

COURT OF APPEALS
DIVISION II
REGISTERED
STATE OF WASHINGTON
BY 

NO. 420392-2-II
COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:
JANE HALE, Respondent
And
TIMOTHY HALE, Appellant

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court committed error by failing to impute income to the Respondent as being voluntarily underemployed as is required by RCW 26.19.071(6) in the calculation of child support. Child Support Order CP-120
2. The trial court erred by failing to grant the Appellant's request for a deviation for a residential credit as is authorized by RCW 26.19.075(d). Child Support Order CP-120
3. The trial court erred by granting a motion to correct scrivener's error and modifying the decree of dissolution when the parties were in disagreement as to the terms of payment of a judgment. Decree of Dissolution CP-115, Order Correcting Decree Nunc Pro Tunc CP-140

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should a parent who is working 30 hours per week rather than 40 hours with a corresponding decrease in income have income imputed to her at a 40 hours times her current rate of pay? Assignment of Error 1.
2. Did the court abuse its discretion by failing to grant a request for residential credit when the children spend a significant period of time with the father?
Assignment of Error 2.

3 Did the court abuse its discretion by failing to grant a request for a residential credit when the responding party failed to file any financial information with the court other than her leave and earnings statement? Assignment of Error 2

4. Did the court abuse its discretion by denying a request for a residential credit when the court denied the request based on the non-statutory factor of a difference in income between the parties? Assignment of Error 2.

5. Did the court commit error when it amended the Decree of Dissolution based on a scrivener's error when there was a dispute as to the agreement itself and not as to a clerical mistake or error. Assignment of Error 3.

STATEMENT OF THE CASE

On January 11, 2011 the parties entered into a CR2A agreement CP-168-70 resolving all issues of their marriage but for the issues of whether or not income should be imputed to Ms. Hale and whether Mr. Hale should receive a residential credit in regard to the amount of child support that was transferred to Ms. Hale. A hearing was held on January 18, 2011 before the Hon. Theodore Spearman to determine these issues. It was agreed that this matter would be submitted on declarations and argument. Mr. Hale filed his declaration CP-17-30, two financial declarations CP-31-37 and CP-38-44 which set forth his alternative expenses

based on whether he maintained his retirement contributions in the Thrift Savings Plan in which he is enrolled at the same level he had been contributing or if he reduced his contributions based on the expense of the children. In addition Mr. Hale filed Sealed Personal Health Care Records CP-78-106. Ms. Hale filed a declaration CP-13-16 though she failed to file any financial declaration.

Mr. Hale's income in 2010 was in the gross amount of \$151,000 with a non-reoccurring bonus of \$2,300. Mr. Hale's base pay with a locality adjustment was in the sum of \$149,391 RP-20. Ms. Hale had an income in 2010 of \$87,300 based on her working a 30 hour work week. RP-21. Her income would have been \$113,496 if she had worked a 40 hour week. RP-20. Ms. Hale continued to contribute \$1,000 per month into her retirement account as a voluntary contribution in addition to her contribution for TSP. RP-21. She therefore had sufficient funds to make a \$1,000 contribution in addition to her normal TSP contribution every month. Ms. Hale had no debt other than her mortgage and the debt that she would owe Mr. Hale at the conclusion of the divorce. RP-21.

Ms. Hale is employed by the U.S. government at the Puget Sound Naval Shipyard as an engineer. She has a long history of employment both in the Puget Sound region and San Diego. Ms. Hale failed to provide any information of job searches or other employment opportunities that she had sought.

The court denied the request to find that Ms. Hale was voluntarily underemployed. The court based its decision on the fact that there was a “differential between incomes that’s large,...the steps that have been made and the availability of the funds that are there with her work history it doesn’t justify doing voluntary underemployment.” RP-38

Mr. Hale also asked for a residential credit based upon his calculation of the cost of the children based upon the parenting plan that was agreed to. Mr. Hale calculated that based on his expected expenses with the children the additional cost to him of the residential time with the children was in the sum of \$783 per month. CP-17-30. The court did not address the issue of the additional expense based upon the additional residential time nor did it address Mr. Hale’s expenses at all. All the court said was that based upon “the income differential I am seeing again ...I can’t see a residential credit.” RP-40.

The Decree of Dissolution was entered on April 8, 2011CP-157-162. Thereafter a motion was filed by the Respondent, Ms. Hale to correct a scrivener’s error. A portion of the Decree, paragraph 3.2(13) provided that the judgment that was ordered to be paid by Ms. Hale was to be paid within 60 days of the entry of the decree and a following portion provided for the payment within 60 days of the CR2A agreement executed on January 11, 2011. It was Mr. Hale’s position that any scrivener’s error was as to payment 60 days after the entry of the decree and

that the provision of the CR2A provided for payment within 60 days of the CR2A. There was no meeting of the minds as to the conflict within the decree as to this payment. The court ignored the argument that this was not a scrivener's error, made no findings and entered an order nun pro tunc finding that payment was to be made within 60 days of the entry of the decree. CP-140.

It is from these rulings that this appeal is taken. CP- _____

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO IMPUTE INCOME TO THE MOTHER FOR VOLUNTARILY BEING UNDEREMPLOYED AS IS REQUIRED BY RCW 26.19.071(6)

An award of child support by the trial is court is reviewed by the court for an abuse of discretion. "To overturn the support award, an appellate court must find an abuse of discretion. An abuse of discretion occurs when a judge exercises his discretion on 'a ground, or to an extent, that is clearly untenable or manifestly unreasonable.'" *In re Marriage of Nicholson*, 17 Wn.App. 110, 114, 561 P.2d 1116 (1977). *Curren v. Curren*, 26 Wn.App. 108, 110, 611 P.2d 1350 (1980). Further the trial courts Findings of Fact must be supported by substantial

evidence. *In re Marriage of Peterson*, 80 Wash.App. 148, 153, 906 P.2d 1009 (1995).

The method for imputation of income for the determination of child support is set forth in RCW 26.19.071(6), stating:

Imputation of income. The 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 that 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. Income shall not be imputed for an unemployable parent. Income shall not be imputed to a parent to the extent the parent is unemployed or significantly underemployed due to the parent's efforts to comply with court-ordered reunification efforts under chapter 13.34 RCW or under a voluntary placement agreement with an agency supervising the child. In the absence of records of a parent's actual earnings, the court shall impute a parent's income in the following order of priority:

- (a) Full-time earnings at the current rate of pay;
- (b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;
- (c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;
- (d) Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is recently coming off public assistance, disability lifeline benefits, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;

(e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.

The statute requires the court to review the parent's work history, education, health, age and other relevant factors in determining if the parent is voluntarily underemployed. Income is not to be imputed to a parent who is working on full-time basis unless the court determines that the parent is underemployed in an effort to avoid a child support obligation. The statute then gives a hierarchy of the rate of imputation beginning with full time employment at the current rate of pay and decreasing to the median net monthly income of a full time worker as derived from the United States Bureau of Census. If the court finds that a parent is voluntarily underemployed the court must impute income to that parent.

In determining whether a parent is voluntarily underemployed the trial court is to look to the level of employment that the parent is capable of and qualified to perform. *In re Marriage of Sacco*, 114 Wn.2d 1, 4, 784 P.2d 1266 (1990); *Clarke v. Clarke* 112 Wn.App. 370, 376, 48 P.3d 1032, 1035 (2002). In the instant case Ms. Hale is a professional engineer, she is highly educated, she has been employed for a number of years in her field, has been employed on a full time basis in the past, was unemployed for a period while she had children and only since the dissolution commenced has she worked less than a full time 40 hours per

week while employed in her field. She is fully capable and qualified to be employed on a full time basis. There was no evidence nor was it contended that Ms. Hale is unemployable or unable to work on a full time basis.

It is understood that the definition of “full time employment” need not mean a 40 hour work week in all circumstances. The court is to look to the level of employment the parent is “capable and qualified to perform.” *Schumacher v. Watson*, 100 Wn.App. 208, 215, 997 P.2d 399 (2000). In *Schumacher*, the court found that Ms. Schumacher, worked in the family flower shop five days a week and while not always working a 40 hour work week did work full time as was “customary in her profession.” *Schumacher*, at 215. Therefore, a parent who is working less than 40 hours can only be found to be working full time if it is customary in their profession to work less than 40 hours in a week. It is not customary, and there is no evidence to the contrary to work less than 40 hours as an engineer.

In *In re Marriage of Pollard*, 99 Wn.App 48, 991 P.2d 1201 (2000) the parties were both employed by the United States military. After divorce Ms. Brookins remarried and had an additional two children. She chose to work on a part time

basis while working full time as a mother and homemaker. The court found that working as a mother and a homemaker was not “gainful employment” under the statute and income should be imputed to her for the determination of child support. *Pollard* at 53. Taking time off to raise children or working only part time because of children does not avoid the imputation of income for a parent who is not employed on a full time basis.

In re Marriage of Wright, 78 Wn.App. 230, 896 P.2d 735 (1995) held that a mother who worked part time as a nurse for the Veterans Administration and part time for the National Guard while raising five children ages 9 to 12 was voluntarily underemployed and income should be imputed to her for child support purposes. The court held that voluntary underemployment by either parent will not shield that parent from a child support obligation. *In re Marriage of Jonas*, 57 Wash.App. 339, 788 P.2d 12 (1990). While the appellate court was sympathetic to a single mother the court found that she could have gained full time employment and income should be imputed to her.

Income was not imputed to a mother who had decreased her hours of work by 20 per cent to care for her children, but as a result in a change of shifts and a wage

differential her income did not change. *Clarke v. Clarke*, 112 Wn.App. 370, 48 P.3d 1032 (2002). In *Clarke* the court found that as a result of the fact that Ms. Clarke's income did not change from her previous 40 hour work week due to the night shift differential there was no abuse of discretion in not imputing income to her. No evidence in the matter before the court supports a finding similar to *Clarke*. Ms. Hale is not working a less than full time job with equal income as was the case in *Clarke*.

In *In re Marriage of Dewberry*, 115 Wn.App. 351 62 P.3d 525 (2003) Mr. Dewberry had income imputed to him for child support purposes. Mr. Dewberry was a 47 year old college graduate with a history of having employed as an executive; he lost his job and became employed 20 hours per week with United Parcel Service. Mr. Dewberry testified that the job with had good benefits and gave him a flexible schedule so he could train for a new career. The court found that income should be imputed to him as he was voluntarily underemployed. Benefits or training for another position does not shield one from having income imputed.

In the matter before the court, Ms. Hale is a college educated engineer working 30 hours per week. No evidence of seeking full time employment was presented to the trial court. She had previously worked in a 40 hour position. While a 40 hour work week is not always necessary to be considered full time, if less it must be what is considered customary in the position. In *Schumacher*, the mother worked five days a week but less than 40 hours in a business where this was customary. It is not customary for an engineer to work less than a full time week and no evidence was presented to support that conclusion.

Ms. Hale cannot claim that her care for her children makes up for the lack of full time employment as that is not considered “gainful” by the court. *Pollard*.

Ms. Hale cannot claim that while she is working only a 30 hour work week her income is equivalent to that which she would make if working a 40 hour week as was the case in *Clarke*. Nor can she claim that because she gets benefits that equates to full time. In *Dewberry*, benefits were associated with a part time job and income was imputed.

The trial court found that there was a lack of evidence in regard to any job search for a full time position. RP 38. The trial court further found that the mother wanted to stay in the Federal system with benefits and ultimately get a 40 hour job, the trial court stated further that the income differential between the parties played a role in the trial court's decision not to impute income.

None of the trial court's rationale falls within the purview of either the statute or the case law interpreting the statute. Wanting to stay in a system for whatever reason does not justify a reduction in the child support obligation a parent is required to contribute. Staying in a system at less than 40 hours is equivalent to *Dewberry* where the father wanted to have flexible hours to train for another position. It was not found to be a valid reason to not have income imputed.

There are no cases that determine that the difference in income between parents supports not imputing income. Imputation under the statute is mandatory if there is voluntary underemployment. For the trial court to find as it did inserts a provision into the statute that provides that a parent who does not make as much as the other need not work on a full time basis. That is completely contrary to the statute and what appears to be the legislative intent.

The trial court did not make adequate findings nor did the evidence support not imputing income to Ms. Hale. The trial court's reasoning was a manifest abuse of discretion requiring reversal and remand for determination of child support with income imputed to the mother. The trial court erred in failing to impute income as is required by RCW 26.10.071(6).

II. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING FOR A DEVIATION FOR A RESIDENTIAL CREDIT IN THE CALCULATION OF CHILD SUPPORT

RCW 26.19.075(d) allows for a deviation for a residential credit. The statute states:

Residential schedule. The court may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment. The court may not deviate on that basis if the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child or if the child is receiving temporary assistance for needy families. When determining the amount of the deviation, the court shall consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the parent making the support transfer payment.

RCW 26.19.075(d) provides that the court may deviate from the standard calculation if the child spends 'a significant amount of time' with the parent who is obligated to make a support transfer payment. In determining the amount of a deviation, the court is directed to consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the

significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the parent making the support transfer payment.

While it is recognized that a deviation under this provision is discretionary, our courts recognize that “deviation from the standard support obligation remains the exception to the rule and should be used only where it would be inequitable not to do so.” *In re Marriage of Burch*, 81 Wn.App. 756, 760, 916 P.2d 443 (1996). In the case before the court it would be inequitable not to allow a residential credit based upon the amount of time that the children reside with their father. In the case before the court it is believed that the residential schedule makes some amount of deviation appropriate unless the trial court articulates a tenable basis for denying it.

Mr. Hale has the children in his residential care between 132 and 142 days and nights, in addition he has the children an additional 17 evenings during the year when he receives residential time with the children and provides them with dinner. Mr. Hale produced evidence of his income and his expenses by way of

affidavit CP-31-37. He provided two financial declarations, CP -31-37 and CP - 38-44 one showing his current expenses and the other showing his anticipated expenses based on the amount of time that the children would spend with him. His evidence showed that as a result of the residential schedule that was in place he expected an increase in the amount of the cost of housing to be approximately \$600 per month, food would increase approximately \$110 per month, activities \$20 per month, transportation for the children would increase \$30 per month, sundry items for the children \$8 per month, an increase in utilities of \$15 per month for a total of \$783 per month as a result of the significant amount of time he has the children in his care. Mr. Hale requested a reduction in support in that amount.

Ms. Hale produced no evidence as to her finances, filing no financial declaration other than her leave and earning statement from her employment. While stating in her declaration CP-14, that a residential credit would impact the children and impact her financially she provided no evidence for the court to rely on. She failed to provide a financial declaration so that the trial court could review her expenses and determine what if any impact a credit would have. She claimed that her disposable income would be lessened severely as a result of her choosing to

keep the family home and therefore owing an equalization judgment to Mr. Hale but provided no evidence of this for the court to review.

The sole reason that the trial court stated for denying the residential credit was the difference in the incomes of the parties stating at RP40:

The principal reason is the income differential that I'm seeing, again. You come in. You've had a lot of health issues, I understand. I don't know the details of it, but I know it has to be significant the way it was described to me. Nevertheless, you've been blessed with the fortune to able to have a very good job and to have your wits and sensibilities about you to keep it. And given the disparity and the financial situation that I understand, two-thirds of carrying this load, and these guys are just going to get a heavier load at (sic) it goes along. Maybe Mom doesn't realize how heavy it's going to be yet, and you don't either, Dad, but it's going to get heavier. I can't see a residential credit on it even if it had been given before, but that's what I couldn't see.

RCW 26.19.075(d) provides in part:

When determining the amount of the deviation, the court shall consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the parent making the support transfer payment.

The language of the statute is mandatory, that “the court shall consider evidence concerning increased expenses to the parent making the support transfer payment and shall consider the decreased expenses, if any to the party receiving the support...” The trial court failed to consider the expenses to the father or any decreased expenses to the mother; focusing solely on the difference in income between the mother and the father, a criteria not recognized by the statute. While a deviation is discretionary a failure of the court to make a determination of this nature without consideration of the statutory criteria is untenable.

Mr. Hale is responsible for his children approximately 38% of the time. He wishes to be able to provide for the children in a reasonable manner that is comfortable and similar in nature to that which is ably to be provided by his ex-wife. It is inequitable for the court not to grant a deviation for a residential credit.

III. THE TRIAL COURT COMMITTED ERROR WHEN IT GRANTED A MOTION CHANGING THE DECREE OF DISSOLUTION WHICH MODIFIED THE CR2A AGREEMENT FINDING A SCRIVENER’S ERROR.

Paragraph 3.2(13) of the Decree of Dissolution CP- 159 stated:

13. Judgment against Jane Hale secured by a Note and Deed of Trust against the family residence in the amount of \$237,500 to be paid within sixty days of the entry of the Decree of Dissolution. In the event that the judgment is paid within sixty days of January 11, 2011 there shall be no interest on the judgment amount. If the judgment is not paid in that period of time, the judgment shall accrue at the judgment interest rate thereafter

The trial court modified the Decree striking the language that the judgment was to be paid within sixty days of January 11, 2011, the date of the agreement and the execution of the CR2A agreement.

The CR 2A agreement read that the judgment was to be paid within 60 days. CP-169. It did not state that the judgment was to be paid within 60 days of the entry of the decree of dissolution which is the result of the court's ruling.

A scrivener's error occurs when the intention of the parties is identical at the time of the transaction but the written agreement errs in expressing that intention. Harford, 86 Wash.App. at 263, 936 P.2d 48. *In re Marriage of Burch*, 81 Wn.App. 756, 760, 916 P.2d 443 (1996)

There was no scrivener's error in the instant case that would allow the modification to allow payment 60 days after the entry of the decree. A scrivener's error requires the parties to have the same understanding and intention at the time of the agreement and a clerical error occurs in the preparation of the written agreement. Here, either the parties had an agreement that the judgment was to be paid within 60 days of the CR2A agreement or they did not agree as to the terms. Under either scenario there was no scrivener's error and the court's ruling is error. Effectively what the court did was to modify the agreement of the parties to what the court thought was fair.

CR 2A provides:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

By its terms, CR 2A applies only to agreements that satisfy two elements. First, the agreement, hereafter called a settlement agreement, must be made by parties or attorneys "in respect to the proceedings in a cause". Second, "the purport" of the agreement must be disputed. *Graves v. P.J. Taggares Co.*, 25 Wash.App. 118, 122, 605 P.2d 348, *affirmed*, 94 Wash.2d 298, 616 P.2d 1223 (1980); *see Eddleman v. McGhan*, 45 Wash.2d 430, 432, 275 P.2d 729 (1954); *Bryant v. Palmer Coking Coal **709 Co.*, 67 Wash.App. 176, 179, 834 P.2d 662 (1992), *review denied*, 120 Wash.2d 1027, 847 P.2d 480 (1993).

When these elements are met, CR 2A supplements but does not supplant the common law of contracts. *Morris v. Maks*, 69 Wash.App. 865, 868, 850 P.2d 1357 (1993); *Stottlemyre v. Reed*, 35 Wash.App. 169, 171, 665 P.2d 1383, *review *40 denied*, 100 Wash.2d 1015 (1983); *see Gaskill v. Mercer Island*, 19 Wash.App. 307, 316, 576 P.2d 1318, *review denied*, 90 Wash.2d 1015 (1978). It precludes enforcement of a disputed settlement agreement not made in writing or put on the record, whether or not common law requirements are met. *Eddleman v. McGhan*, 45 Wash.2d at 432, 275 P.2d 729 (predecessor rule); *Bryant v. Palmer Coking Coal Co.*, 67 Wash.App. at 176, 834 P.2d 662; *Gaskill v. Mercer Island*, 19 Wash.App. at 316, 576 P.2d 1318. However, it does not affect an agreement made in writing, *Morris v. Maks*, *supra*, or put on the record. *Snyder v. Tompkins*, 20

In re Marriage of Ferree, 71 Wash.App. 35, 39-40, 856 P.2d 706, 709 (1993)

While the court could have found an ambiguity, it did not do so, it merely unilaterally modified what the appellant believed to be the agreement. The court at RP-11 of the hearing on May 13, 2011 agreed that there was a conflict but

granted the motion finding that a scrivener's error occurred. This determination was error.

CONCLUSION

The trial court focused on one factor in determining whether to impute income to Ms. Hale or to grant Mr. Hale a residential credit; that being the difference in their incomes. Ms. Hale chooses to work less than full time and as a result makes less than she could, while still making a very good income for part time work. That difference in income then is used by the trial court to deny a residential credit without taking into consideration any of the statutory factors. Based upon the above it is requested that this court remand the matter to the trial court for a determination of imputed income for Ms. Hale, a recalculation of child support and the awarding of a residential credit based on the statutory criteria of the increased expenses to the father paying support as a result of the significant amount of time the children spend with him.

The trial court further, abused its discretion by not allowing a residential credit and by unilaterally changing the decree of dissolution finding that a scrivener's error occurred.

Based on the above it is requested that this court remand this matter to the trial court to determine the appropriate imputed income of Ms. Hale, determine the residential credit that should be applied and to determine the date by which payment of the judgment amount was to be made.

Respectfully submitted this 7th day of October, 2011.



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