: -- is more than the
25 $541 --

1 MR. STOCKS: Um-hmm.
2 MS. KIRKPATRICK: -- that that creates an
3 underpayment so that he would owe more money.
4 MR. STOCKS: Okay. I follow you. I thought
5 maybe the State was asking for an incremental
6 increase --
7 MS. KIRKPATRICK: No. No.
8 MR. STOCKS: -- and I don't think anyone has,
9 so --
10 THE COURT: All right.
11 MR. STOCKS: That's all I have.
12 THE COURT: Mr. Stocks, let me ask you.
13 Maybe I misunderstood you when you started. I thought
14 you said the State has these figures, and there are
15 three work sheets -- the State's work sheet, your work
16 sheet, the father's work sheet -- and that your work
17 sheet was about $250 over the State's, and father's was
18 about $250 under.
19 MR. STOCKS: That's what I think it is, yeah.
20 THE COURT: Okay. Well, I'm looking -- and
21 maybe I -- I'm looking at the State's, which says a
22 gross to the father of $4,723, and you have a gross to
23 the father of $6,579.
24 MR. STOCKS: Correct.
25 THE COURT: That's almost $1900 a month --

1 MR. STOCKS: Yeah. The difference is in line
2 1A.
3 MS. KIRKPATRICK: Your Honor, I think what he
4 was saying was -- it's a difference of about $250 --
5 THE COURT: In the child support.
6 MS. KIRKPATRICK: -- in the -- in the
7 transfer payment.
8 MR. STOCKS: Right.
9 THE COURT: Okay. All right.
10 MR. STOCKS: Sorry about that. The transfer.
11 She knew what I was saying. I didn't know what I was
12 saying.
13 THE COURT: All right. Mr. Lombino?
14 MR. STOCKS: Thank you.
15 MR. LOMBINO: Thanks. Before I start, Your
16 Honor, it's about 2:30. Does the Court have any
17 questions at all. Any -- any place you want me to
18 focus in on, because there's -- unfortunately, there's
19 a few things to -- make sure that to -- to get across
20 to this Court.
21 THE COURT: Go ahead.
22 MR. LOMBINO: All right. Briefly I'm going
23 to set the stage here. You've got somebody that's paid
24 his support every time on time like clockwork. Not
25 just the child support, the day care, extracurricular

1 expenses. Any time she needed some more money, we
2 would write a check out for her. He voluntarily
3 increased his child support by $125 a month going back
4 to -- I think it was 2000, 2001. So the point here,
5 Your Honor -- I want to really kind of set the
6 statement and make sure the Court understands what kind
7 of guy we're talking about here. He's a straight-up
8 guy. He's taken care of his kids. He has a great
9 relationship not just with these two kids, but all four
10 of his kids. He has two others that are older, past
11 the age of 18, emancipated.
12 Number two, and this is where I want to really
13 kind of focus in, because I think between the State and
14 Ms. Herman, Mr. Stocks' client, there's a massive
15 misunderstanding of what's going on with my client.
16 And I'm going to start -- I'm going to kill two birds
17 with one stone.
18 If the Court can turn to subsection 3 of the
19 work -- of our working copies, which is our work
20 sheets, counsel brings up a good point. You know,
21 what -- what's the father doing with his -- his work
22 sheets? Very simply this: The 1 -- this is on his
23 work sheets. Where it says wages and salaries in
24 parentheses -- this is in 1A -- this is his net. It's
25 not his gross. It's his net. We delineate that. I'm

1 sure it's inadvertent. Counsel probably just didn't
2 see that.
3 Net to the father, $1,664. Those are the same
4 calculations used by the State. We have no problem
5 with that, because basically what we have are income
6 statements from the bookkeeper of the company where my
7 client works. Clearly sets it out. I mean, it's black
8 and white. I mean, there's no question about that.
9 There's no question. And the State got it right. The
10 State used the gross number. I just divided the net
11 number. Either way, we get to the same place. The
12 State used the right numbers on that.
13 The problem I have with Ms. Herman's is
14 that -- her calculation is -- what she's saying to this
15 Court is, Well, let's ignore his income, his current
16 income. Let's take his last three years and average it
17 out. And, you know, it's not a bad argument, because
18 my client has been in construction for the last 38
19 years and, you know, the way that -- it fluctuates.
20 Even though we're not -- the economy is in the toilet
21 right now, that might be a way to do it.
22 But why can't we do it here? For this reason. In
23 July of 2007, my client retired. My client retired for
24 medical reasons as substantiated through medical
25 documentation that's been provided to this Court.

1 There's no secrets here. There's no hidden ball.
2 There's no cloak and dagger. There's no smoke and
3 mirrors. My client's worked very, very hard for the
4 past 38 years. He's a brick mason.
5 I don't know how else to do this except on the
6 record. The records reflect that when you're a
7 commercial brick mason you pick up these blocks.
8 They're supposedly split-face blocks. They're heavy.
9 And, you know, for somebody who's 25, 30 years old, not
10 a big deal. My client's 57 years old. It's a big deal
11 now.
12 And the reason it's a big deal, because his thumbs
13 no longer work. And I'm going to spend a little bit of
14 time on this because it's important why he retired.
15 And, incidentally -- and I want this made very, very
16 clear -- when he retired it was before he knew anything
17 about this modification action, anything. He retired
18 when the doctor said you can't do it anymore because of
19 x-rays and what the examination is.
20 And I'm quoting from his report, and this is in
21 the sealed medical report: He, being Mr. Skusek, has
22 marked hyperextensibility -- extensibility about the
23 bilateral thumb AT joints and marked loss of motion
24 about the bilateral CMC joints. He has swelling about
25 the bilateral CMC joints. There is significant

1 tenderness to palpitation [sic] about the bilateral CMC
2 joints and the markedly positive thumb grind tests
3 bilaterally. The x-ray findings, objective findings,
4 show on the right they do demonstrate severe CMC
5 anthropathy [sic]. Left shows significant CMC
6 anthropathy. The diagnosis, significant bilateral CMC
7 anthropathy.
8 And then he talks a little bit about the
9 narrative, and I think this is important.
10 Fred is still trying to use his hands in fairly
11 vigorous work. The only option that I would have for
12 him would be CMC fusions, although that would be very
13 disabling. This is particularly due to the fact that
14 his MP joints hyperextend so -- so much, and at some
15 point those may need to be fused. I would strongly
16 recommend against the CMC fusion, as I really do not
17 think that it's in his best interest to continue
18 working in the position such as brick mason.
19 While he may now be doing that part time, I
20 certainly do not think he should be getting back into
21 that as full-time occupation, as the thumb simply will
22 not tolerate that. Once he can entirely stop that
23 aggressive type of work, then a soft-tissue suspension
24 anthroplasty [sic] like a volar beak ligament
25 reconstruction as well as a volar plate reconstruction

1 at the level of the MP joint would likely provide
2 excellent relief of his symptom -- symptoms.
3 He can't even get the help he needs right now
4 because he's still in that line of work. The thing is,
5 he can't be full time, because as he explains in his
6 declaration, full-time work requires being in the
7 union. Union work requires this type of the use of
8 these blocks. He can't do that. He can't do it. So
9 he retired in 2007, again, before this modification was
10 entered.
11 My client really lucked out there. He really
12 lucked out. Because in addition to his pension, his
13 son, who is a brick mason and owns Skusek Masonry,
14 said, You know, dad, I think I can use you. Albeit on
15 a part-time basis, I think I can use you. And I'll pay
16 you 40 bucks an hour to do it. What other job is going
17 to pay $40 an hour?
18 So he takes that job, and he's very careful at
19 what he does. He doesn't work all the time, obviously,
20 because -- well, everybody reads the paper. The
21 industry is going down. It's difficult. He's good at
22 what he does. He's good at what he does, and his son
23 is good, so they're going to have some work. But the
24 point is, his income is what it is. There's no smoke
25 and mirrors here. There's no reason to average back

1 during years when he worked full time before he
2 retired. That's nonsensical. It doesn't make sense to
3 do that. The State got it right as to what his
4 earnings are.
5 Now, where the State got it wrong is they -- with
6 all due respect to counsel, what they did was they took
7 the average interest income from CDs and his
8 investments. And, again, under normal circumstance, no
9 problem. But what has he done? During the last year,
10 year and a half since he's retired, he's run into some
11 money problems. His financial declaration shows
12 expenses that exceed his income. His income is clearly
13 $3,171 a month. That's -- that's it. That's what he
14 has: $3,171 a month net.
15 Well, his expenses have been running higher. So
16 how is he supplementing? He has sold everything under
17 the sun that belongs to him. He's cashed in his CDs;
18 he's sold some real property that he owned. And this
19 is all in his declaration. He sold an ATV. He's got
20 money from his dad. The biggest thing he's done is
21 cashed in his CDs.
22 So while the State is absolutely right, there used
23 to be an interest income, not anymore. Not anymore.
24 He's got about $3,500 to his name at this point.
25 That's it. That's it. He's got a Corvette up for sale

1 right now, but there's about the same amount owing as
2 what the thing is worth, so that's not going to provide
3 him a whole lot of cash. But it will get rid of the
4 obligation, and that's going to be important for him.
5 But that's what he's been doing. That explains a
6 lot of the -- these deposits. I mean, that it
7 was -- the sale of that -- he had a timeshare that sold
8 in March of 2008 for about $12,000. That's like, man,
9 from heaven when he has net income of $3,171.
10 Now, I'm going to talk a little bit more about
11 the -- the medical insurance. Does the Court have any
12 questions for me about the income before we move on?
13 Okay.
14 I'd like to talk about the medical insurance.
15 THE COURT: Well, you want to talk -- okay.
16 Go ahead. Go ahead. I was going to go on. Do you
17 have any evidence that he is paying medical insurance?
18 MR. LOMBINO: I was just going to talk about
19 that. Yes. Yes, we do. In fact, the State was able
20 to get that right from the get-go. When they filed,
21 they actually filed in their sealed financial source
22 documents the evidence -- and it's in the sealed
23 financial source documents. I'm getting it right now.
24 Mr. Skusek provided it to the State and the State filed
25 it.

1 The reason it doesn't show up -- oh, here it is.
2 It's in subsection 4 of the work sheets. The reason
3 why it doesn't show up in the work sheets -- and
4 counsel is correct. Mr. Stocks is right. It's not a
5 deduction from the company where he works. It's not an
6 employment benefit. He doesn't have it. He works part
7 time. He doesn't get medical. He gets it through the
8 union, through Masonry Security Plan of Washington. He
9 pays a total of $500. It's in the sealed financial
10 source document, subsection 4.
11 Now, where counsel was absolutely right -- he
12 said, You know, Joe -- he goes, I don't have anything
13 that shows just the kids. We have it in my client's
14 declaration. He says, I pay $120 for my kids, and the
15 rest I've got to pay for myself, a total of $500 bucks,
16 $499.
17 Well, what we did was we supplied that. We
18 supplied that. And that's in the sealed financial as
19 well, and I'm going to direct the Court's attention to,
20 again, subsection -- it's the supplemental --
21 subsection 5 of the work sheets that shows, again, to
22 the Masonry Security Plan of Washington, her child,
23 it's about 60 -- or $59.45 a month. That's what he
24 pays. He pays it not -- again, I have to emphasize
25 this. It's not through his employment. It's through

1 the Masonry Security Plan of Washington. That's what
2 he pays. And so we've been giving -- we've given him a
3 credit for the $120.
4 I don't know what else we can do to show that.
5 THE COURT: How does he pay it?
6 MR. LOMBINO: I believe it comes out of your
7 checking account, doesn't it?
8 MR. STOCKS: Well, we would object to that,
9 Your Honor. That's not -- that's not before you.
10 THE COURT: Is there -- is there copies
11 of --
12 MR. STOCKS: No.
13 THE COURT: -- checking account?
14 MR. STOCKS: That was one of our complaints
15 from the get-go.
16 MR. LOMBINO: We have --
17 MR. STOCKS: We stipulate that that's the
18 amount. We need proof -- and that's why my suggestion
19 is either give him the credit and he needs to prove it
20 later or don't give him the credit because he didn't
21 prove it. And I think today is the day he had to prove
22 it, not counsel asking him a question: Does it come
23 out of your checking? Well, provide proof of that.
24 We've had 12 months.
25 MR. LOMBINO: I -- I don't know what else to

1 do other than to show the Court as the amount that he
2 pays or total. And then the amount -- the breakdown.
3 And, again, I'm going to refer the Court to
4 Exhibit -- or Subsection No. 5 of our work copies.
5 It's right there. It's right there.
6 MR. STOCKS: That doesn't show payment,
7 though, Counsel. That's, I think, the Court's
8 question.
9 THE COURT: That shows -- that --
10 MR. STOCKS: Where's the canceled check?
11 THE COURT: -- that shows the cost. If
12 someone had to -- well, normally you show payment by a
13 receipt, by a copy of a check, by some -- if it's an
14 automatic withdrawal, something with a bank statement
15 showing that that's an automatic withdrawal.
16 MR. LOMBINO: Well, we have bank statements
17 here. We have bank statements. So I can go through, I
18 would imagine --
19 THE COURT: Does counsel have a copy of them?
20 MR. LOMBINO: Yeah. He's the one that
21 provided them to me.
22 MR. STOCKS: I have bank statements, not
23 recent ones, and I didn't see any minus $49- --
24 THE COURT: Well, can you show something in
25 the bank statements?

1 MR. LOMBINO: We'll do that. Actually, we
2 can --
3 Why don't you look through those right now while I
4 make my other argument.
5 All right. The other issue that I want to present
6 to the Court, and this is something that was completely
7 left off the State and Ms. Herman's work sheets, and
8 that is the fact that my client incurs long distance
9 transportation expenses in respect to his visitation.
10 He has -- he has 100 percent responsibility of
11 providing transportation for the kids. And I'm going
12 to get to my client's declaration information.
13 THE COURT: Did your -- did your client file
14 a 2007 tax return?
15 MR. LOMBINO: Yes, he did. 2005, 2006, 2007.
16 And all of those documents are filed with the Court,
17 and we provided those work sheets. It would be in our
18 sealed financial source documents.
19 May I go on?
20 THE COURT: Go ahead.
21 MR. LOMBINO: And far as the travel expenses,
22 he sees the boys two weekends a month. He provides 100
23 percent of the transportation. This is undisputed.
24 THE COURT: Where do the children reside?
25 MR. LOMBINO: Fall City, King County,

1 Washington. Fall City, King County. My client lives
2 in Pierce County. The total mileage involved is 204
3 miles. That's 52 miles each way. He drives a 1999
4 Ford F-250. It gets approximately 12 miles to the
5 gallon. What we simply did was we took the standard
6 mileage that is applicable for -- if you were to do an
7 expense report, and it's at 45 cent a miles. That
8 comes to $91.80 a month. There's no dispute that my
9 client provides all the transportation. There's no
10 dispute that there is an expense. The only question is
11 what standard do you want to use.
12 Now, if you want to take 12 miles a gallon, I
13 submit it's going to be higher than $91.80 a month.
14 That is the figure we're asking this Court to use.
15 Now, as far as proof before the Court, I'll direct
16 the Court's attention --
17 THE COURT: Mr. Lombino, let me ask you, when
18 does visitation consist of regular visitation as
19 opposed to long distance visitation? Is it 15 miles?
20 20 miles? 30 miles? I mean, if somebody lived in
21 Pierce County and, let's say, that they lived in
22 Eatonville, the father or the mother, and the other
23 side lived in Lake Bay --
24 MR. LOMBINO: That's a very good -- that's a
25 very good question. Where do you draw the line? If

1 somebody lives in Portland and Tacoma, do you -- do you
2 do it then? Probably. What about Chehalis? What
3 about Lake Bay, right? Where you draw that line?
4 And I submit to Your Honor, you don't. You don't
5 draw it. Because why -- what do we see in 89 -- or 95
6 percent of the parenting plans? It's shared. If they
7 lived in Oshkosh, Wisconsin, but they were sharing
8 transportation, zero credit, zero. Wouldn't apply.
9 The fact -- where it comes into play is when one parent
10 is responsible for 100 percent, and that's when we have
11 to start taking a look at, well, how far is it.
12 Now, there is no case law that is directly on
13 point as to what is -- how much is too far. The reason
14 we don't see it, like I say, is because most of the
15 time it's shared. But I suspect, Your Honor, there's
16 nothing in the statute that limits it. So you could
17 literally have something where it is -- somebody lives
18 in Fircrest, Washington, and they are driving to
19 Spanaway. But if it's 100 percent, there's nothing
20 provided -- preventing then from claiming that credit.
21 Now, would you, as a practical matter? No,
22 because it would be insignificant as far as the big
23 picture goes. But when we're talking Fall City,
24 Washington, in King County, over 200 miles in a given
25 month, then I think it becomes applicable.

1 Now, as far as health care insurance, you -- the
2 Court wanted to see proof. Proof is set forth in
3 subsection 7 of the work sheet. And this is -- these
4 are records that were provided by Mr. Skusek that
5 counsel has -- and I think counsel submitted them as
6 well. This is the August 4, 2008, paycheck, Check
7 No. 2743. A withdrawal of $499.90 exactly to the penny
8 as to what he pays in monthly health care expense for
9 him and his two children.
10 MR. STOCKS: Are there any other months?
11 MS. KIRKPATRICK: Your Honor, if I could
12 interject. I found the same payment in July and in
13 June on his bank statements. And I'm looking quickly
14 at May. And in May.
15 THE COURT: All right, Mr. Stocks, it looks
16 like you lose that argument.
17 MR. STOCKS: Okay. I just need to see it,
18 then. I don't have it in my records, but that's --
19 MS. KIRKPATRICK: You want to --
20 MR. STOCKS: -- but that's fine.
21 THE COURT: Oh, you don't have it? I
22 thought --
23 MS. KIRKPATRICK: No. You must have it,
24 because I have it.
25 MR. STOCKS: Was it submitted per this

1 hearing, or was it submitted at the beginning?
2 MS. KIRKPATRICK: It was submitted --
3 MR. STOCKS: Well, anyway, I wasn't --
4 MS. KIRKPATRICK: -- last week.
5 MR. STOCKS: That's fine. I understand the
6 Court's position. I'll -- I'll get it later.
7 MR. LOMBINO: The single most important --
8 that -- and I'm not -- if the Court has any questions
9 that I need to truly emphasize here --
10 MR. STOCKS: I have one quick question. Is
11 there -- is there some time limit? Because we're -- if
12 I respond to all of this --
13 THE COURT: Yes.
14 MR. STOCKS: -- we're going to be here until
15 4:30.
16 THE COURT: No. We're going to cut it off
17 real quick.
18 MR. STOCKS: Okay.
19 MR. LOMBINO: There's no --
20 THE COURT: Two minutes to respond.
21 MR. LOMBINO: There's no question at all that
22 my client has a medical condition. That has not been
23 contradicted. There hasn't been any -- some sort of
24 independent medical examination or anything to
25 challenge this. There is no smoke and mirrors here.

1 He earns what he earns. It's set forth in his work
2 sheets. We could -- we could have settled this case
3 way back when, but Ms. Herman really wanted to see what
4 there was out there, maybe more money.
5 Now, one last issue that I have to cover is the
6 side income issue. This is the other thing where
7 respectfully I disagree with the State. They've
8 imputed income on side jobs. The statute's clear. You
9 have to have recurring income for you to do anything
10 with that, to apply that income. You have to find
11 that. The Court has to say based on the evidence
12 there's recurring income and we're going to include
13 that. What do we have here? We have nothing but
14 speculation. My client admits that, what, six, seven
15 months ago he had a side job. He also states that they
16 are few and far between and that he doesn't do them
17 because, A, his medical condition, and, B, the economy.
18 What number do we use, unless we completely,
19 totally guess. That's the only way to impute income on
20 these side jobs. They don't -- they don't exist. He
21 has worked some in the past, but that's where it was.
22 Is it -- is it regular? No. There -- there's not even
23 evidence of anything like that. What we have is
24 nothing more than speculation.
25 So in conclusion, no side job income, so we can't

1 impute. He earns income from Skusek Masonry, which is
2 set forth, and no interest income, because there is no
3 more -- no more CDs, no more investments.
4 THE COURT: All right. You've got the last
5 shot, Mr. Stocks, for two more minutes, three more
6 minutes at the most.
7 MR. STOCKS: Your Honor, here's the problem.
8 Counsel has misstated the statute. You don't -- it's
9 not our burden to prove that he has regular, recurring
10 side jobs. It's his burden to come forward with that
11 information, and he failed to do it. He has to put
12 before you 24 months, two calendar -- two calendars of
13 here's my side jobs and here's what I earned and then
14 ask you to conclude it's not recurring. He can't say,
15 well, it's few and far between and I'm just going to
16 leave it at that and not report it, not pay taxes on
17 it, not tell everybody about it and then say, look,
18 there's not enough proof that I have these side jobs.
19 That's insufficient under the statute, and counsel
20 has misstated the statute. The burden is on him to
21 show it's nonrecurring. And you can't meet that burden
22 by not producing the records and saying there aren't
23 records of my side jobs. I think those side jobs have
24 to be included, and counsel's stated there's some
25 testimony that he doesn't do them because of his

1 medical condition. I either missed that or that's not
2 in any deposition that I recall or any declaration
3 that --
4 MR. LOMBINO: It is.
5 MR. STOCKS: -- he doesn't do side jobs. I
6 mean, he's doing tile work. And there's nothing in the
7 medical records saying he can't these tile work or side
8 jobs. He did one six months ago. I think that income
9 has to be included.
10 The transportation issue is in dispute because we
11 don't have before you a record of what transportation
12 he does provide. My client says he doesn't always
13 exercise his visitation. He's gone sometimes for a
14 month on vacations like he was recently. And -- and
15 that's an issue that was -- if that was an issue
16 before, you know, in the prior work sheets there was no
17 transportation issue.
18 And I think what's important here is
19 Mr. Skusek -- you know, some might say he's a standup
20 guy because he's timely paid his child support. But
21 there's also dispute about this extra child support
22 that he claims he wants some sort of credit for. And,
23 again, we can't go backwards, so it's almost
24 irrelevant, but it goes to the issue of whether this
25 person has been supporting these two 15-year-olds. The

1 amount he's been paying for ten years is based on
2 five-year-olds. These two twin boys that have grown up
3 now to be 15. My client could have filed earlier when
4 his income was different.
5 The last issue -- I know there's limited time --
6 is this -- this number 12.7. I looked at his average
7 week -- work week and divided it by 38 weeks. He
8 worked 12.7 hours a week by average. This isn't a
9 person who is, you know, increas- -- that was in the
10 year 2008 after he knew of this action. So counsel's
11 comments that, well, he retired before he knew about
12 this action, those don't carry much weight or shouldn't
13 because his actions in 2008 are what resulted in 12.7
14 hours of work. The Court should include these numbers.
15 I agree with the medical health insurance credit,
16 but I don't think he should get a long distance
17 transportation credit. Thank you.
18 MS. KIRKPATRICK: Your Honor, very quickly
19 from the State, the net income that we end up with and
20 the net income that the father ends up with are
21 different by $128. I think he's overestimating his
22 taxes. He took what was actually taken out of his
23 paycheck, which is probably at single with zero
24 exemptions or single with one exemption, because when
25 you run it, I mean, head of household. I don't know

1 what he does at work. And last year on his tax return,
2 he got a large refund. So I think the State's figures
3 of doing it by gross and then taking taxes out are more
4 accurate.
5 And as far as the jobs on the side, in his
6 interrogatory, he said he could -- he was only doing
7 jobs he could do. And maybe you think six jobs a year
8 is too many based on the economy or his health at this
9 point, but I think that some income should be imputed
10 to him, because he does admit that he does side jobs
11 sometimes.
12 THE COURT: All right. What I'm going to do
13 is give him the health care credit. I'm going to adopt
14 the figures that State has set forth. I'm not going to
15 give him the transportation expenses. And that's going
16 to be the order of the Court.
17 MR. LOMBINO: Your Honor, given the fact
18 that -- this is going to be starting when?
19 MS. KIRKPATRICK: Last January.
20 MR. LOMBINO: Your Honor, there's going to be
21 a -- a pretty large arrearage, and this does exceed by
22 30 percent. I'm asking the Court for an incremental
23 increase.
24 MR. STOCKS: That request wasn't made as an
25 affirmative request for relief in the response to

1 petition. I could have briefed it and addressed it.
2 His answer to the petition said I admit this should
3 start January 16, 2008. Don't forget this could have
4 been adjusted in 2000, 2002, 2004, 2006. So by virtue
5 of the history of this case, he's gotten an incremental
6 increase. He hasn't had to pay those increased amounts
7 in years when he made $60- and $70,000.
8 THE COURT: I'm going to deny the request for
9 an incremental increase.
10 MR. LOMBINO: Thank you, Your Honor.
11 MR. STOCKS: Thank you.
12 MS. KIRKPATRICK: Do you want to see those
13 figures real quickly?
14 MR. STOCKS: Did you hand up the order?
15 MS. KIRKPATRICK: Oh, yes, I already handed
16 up the order, yeah. See, there -- that was May --
17 MR. STOCKS: So you've got May, June, July,
18 August.
19 MS. KIRKPATRICK: June, July, August.
20 MR. STOCKS: What about January, February,
21 March, April, May? Do you know?
22 MS. KIRKPATRICK: Well, I don't know where
23 those --
24 MR. STOCKS: We don't have those? Okay.
25 MS. KIRKPATRICK: -- bank statements are.

1 THE COURT: Do you have a proposed order,
2 Counsel?
3 THE CLERK: We do, Your Honor.
4 (End of recorded proceedings.)
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1 CERTIFICATE
2
3 I, KYLIE HAMMINGTON, a Certified Court Reporter in
4 and for King County, Washington, do hereby certify that I
5 reported in machine shorthand the foregoing verbatim
6 transcript of recorded proceedings in the above-entitled
7 cause; that the foregoing transcript was prepared under my
8 personal supervision and constitutes a true record of the
9 recorded proceedings to the best of my ability.
10 I further certify that I am not an attorney or
11 counsel for the parties, nor a relative or employee of any
12 attorney or counsel connected with the action, nor
13 financially interested in the action.
14
15 DATED this 5th day of March, 2009.
16
17 _____
Kylie Hammington, CCR, RPR
18 Certified Court Reporter
19 License No. 2054
20
21
22
23
24 Kylie Hammington, CCR, RPR
James, Sanderson & Lowers
25 307 29th Street NE, Suite 101
Puyallup, Washington 98372

Appendix II – RPII

Verbatim Report of Proceedings Before The Honorable Katherine M. Stolz, January 9, 2009 (pages 1-15).

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

In re the Marriage of:	)	
	)	
FREDERICK SKUSEK,	)	Superior Court
	)	No. 97-3-01414-9
Petitioner,	)	
	)	Court of Appeals
and	)	No. 38778-6-II
	)	
SHEILA M. SKUSEK, n/k/a	)	
HERMAN,	)	
	)	COPY
Respondent.	)	

VERBATIM REPORT OF PROCEEDINGS

Friday, January 9, 2009
Before The Honorable Katherine M. Stolz
Tacoma, Washington

<<<<<< >>>>>>

A P P E A R A N C E S

For the Petitioner: JOSEPH J.M. LOMBINO
Attorney at Law

For the Respondent: JOHN S. STOCKS
Attorney at Law

For the State: SUSAN KIRKPATRICK
Attorney at Law

Reported by: Kimberly A. O'Neill, CCR
License No. 1954

CC:C 3/11/09 DB

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2 Proceedings of January 9, 2009

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1 BE IT REMEMBERED that on Friday, the 9th
2 day of January, 2009, the above-captioned cause
3 came on duly for hearing before THE HONORABLE
4 KATHERINE M. STOLZ, Judge of the Superior Court in
5 and for the county of Pierce, state of Washington;
6 the following proceedings were had, to wit:
7
8 <<<<<< >>>>>>
9
10 THE COURT: All right. The next matter is
11 No. 1, which is Herman vs. Skusek, child support
12 modification; and this is Cause No. 97-3-01414-9.
13 The parties are before the Court for a motion to
14 revise.
15 PETITIONER'S ORAL ARGUMENT
16 MR. LOMBINO: Good morning, Your Honor.
17 For the record, my name is Joe Lombino, attorney
18 of record for the Petitioner, Fred Skusek; and
19 this matter comes before the Court on a motion for
20 revision.
21 Ms. Kirkpatrick is to my left, representing
22 the State. Mr. Stocks, to her left, is
23 representing -- is private counsel for Sheila
24 Skusek.
25 THE COURT: All right.

1 MR. LOMBINO: You have a long docket. I'm
2 just going to hit the high points here.
3 THE COURT: I did review the materials.
4 MR. LOMBINO: Okay. We think that there is
5 a mistake on the income, Your Honor, specifically
6 the addition of the $97 a month dividend interest
7 income.
8 THE COURT: Would you raise your voice a
9 little bit.
10 MR. LOMBINO: Yes.
11 THE COURT: Thank you.
12 MR. LOMBINO: Yes.
13 THE COURT: You're getting a little harder
14 to hear.
15 MR. LOMBINO: Okay. The dividend income of
16 $97 a month, Your Honor, we think that that's
17 wrong because -- the State's absolutely correct.
18 In the past, he did have dividend interest. The
19 problem is with the economy tanking the last few
20 years, he's going down to part-time employment.
21 He sold -- he's had to sell and cash in all his
22 investment CDs and his personal property. He no
23 longer has dividend income because he no longer
24 has assets.
25 Number two, on the imputation of income for

1 these side jobs, there is no evidence that he
2 earns $500 a month on side jobs. There's nothing
3 in the record that suggests that.
4 Number two, even if there is -- somehow he
5 could, the market doesn't have it right now; but
6 even if the market did allow for it, his health
7 condition is -- I don't know if you read the
8 deterioration in his hands from the doctors, so he
9 doesn't have that income. The bottom line income
10 from him should have been $3,171. That takes into
11 account his part-time income for his job as a
12 part-time bricklayer and his pensions.
13 Number two, the transfer payment,
14 respectfully, should have been $761.
15 Number three, the start date should have
16 been December of 2008. Mr. Skusek did everything
17 he was supposed to have done when he filed his
18 response. He did it on a pro se basis, initially.
19 As soon as he got served from the State 20 days
20 later, he got -- he filed all the documents he was
21 supposed to file. It was, actually, ready for a
22 hearing right then; but it didn't get noted until
23 December, some ten, eleven months later; and I
24 think it's a little bit unfair for Mr. Skusek to
25 have to go back and all of a sudden, now, have

1 this large judgment in addition to a huge,
2 increased child support obligation or, at the
3 least, even if we went back to January of 2008, at
4 least to make the incremental increase because we
5 showed that it was a tremendous financial
6 hardship.
7 Lastly, the long distance transportation
8 expenses, it's provided for in the statute. The
9 Commissioner really didn't give a reason why as to
10 deny it, but it's clear. I mean, it's set forth
11 in the declaration as far as what the credit
12 should have been; so like I said, I know the Court
13 has read, in particular, the medical report.
14 We're asking that support be made at $761,
15 commencing December of 2008. Thank you.
16 THE COURT: Who wishes to go first,
17 Mr. Stocks or the State? The State?
18 MS. KIRKPATRICK: The State.
19 THE STATE'S ORAL ARGUMENT
20 MS. KIRKPATRICK: The State's position is
21 that the Court didn't abuse its discretion in
22 picking out the $998 and using historical
23 interest. I did a three-year average; and then,
24 historically, he said he had side jobs; and these
25 were side jobs he said he was capable of doing in

1 his deposition, not jobs based on what he can't
2 do.
3 Now, it could be that maybe it should have
4 been imputed at fewer side jobs; but he said he,
5 historically, did some side jobs; and so the State
6 believes he should be imputed some side jobs.
7 THE COURT: Okay. Mr. Stocks?
8 RESPONDENT'S ORAL ARGUMENT
9 MR. STOCKS: Yes, I represent Sheila
10 Herman, who is here in the courtroom. Just to hit
11 the main points, too, I think, first of all, the
12 Court should deny a revision. There's been a new
13 argument today that the starting date should, now,
14 change. The argument on revision, I thought, was:
15 There should be an incremental increase. The
16 Court should know, procedurally, that's a problem
17 because Mr. Skusek admitted in his response
18 petition that the starting date should be January
19 2008. We got no notice from a due process
20 standpoint that his attorney would say in rebuttal
21 argument, well, let's -- now that the numbers have
22 gone up, let's do either an incremental increase
23 or a new starting date.
24 Procedurally, that was set well in advance;
25 and I think from a statutory standpoint, and I'm

1 speaking of RCW 26.09.170.9(c), which is the
2 incremental increase provision, there must be a
3 finding not only that there was a thirty percent
4 increase but that the change would cause
5 significant hardship to the father; and we don't
6 have that here. We don't have a significant
7 hardship, particularly when the support hasn't
8 been changed for ten years.
9 I think it's time for Mr. Skusek to,
10 somewhat, cash in his luck or his good timing
11 because nobody is going back and saying look at
12 all these years. You made $75,000 and $60,000 and
13 $45,000 a year. It happens to be when the mother
14 filed for modification. Ten years after the
15 original amount, you know, his income is way down;
16 and his retirement income is included in there.
17 So I think, first of all, the Court should
18 keep the starting date in January. He was well
19 aware of this in advance. The business income
20 should stay in; and it could even be higher
21 because the burden of proof was on Mr. Skusek.
22 The statute, 26.190.75(1)(b), is, essentially, a
23 statute saying if someone wants to claim an income
24 is nonrecurring, then that person needs to come
25 forward with 24 months, two calendar years, of

1 that income, so the Court can assess whether it's
2 nonrecurring; and here, he didn't do that. What
3 he did is say, "Oh, I've done some cash jobs."
4 And we took his deposition, which isn't
5 normal in a modification case, to try and nail
6 some of this down, but he couldn't recall the
7 number of jobs and how much they were; and it was
8 his obligation to produce those records and
9 two-year records, so we could assess that. I
10 think the interest income is such a small amount,
11 it probably changes child support two or three
12 dollars a month; but historically, this is a
13 person who deposited over $111,000 in unexplained
14 deposits over a three-year period that were never
15 explained by Mr. Skusek.
16 And lastly, the long distance
17 transportation, there's some dispute there, too,
18 because Mr. Skusek agreed to that long distance
19 transportation. It's 50 miles. He's not, like,
20 you know, taking an airline or doing this other
21 stuff; and as my client says, he doesn't exercise
22 half of that because he's off and on vacation; so
23 I think that's just, like, a throw-in there.
24 One other thing that's important: You
25 know, we proposed the $1,300 transfer payment when

1 this went before the Commissioner; and we asked
2 for attorney fees based on the intransigence of
3 Mr. Skusek; and again, I say he should, somewhat,
4 count his luck there because I think attorney fees
5 should have been granted below based on his
6 failure to produce several records that were
7 requested and not produced. Thank you.
8 MR. LOMBINO: Just a couple points in
9 rebuttal.
10 THE COURT: Yes.
11 MR. LOMBINO: Mr. Skusek provided
12 everything he was supposed to when he filed his
13 response. He thought -- well, everybody thought
14 this was going to be noted up the next week, a
15 couple of weeks later, as it normally would. He
16 had no way of knowing it was going to be 11 to 12
17 months later.
18 He's complied with every discovery request.
19 Number two, in all the deposits he's made,
20 remember, he cashed in all his CDs. He cashed in
21 everything he had because his expenses exceeded
22 his income.
23 The other point is: He retired long before
24 this modification ever started, so this isn't the
25 kind of case, where -- you know, we see every so

1 often where a modification gets filed; and, oh,
2 all of a sudden, income drops. This guy retired
3 before because of his medical condition.
4 Mr. Stocks is correct that it hasn't been
5 modified for a while; but he voluntarily paid more
6 in child support in excess of his obligation, his
7 court-ordered obligation. We have somebody who's
8 paid every dime of support and more, not just in
9 support but in uninsured health care expenses,
10 uninsured extracurricular activities, everything
11 this guy has done.
12 And as far as the side jobs, he did say --
13 he volunteered the information. He said, "You
14 know, I used to do it. It happened very rarely."
15 The last one he had was six months ago, and he
16 could barely remember that. It doesn't happen
17 anymore because of the economy, he's part-time,
18 and his health condition. His doctor said, "You
19 know, he can't start healing until he gets out of
20 this gig entirely; but there's one thing that he
21 can't do is anything more because he's going to
22 risk permanent -- permanent -- " That's all I
23 have.
24 THE COURT'S RULING
25 THE COURT: I'll grant the motion to

1 revise. I do think that the economy has
2 substantially altered conditions rather abruptly
3 since everybody that has investments is looking at
4 the fact that they're no longer worth very much;
5 and they're, certainly, not generating the income
6 that they were; and it's, you know, a physical
7 fact that the body can't do at 50 or 60 what it
8 could do at 20 or 30. I mean, if you're working
9 in the construction trades, you know, the knees
10 give out. The hands give out. The wrists give
11 out. The joints give out. You get back problems
12 because it's physical work; and what you could do
13 when you were young and healthy, you can't do when
14 you're older. I know. My brother worked
15 construction.
16 So I'm going to grant the motion to revise.
17 I'm going to start the increase rather than in
18 January in July of last year, and he'll pay $50 a
19 month on the arrears for the first 12 months; and
20 then it will go to $100 a month, so he gets caught
21 up on that. He's, obviously, going to need to get
22 another job somewhere doing something else.
23 MR. LOMBINO: Thank you, Your Honor.
24 MS. KIRKPATRICK: Thank you, Your Honor.
25 MR. STOCKS: I have a question: On the

1 revision, what incomes are we using, then,
2 because --
3 THE COURT: Well, I'm striking the side
4 jobs. I'm striking the interest income and --
5 MR. LOMBINO: Are you adopting Mr. Skusek's
6 worksheets?
7 THE COURT: I'm adopting his.
8 MR. STOCKS: I object to that because his
9 worksheets weren't part of the revision. What
10 he -- what he did on revision was: He objected to
11 the business income and the interest, and now he's
12 saying let's use my worksheets that I proposed
13 back before the Commissioner; and that's a
14 problem.
15 MR. LOMBINO: Your Honor, I used the
16 worksheets -- the same worksheets that I use --
17 all along have been the same worksheets that show
18 his income.
19 THE COURT: Those are the ones I looked at.
20 Those are the ones I'm adopting. All right.
21 MR. STOCKS: It has the wrong retirement
22 figures and income figures. That's the problem.
23 THE COURT: Well, I'm not making that
24 finding. You're asserting that.
25 MR. STOCKS: Well, he didn't appeal that on

1 revision. That's the issue. He appealed business
2 income and interest income and, now, says let's
3 use my worksheets. I think that's going to create
4 a problem.
5 THE COURT: Okay. Counsel, I've ruled.
6 MR. STOCKS: Okay.
7 MS. KIRKPATRICK: Thank you.
8 THE COURT: All right. Prepare an order,
9 Counsel, and I'll sign it.
10 (Proceedings concluded.)
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
3 IN AND FOR THE COUNTY OF PIERCE

4

In re the Marriage of:	)	
5	)	
FREDERICK SKUSEK,	)	Superior Court
6	)	No. 97-3-01414-9
Petitioner,	)	
7	)	Court of Appeals
and	)	No. 38778-6-II
8	)	
SHEILA M. SKUSEK, n/k/a	)	
9 HERMAN,	)	
	)	
10 Respondent.	)	

11

12 REPORTER'S CERTIFICATE

13

14
STATE OF WASHINGTON)
15) ss.
COUNTY OF PIERCE)
16

17 I, Kimberly A. O'Neill, Court Reporter in the state of Washington, county of Pierce, do
18 hereby certify that the foregoing transcript is a full, true, and accurate transcript of the
19 proceedings and testimony taken in the matter of the above-entitled cause.
20

21 DATED this 9th day of March, 2009.

22
23

24 KIMBERLY A. O'NEILL, CCR
License No. 1954
25