

NO. 40402-8-II
COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

In re the Marriage of:

WALTER WILSON,

Appellant,

and

PAMELA WILSON,

Respondent.

SUPERIOR COURT FOR PIERCE COUNTY

HONORABLE KATHERINE M. STOLZ

REPLY BRIEF OF APPELLANT

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II. REPLY TO ISSUES WITHIN BRIEF OF APPELLEE.

This Reply Brief of Appellant is filed pursuant to RAP 10.1(b)(3), 10.2(d), 10.3(c), 10.4(b) and other applicable Rules of Appellate Procedure. The purpose of this Reply Brief of Appellant is to respond to certain specific issues contained within the Brief of Appellee.

III. REPLY TO LEGAL ARGUMENT ASSIGNMENT 1 OF RESPONDENT

Respondent's reply in his first assignment of error states that the court followed the directions of Chapter 26.19 RCW in the utilization of appropriate forms and in the computation of child support. [CP162-166] The actual form itself is not the issue. It is the failure of the court to meet the standards which are stated in Section (1), (2), (3) and (4) of RCW 26.19.035. The court failed to apply the standards required and thus entered a child support order which was contrary to law.

In Marriage of Daubert, 124 Wn.App. 483, 99 P.3d 401 (2004) the court said at page 487 that:

“Failure to utilize the mandatory form for findings of fact was not reversible error. The findings of fact are insufficient to sustain the order of support based on extrapolation from the economic table. Calculating support based on the one-child column of the economic table was error. Apportioning

postsecondary education support equally between the parents rather than in proportion to next income was error.”

The court did not correctly use the worksheets developed by the Office of the Administrator for the Courts. The form is correct, however the information contained in the form was error.

REPLY TO LEGAL ARGUMENT ASSIGNMENT NOS. 2 AND 3 OF
RESPONDENT

Respondent suggests that the determination of the amount of support lies in the sound discretion of the court, citing In Re Marriage of Stern, 57 Wn.App. 707, 789 P.2d 807 (1990). Further, that the scope of review is whether the court abused its discretion.

In the Daubert case, supra, the court set out the standard of review at p. 490 as follows:

I. Standard of Review

[1, 2] ¶ 11 We review child support orders for a manifest abuse of discretion. *In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). To succeed on appeal, the appellant must show that the trial court’s decision was manifestly unreasonable or based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

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

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

[Emphasis added.]

The Daubert case, supra dealt with education costs which were being considered in addition to monthly child support. The case does not state that the court has discretion in deciding whether or not to abide by the mandates of Chapter 26.19 RCW in determining the parties' net income, when applying the Washington State Support Guidelines. No authority for that proposition has been cited. To the contrary, the court is bound by law as to the manner in which the gross and net incomes of the parties are to be determined. Marriage of McCausland, 159 Wn.2d 607, 152 P.3d 1013 (2007).

An area of discretion reserved for the court relates to situations where the parties' combined income exceeds the maximum monthly income level of the guidelines table and the court is desirous of exceeding that level. In so doing the court must make specific findings if it wishes to exceed the level of support.

In addition, RCW 26.19.035 "Standards for Application of the Child Support Schedule" states in part:

“The provisions of this chapter for determining child support and reasons for deviation from the standard calculation shall be applied in the same manner by the court, presiding officers, and reviewing officers.”

The court did not deviate from the calculated support. The support level was never correctly established. In any event there are no findings of any nature whatsoever in the Order of Child Support. [CP 146-161]

The court would have had the authority to deviate from the calculated standard support amount once it had correctly determined the net income of the parties, but it would require specific findings as to the reasons for any deviation. [App. A, p. A-5 Deviation Standards(3)]; RCW 26.19.035(2), RCW 26.19.075(3). In this case no motion or request was made for a deviation nor were any findings entered authorizing a deviation. Such a finding would be required and there is nothing in the Order of Child Support, Findings of Fact, Conclusions of Law or in the Report of Proceedings evidencing the fact that the ultimate award of child support was a deviation from the calculated support amount. Nor is there anything in the record to indicate that the court was deviating from the calculated basic support amount.

Respondent subscribes to the premise of the Stern case, supra, which holds that the appellate court will not substitute its judgment for the trial court when the record shows the trial court considered all relevant factors and the award is not unreasonable under the circumstances. [Respondent Trial Brief, p. 2]

In Marriage of Marzetta, 129 Wn.App. 607, 120 P.3d 75 (2005), the court offered the standard of review set forth in the Stern case, supra, and stated as follows at p. 623:

“. . . Ms. Marzetta is correct in her assertion that child support worksheets are mandatory, but RCW 26.19.071(1) does not require that the court make a precise determination of income. Instead, the court is required to consider all income and resources of each parent’s household.” (Emphasis added.)

In the present case, the court did not consider the award of maintenance ordered in computing the child support obligation. The amount of maintenance was not deducted from Mr. Wilson’s income as is provided for on the second page of the Washington State Child Support Schedule Worksheets. [CP 163 ¶(2)g]. Nor was it added to Ms. Wilson’s income as provided for in ¶(1)(d) of the form. It was totally ignored and unexplained. This omission shows that the court did not consider all income and resources of each parent’s household.

Respondent suggests that the term “maintenance actually received” allows the court to exclude maintenance in computing the basic support obligation. He cites no authority to support that proposition. The statutes and directions of the Court Administrator mandate that it be added to income of Ms. Wilson and deducted from the payor’s (Mr. Wilson) income.

Otherwise, maintenance ordered to be paid in a Decree of Dissolution would have no meaning as far as computing each party’s obligation to pay support.

Respondent’s rationale would suggest that after Respondent receives her first maintenance payment, Appellant’s only recourse would be to file a Petition to modify the child support order to reflect the payment of maintenance and a request to recompute the child support. Conversely, if a payment was missed but was included in the worksheets, Ms. Wilson would not have to file a Petition for modification. That is not the plain meaning or intent of the law. This view would do nothing more than promote litigation. Under Respondent’s view maintenance would never be considered in the calculation of child support. But again Ms. Wilson has the collection efforts assigned to DCS to work on her behalf.

The court in its decree ordered maintenance to be paid by Mr. Wilson. That court order is enforceable by contempt, imprisonment, loss of a driver's license and other substantial enforcement protocols. [CP 150-152] The court ordered maintenance is assignable to the Division of Child Support (DCS) for enforcement and collection. Respondent checked the appropriate box requesting this assistance, but did not check the reason therefore. [CP 153]

Nor did Respondent address the mandates set forth in Marriage of Irwin, 64 Wn.App. 38 (1992); In re the Marriage of Sacco, 114 Wn.2d. 1, 784 P.2d 1266(1990) and Harmon v. Dept. of Social and Health Services, 134 Wn.2d 523 (1998), all of which were cited in Appellant's opening brief on pp. 7-10. Nor was there any attempt to distinguish these cases.

These cases were simply ignored by Respondent in the Reply brief.

Appellant urged the court to apply the correct standard in closing argument and again in a post-judgment motion for reconsideration. Both were summarily dismissed by the court.

In computing income of the parties on the child support worksheets, Respondent must be suggesting that maintenance

need not be included as income to the Respondent and taken as a deduction by the Appellant. How then does he explain the clear mandate of the statute? RCW 26.19.071(3)(g), (4)(f).

The court is required to follow the plain meaning of the law.

The Stern case, supra, relied upon by Respondent, involved the issue of post-secondary education, not basic child support and involved the court's exercising its discretion with regard to determining whether or not the parties should be required to pay for private school educational costs.

The court in Stern, supra said at page 716:

“As a part of its decree modifying custody, the trial court modified support. In addition to monthly child support, the order requires appellant to contribute a percent of the private educational expenses of the children.” [Emphasis added.]

The Stern case, supra does not state that the court has discretion in deciding whether or not to abide by the mandates of Chapter 26.19 RCW in determining the parties' net income in order to apply the Washington State Support Guidelines in determining the amount of support. In fact, the opposite is true. To the contrary, the court is bound by law as to the manner in which the gross and net incomes of the parties are to be determined, and

then applying those numbers to the Washington State Support Schedule Economic Table.

The case of Harmon v. Dept. of Social and Health Services, supra states that the overriding principle of the statutory support schedule is to equitably apportion child support, based on the parents' combined income.

The court ordered Mr. Wilson to pay basic child support of \$1,840 a month, based on net income of \$8,911 and Ms. Wilson's share was \$188 net, based on net income of \$1,750. [CP 163] Further adjustments were made for medical premiums. The support schedule does not indicate how the court reached the net income from the gross income because the required information for deductions were omitted. [CP 163]

The impact of this differential is more fully explained in Reply to Legal Argument Assignment 6 of Respondent below.

Had the court appropriately included maintenance as a factor, Mr. Wilson's net income would be \$5,750.58 a month and Ms. Wilson's net \$3,744.10. [CP 194] Her net income would therefore more than double.

His percentage of the combined income would then be 60% rather than 83% of the calculated support. This figure is based on

the numbers used by the court and without adjusting for other errors, such as improperly using overtime income and failing to use the Arvey formula.

These figures do not provide for a reduction for withholding taxes from Ms. Wilson's income based on the Earned Income Credits she receives from the U.S. Treasury for her children, when she files her income tax returns.

REPLY TO LEGAL ARGUMENT ASSIGNMENT 6 OF
RESPONDENT

The court did not apply the required mandate of the Arvey formula. Respondent suggests that the court made some mathematical computations, but it was not done pursuant to Arvey. In re Marriage of Arvey, 77 Wn.App. 817, 894 P.2d 1346 (1995) sets out the formula for split custody. It is not a statutory factor.

1. Assuming the figures used in the child support worksheets adopted by the court are correct [CP 162-166], the mandatory application of the Arvey formula for a 3 child split custody arrangement would be calculated as follows:

	Father	Mother
Net Income	\$8,911.52	\$1,750.00

Total Child Support Obligation

\$1,107

\$1,107

\$1,107

\$3,321

Total Net Income

\$10,661

	Father	Mother
Percentage share	.83	.17
Each parties' basic obligation	\$2,756.43	\$564.57

Split Custody Adjustment =

$2/3 \times \$2,756 = \$1,837.31$

$1/3 \times \$564.57 = \187.98

Father	\$1,837
Mother	<u>\$ 187</u>
	\$1,650

Add Father's percentage of medical expense

$\$400 \times 66.66\% = \underline{+266.64}$
\$1,966.64

Less Child Support Credit for Medical -\$ 400

Father pays Mother \$1,516.64

Medical costs of \$400 [CP 164] was added as an expense to be paid by Mr. Wilson [CP 164]. However, the total amount stated to be apportioned was \$547. There is no indication how this number was determined because no numbers other than the medical

insurance premium of \$400 can be found. The apportionment found on line 14 of page 3, line 14 of the worksheets states that father is to pay \$235 and mother \$46, for a total of \$281 [CP 164] and has no relevancy either to the \$400 health cost or the total cost of \$547.

Credits for health care was correctly given to father for \$400, but the credit total used in Part V line (d) of the worksheets shows \$425. There was an additional \$25 added expense stated in the worksheet which is unsubstantiated and unexplained.

The total credits shown on Part V (16)(d) of the approved worksheets show \$400 for health care and \$25 for day care. There was no day care expense denominated in Part III, line 11(a) in the worksheets. How that \$25 credit came about is unknown, especially considering the fact that all of the children were over the age of 12 years.

Mr. Wilson's actual support is overstated in the court's child support order by not applying the mandated Arvey formula.

2. If the court had correctly included the maintenance payments ordered to be paid to Ms. Wilson as her income and deducted that sum from Mr. Wilson's income, the support calculation using the Arvey formula would be dramatically different.

The following example is based on the use of the same figures used in the court's Order of Child Support [CP 162-166]. There is no change or modification of Mr. Wilson's gross income which Appellant stated, in his opening brief was too high because the court failed to recognize the decrease in Mr. Wilson's income, and in his overtime pay.

TOTAL NET INCOME		\$10,691
Net Income	Father	Mother
	\$6,411	\$4,250
Child Support		
\$1,107		
\$1,107		
<u>\$1,107</u>		
\$3,321		
Percentage share	.60	.40
Each parties' basic obligation	\$1,992.60	\$1,328.40
Split Custody Adjustment		
2/3 X \$1,992.60 =	\$1,328.40	
1/3 X \$1,328.40 =	<u>\$ 442.80</u>	
	\$ 885.60	
Add Father's 60% of \$400 medical premium	+ <u>\$ 240.00</u>	
	\$1,125.60	
Health Care Credit	- <u><400.00></u>	
Father Pays Mother	\$ 725.00	

Father's child support = \$725.00

This is \$927 less than the amount ordered to be paid in the Order of Child Support. [CP 162-166]

REPLY TO LEGAL ARGUMENT ASSIGNMENT NOS. 7 AND 8 OF RESPONDENT

In looking at the components of RCW 26.09.090 relating to maintenance the statute directs the court should without excluding other factors consider the following issues:

(a) The financial resources of the party seeking maintenance, her ability to meet his or her needs independently, including child support being awarded to the party seeking maintenance.

There were few assets and Ms. Wilson was gainfully employed and successful. She likewise was awarded child support in the amount of \$1,650 per month.

(b) The time necessary to acquire sufficient education or training to enable her to find employment appropriate to her skills.

Ms. Wilson received training as a massage therapist during her marriage and obtained a license from the State of Washington authorizing her to practice her profession in this state. By contrast

Mr. Wilson became obligated for community debts amounting to \$27,469. [CP 100-101]

This profession was one which was appropriate to her skills and interest as a massage therapist. At age 49, she wishes to return to school to become a nurse practitioner. No one knows how long that will take, except that Ms. Wilson said it might take 6 years. No evidence of such a program was proffered. No evidence was submitted to show she is qualified or has the necessary prerequisites to enroll. No evidence was submitted about the curriculum, or the costs to obtain this training. No evidence as to whether she would be able to be employed during her course of training?

(c) The standard of living established during the marriage is a consideration. This was best expressed by the following testimony of Ms. Wilson at trial:

“Q - Up until the time that you and the – and Mr. Wilson separated, did you share finances? Did you have access to his bank account?

A - I had – I used the debit card – debit card or the – yeah.

Q - And it was linked to his bank account?

A - Mm-hmm.

Q - Were you restricted in any way from use of that debit card?

A - Hmm-mm. No.

Q - Are you aware of the bank account being overdrawn at any point?

A - Oh, yeah.

Q - Was it a frequent occurrence?

A - Mm-hmm. Yes.

Q - Throughout the marriage or –

A - No. Not throughout the marriage. There was times – there were high points and low points, like, any marriage.

Q - When you say high points and low points, can you explain?

A - There was times that – when – when we weren't – it seems like forever, now, but other times when we weren't – there was times when things were okay, and there was times when things were tight.

Q - And by things, you mean money?

A - Mm-hmm.”

[RP p. 73, l. 17 to p. 74, l 15]

This is in addition to the cited examples in the transcript cited in Appellant's opening brief at page 34.

(d) The duration of the marriage was lengthy.

(e) The age of Respondent and financial obligation. She is 49 years of age and was left with no community debt to pay except for \$754. [CP 182] Her financial obligations related to child support expenses and expenses relating to her household.

(f) The ability of Mr. Wilson to meet his needs and financial obligations. Mr. Wilson became responsible for \$27,469 of debt. He has an obligation to pay child support of \$1,652 per month. His earnings were barely enough to pay for expenses while the parties were living together. Now with two homes to support, the financial burden increased. The Findings [CP 167-183] are not supported by the evidence, and as a result the granting of the award of maintenance in the amounts set forth and the duration of time because it was unsupported by the evidence was an abuse of discretion.

Ms. Wilson was not without an education and training and was at the time of the dissolution gainfully employed with expectations of greater earnings.

In Exhibit A, attached to the Findings of Fact and Conclusions of Law [CP 178], Respondent lists the basis for the award of maintenance, by making reference to the particular

statutory factors and relates these factors to the evidence, testimony and exhibits.

His first reference to RCW 26.09.090(a). He makes reference to the Appellant's recent earnings of \$110,000. However, those earnings are not supported by the evidence. His income was substantially reduced and his overtime earnings were almost substantially gone. The court refused to recognize that evidence.

There was no evidence to support a finding that 'without additional schooling she would continue on a course of financial need'. As a matter of fact, her testimony indicated that she expected to earn more monies from her work as a massage therapist.

Citing RCW 26.09.090(b) [CP 178] respondent states that "Petitioner presented a meaningful educational plan, requiring extensive higher education followed by training time."

The evidence and testimony of Petitioner at trial does not support this finding. [RP 61-62] There was no specific plan to adopt. At age 47, she said she might pursue a six year educational program, then needed time for training to enter her new field while abandoning her profession as a massage therapist for which she received training and obtained a license.

RCW 26.09.090(f) recites a conclusion, without asserting any facts elicited by evidence or testimony to support this conclusion. [CP 179]

In Marriage of Marzetta, 129 Wn.App. 607, 120 P.3d 75 (2005), Mr. Marzetta was ordered to pay maintenance amounting to \$3,000 per month for 20 years. Here Mr. Wilson is ordered to pay \$2,500 a month for three years, \$2,000 a month for three years, \$1,500 a month for three years and \$1,000 a month for three years, a total of \$252,000.

The Marzetta court stated as follows at p. 624:

The court's decision on maintenance "is governed strongly by the need of one party and the ability of the other party to pay an award." *In re Marriage of Foley*, 84 Wn.App. 839, 845-46, 930 P.2d 929 (1997). The only limitation on the maintenance award is that the amount and duration, in light of all the relevant factors, be just.

Mr. Marzetta had a net worth of \$2,900,000. By contrast Mr. Wilson had a negative net worth. He had no assets and substantial debt.

Mr. Marzetta had his own company. The court acknowledged that he had substantial wealth and income. He received rental income of \$5,000 per month. He received bonus monies amount to \$559,780 and dividends of \$454,000. He had

one parcel of real property valued at \$5.5 million dollars. Trust funds were established for their children.

By contrast the Wilson's lost their home to foreclosure.

The amount of maintenance awarded to Ms. Marzetta amounted to \$3,000 a month.

The Marzetta holding requires that an award of maintenance be just. The court's award of maintenance in this case was a manifest abuse of discretion, unsupported by the evidence in this case.

The parties' financial statements [CP 19-25; 96-103] show limited income and no savings or funds set aside for their benefit.

REPLY TO LEGAL ARGUMENT ASSIGNMENT 9 OF
RESPONDENT

In the motion for reconsideration, Appellant raised the issues being presented in this appeal. [CP 199-200] and submitted a memorandum of law [RP 201-207]. The court refused to acknowledge any argument and summarily dismissed the motion.

REPLY TO LEGAL ARGUMENT ASSIGNMENT 10 OF
RESPONDENT

The court acknowledged the debt of the parties and stated that their accounts still hemorrhaged money. Basically all of the debt was given to Appellant. After child support and maintenance,

it is clear that Appellant has no resources or ability to pay maintenance. [RP 211-213]

The court made no finding of Mr. Wilson's ability to pay nor did the evidence support such a finding.

CONCLUSION

Respondent/Petitioner fails to provide any legal basis to support the court's refusal to adhere to the requirement that child support worksheets must comply with statute and the guidelines of the Washington Administrator relating to the inclusion of necessary and accurate information in the child support worksheets and in the computation of child support. Failure to do so was an abuse of discretion.

The court's award of maintenance both in amount and duration was an abuse of discretion, as well as the awarding of attorney fees.

Respectfully submitted this 9 day of February, 2011.

GELMAN & ASSOCIATES

HERBERT GELMAN WSBA #1811
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and also filed the original of the Reply Brief of Appellant with the Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, Washington 98402.


VIVIAN PARKER

SUBSCRIBED & SWORN TO before me this 9th day of February, 2011.


Signature of Notary Public
My commission expires: 12/3/13