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DIVISION II
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No. 43060-6-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

In Re:

JENNIFER A. CRANE (F/K/A BROWN),
Respondent,

v.

TERRY L. BROWN,
Appellant.

BRIEF OF RESPONDENT

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ORIGINAL

TABLE OF CONTENTS

I. STATEMENT OF CASE 1

II. QUESTIONS PRESENTED 5

III. ARGUMENT 5

A. Standard of Review 5

B. The Trial Court did not abuse its discretion by crediting Father with overtime pay for purposes of child support because evidence showed that Father had averaged 258 hours of overtime per year for the prior 7 years 6

C. The Trial Court did not abuse its discretion by refusing to enter a judgment for daycare expenses paid by the Father because the Mother provided proof to the Court that all expenses toward which Father paid, were incurred by her 8

D. The Trial Court did not abuse its discretion by including all of Father's VA benefits for purposes of child support because RCW 26.19.045 gives the Court the discretion to include all or none of the benefits 12

E. The Trial Court did not abuse its discretion by ordering Father to pay Mother's attorney fees because the Court considered the need of Mother as compared to Father's ability to pay, pursuant to RCW 26.09.140 13

F. The Court should award Ms. Crane her reasonably incurred attorney's fees for having to defend against this appeal.

1. The Court should award Ms. Crane her reasonably incurred attorney fees because she

has the need and Mr. Brown has the ability to pay.

2. The Court should order Mr. Brown to pay Ms. Crane's costs incurred herein in the event Ms. Crane is the prevailing party.

3. The Court should order Mr. Brown to pay Ms. Crane's attorney's fees as compensatory damages pursuant to RAP 18.9 because Mr. Brown's appeal has no merit and is frivolous.....16

IV. CONCLUSION.....18

TABLE OF AUTHORITIES

State Cases

In re Marriage of Dodd, 120 Wn.App. 638, 644, 86 P.3d 801 (2004).....5, 6

Goodell v. Goodell, 130 Wn. App. 381, 388, 122 P.3d 929 (2005).....6

Fairchild v. Davis, 148 Wn. App. 828, 833, 207 P.3d 449 (2009)..11

In re Marriage of Trichak, 72 Wn. App. 21, 26, 863 P.2d 585 (1993).....14

Statutes

RCW 26.09.140.....13, 14, 16

RCW 26.19.045.....12, 13

RCW 26.19.071.....6

RCW 26.19.080.....8, 9

Court Rules

CR 34.....10

RAP 14.2.....17

RAP 18.1.....17

RAP 18.9.....17

STATEMENT OF THE CASE

On October 22, 2004, the Pierce County Superior Court dissolved the marriage of Appellant, Terry Lee Brown (herein "Brown"), and Jennifer Crane, fka Brown (herein "Crane"). CP 54. Brown and Crane have two children, Lane, now age 13, and Hadley, now age 11. CP 54. Pursuant to the Final Parenting Plan entered when the marriage was dissolved, the children reside primarily with Crane, with a residential schedule for Brown. CP 1-14.

Brown has filed multiple previous requests to modify the child support. CP 437. Each time he has requested that the support be reduced. CP 437.

Brown most recently filed a Petition to Modify Child Support on July 25, 2011, in which he requested a modification of child support, and reimbursement of overpaid daycare, among other requests. CP 30–32. Crane's response was to request that her proposed Order of Child Support be adopted, that Brown's request for reimbursement be denied, and that sanctions be imposed and attorney fees awarded to her. CP 447.

Brown is a firefighter employed by Pierce County Fire District #17. CP 48; 439. He has several sources of income, including base pay, overtime, and VA benefits, among others. CP 439-440. In each child support modification filed by Brown, he had asserted that, although he had worked and earned overtime pay in the past, he was not expected to earn it in the future. CP 441-443. In each proceeding, Brown submitted in support of this claim, a statement from his supervisor in his position as firefighter. CP 441-442. Similarly, for this proceeding, Brown provided a letter from the South Pierce Fire and Rescue Fire Chief, which said that he did not intend overtime to be a reliable source of income for Brown. CP 213.

Except for a period following an injury, Brown always has earned overtime. CP 442-443. In fact, records indicate that from 2005, through 2011, Brown averaged 258 hours of overtime per year, which equals approximately $764 per month. RP1 21. CP 443.

From August 2007 to August 2011, the children had been receiving childcare from Ms. Vikki Brown (no relation to Brown). CP 497. As part of the discovery process prior to the initial hearing in this matter, Brown's counsel deposed Vikki Brown, and obtained

from her copies of some of the checks Crane used to pay for the childcare provided. CP 329; 498. In her deposition, Vikki Brown testified that she had been paid $758 per month, every month, for childcare for the children. CP 333. Crane also provided to Brown proof of all monthly payments made to Vikki Brown. CP 499. Crane did not maintain in her possession the canceled checks, but advised Brown these were available from her bank, at a cost. CP 499. It is unknown if Brown obtained these from the bank; he did not submit them to the Court.

At the time of the hearing on Brown's Petition for Modification of Child Support, Judge Tollefson had before him Financial Declarations from each party and a plethora of financial records including tax returns, pay statements, bank account statements, etc. CP 33–47, 48–53, 26, 74–194, 211–320; Report of Proceedings January 6, 2012 (herein "RP1") 1-3. The Trial Court also had the testimony of each party and the argument of their respective counsel to consider. RP1 1-3. Ms. Crane's Financial Declaration, filed on September 23, 2011, in response to Mr. Brown's Petition for Modification of Child Support, and long before the extensive discovery was had and multiple trips to court were

required, indicated that she already had paid attorney's fees in the amount of $4,000. CP 469.

On November 29, 2011, Pierce County Superior Court Commissioner David Johnson heard the Motion and took the issue under advisement. Report of Proceedings, November 29, 2011 (herein "RP2") 1-8. He issued his decision on December 15, 2011. Report of Proceedings, December 15, 2011 (herein "RP3") 1-18. On December 21, 2011, Commissioner Johnson entered a Judgment and Order of Child Support. CP 352-387.

Brown filed a Motion for Revision on December 23, 2011. CP 388. A hearing was held before Judge Brian Tollefson on January 6, 2012, who issued his oral decision that same day. RP1 1-40. Judge Tollefson included Brown's average overtime earnings as income, denied Brown's request for reimbursement of daycare expenses, included all of Brown's VA Disability pay, and ordered Brown to pay attorney fees to Crane in the amount of $4,500. RP1 37-38. In rendering his decision, Judge Tollefson made the following statement regarding the award of attorney fees: "It's clear that Ms. Crane has a need for attorney's fees and Mr. Brown has the ability to pay." RP1 38. A final hearing was held on January

27, 2012, for presentation of the Judgment and Order of Child Support Final Order. RP1 42-48.

Brown filed a timely Notice of Appeal to Court of Appeals and this appeal follows.

QUESTIONS PRESENTED

1. Which standard of review should this Court apply?

2. Did the Trial Court abuse its discretion by including historically averaged overtime income for the Father for purposes of child support when evidence demonstrated that overtime income was likely to occur in the future?

3. Did the Trial Court abuse its discretion by refusing to enter judgment for daycare expenses paid by the Father when the Mother provided proof to the Court that all expenses were actually incurred?

4. Did the Trial Court abuse its discretion by including all of Father's Veterans' Administration income for purposes of child support when the statute allows the Court to include all VA benefits or none?

5. Did the Trial Court abuse its discretion by ordering Father to pay Mother's attorney fees?

6. Should the Court order Father to pay Mother's attorney fees incurred in responding to this appeal?

ARGUMENT AND ANALYSIS

1. Standard of Review

The trial court has broad jurisdiction to modify child support provisions. In re Marriage of Dodd, 120 Wn.App. 638, 644, 86 P.3d

801 (2004). Reviewing courts should apply an abuse of discretion standard and "cannot substitute [their] judgment for that of the trial court unless the trial court's decision rests on unreasonable or untenable grounds." Goodell v. Goodell, 130 Wn. App. 381, 388, 122 P.3d 929 (2005).

2. The Trial Court did not abuse its discretion by crediting Father with overtime pay for purposes of child support because evidence showed that Father had averaged 258 hours of overtime per year for the prior 7 years.

Pursuant to the Washington State Child Support guidelines, all income of the parties should be disclosed and considered by the Court when establishing child support. RCW 26.19.071. This shall include overtime pay, according to RCW 26.19.071(3)(e), unless the overtime is performed in order to care for a current family's needs, to retire past relationship debt, or to retire child support debt AND the Court finds that the overtime will cease when the party has paid off the debt. RCW 26.19.071(4)(i) (Emphasis Added).

In the present case, Mr. Brown presented no evidence to suggest that his overtime income was earned only to care for his current family's needs, to retire past relationship debt, or to retire child support debt. Instead, Mr. Brown simply argued that his overtime income will not be recurring in the future. This argument

was belied by the fact that, in all previous child support modification proceedings in this case, Mr. Brown submitted virtually identical information (a letter from the South Pierce Fire and Rescue Chief) to support an argument that overtime no longer would be available to him in the future. Yet, after each respective modified Order of Child Support was entered, Mr. Brown continued to accrue a similar number of overtime hours. In fact, the only time Mr. Brown experienced any decrease in overtime was when he was injured and unable to work for a period of time.

Simply put, the Trial Court did not believe the evidence presented by Mr. Brown. Mr. Brown had brought this same evidence before the Trial Court multiple times previously, and each time the Court declined to include overtime as part of his income for purposes of calculating child support, or included it at a reduced rate. This time, the Trial Court, after being presented with evidence to suggest that the prior statements offered by Brown's supervisors had not been accurate, decided to include Mr. Brown's average historical overtime income.

The Trial Court acted well within its discretion in including Mr. Brown's average historical overtime pay. Mr. Brown's appeal of this issue is nothing more than a request to have the Court of

Appeals substitute its judgment for the judgment of the Trial Court, but this is not the standard the Court of Appeals should apply. In order to overturn the Trial Court's decision, the Court of Appeals must find that the Trial Court abused its discretion by making its decision based on untenable grounds or for untenable reasons. That simply did not happen here and the Court of Appeals should affirm the decision of the Trial Court.

3. The Trial Court did not abuse its discretion by refusing to enter a judgment for daycare expenses paid by the Father because the Mother provided proof to the Court that all expenses toward which Father paid, were incurred by her.

The payment of daycare expenses, and specifically the reimbursement of daycare expenses, is governed by RCW 26.19.080, which provides in pertinent part:

> ...If an obligor pays court or administratively ordered day care or special child rearing expenses that are not actually incurred, the obligee must reimburse the obligor for the overpayment if the overpayment amounts to at least twenty percent of the obligor's annual day care or special child rearing expenses. The obligor may institute an action in the superior court or file an application for an adjudicative hearing with the department of social and health services for reimbursement of day care and special child rearing expense overpayments that amount to twenty percent or more of the obligor's

> annual day care and special child rearing expenses...

RCW 26.19.080(3).

Mr. Brown first argues that the Trial Court abused its discretion by refusing to enter judgment for daycare costs which were not incurred. Mr. Brown then argues that the children should not have been in daycare through age 12 or, alternatively, that the children should have been in the daycare facility owned by Mr. Brown's current wife. Mr. Brown completely ignores the fact that the Final Parenting Plan gives Ms. Crane sole decision making authority on the issue of daycare for the children. Mr. Brown's argument on this issue is wholly without merit.

Mr. Brown argues that Ms. Crane failed to provide sufficient proof of payment for all daycare expenses. This is simply not the case. The proof of expenses paid comes from four sources: (1) Some canceled checks provided by Ms. Vikki Brown, the daycare provider; (2) the bank statements provided by Ms. Crane showing the checks in the daycare amount of $758 being paid from her account each month; (3) the testimony of Ms. Crane that she paid each $758 month for daycare; and (4) the testimony of Ms. Vikki Brown, the daycare provider, that she was paid $758 each month.

This is clearly sufficient evidence for the Trial Court to determine that the expenses actually had been incurred.

Mr. Brown argues that the lack of all canceled checks demonstrates that payments were not made. He claims that Ms. Crane should have provided all canceled checks because they were requested by him in the discovery process. Ms. Crane gives a very simple explanation for this. Requests for Production of Documents made pursuant to Washington State Civil Rule (CR) 34, may only compel a party to turn over documents that are in his or her "possession, custody or control." Ms. Crane did not have copies of her canceled checks. The only copies available either were in the possession of Ms. Vikki Crane (she produced what she had, which she acknowledged was not a complete set) and/or maintained by Ms. Crane's bank. Obtaining copies from the bank would have come at a cost which Ms. Crane was not willing to incur, and Mr. Brown was just as able to obtain copies from the bank via a Subpoena Duces Tecum. Since Mr. Brown was requesting the documents, Ms. Crane suggested to him that he make the request to the bank and pay the costs associated therewith. Mr. Brown apparently declined to do so. Then he attempted to point to the lack of canceled checks as proof that

costs were not incurred. He would like the Court to ignore the bank statements, the testimony of Ms. Crane, and the testimony of the daycare provider, who testified under oath that Ms. Crane paid her each and every month.

Interestingly, in the Fairchild case, upon which Mr. Brown relies to suggest that Ms. Crane's proof was insufficient, the Court found that a simple declaration from the obligee was insufficient, but then went on to say, "Cancelled checks, prior tax returns, or declarations from child-care providers would have been more helpful. Fairchild v. Davis, 148 Wn. App. 828, 833, 207 P.3d 449 (2009) (Emphasis Added). Clearly the evidence in this case would have convinced the Fairchild Court.

The Trial Court had before it ample evidence upon which to make the finding that the daycare expenses actually were paid. Mr. Brown is again simply asking this Court to substitute its judgment for that of the Trial Court. The Trial Court should be affirmed in this regard.

4. The Trial Court did not abuse its discretion by including all of Father's VA benefits for purposes of child support because RCW 26.19.045 gives the Court the discretion to include all or none of the benefits.

For purposes of child support, the inclusion or exclusion of Veterans' Administration benefits is governed by RCW 26.19.045, which provides in pertinent part as follows:

> Veterans' disability pensions or regular compensation for disability incurred in or aggravated by service in the United States armed forces paid by the veterans' administration shall be disclosed to the court. The court may consider either type of compensation as disposable income for purposes of calculating the child support obligation...

RCW 26.19.045 (Emphasis Added). Thus, pursuant to the statute, the Trial Court had the authority to either include all of Mr. Brown's VA income, or none of it. The fact that the Court chose to include all of Mr. Brown's benefits was perfectly within the discretion of the Trial Court and Mr. Brown can point to nothing to suggest that the Trial Court's decision was based on untenable grounds or for untenable reasons.

The absurdity of Mr. Brown's appeal of this issue can be summarized by reviewing the following statement from page 12 of Mr. Brown's brief to this Court:

"This provision [Referring to RCW 26.19.045] clearly gives the court the discretion as to whether or not disability benefits received from the Veterans' Administration should be considered when calculating income for determining a party's child support obligation."

Mr. Brown acknowledges that the decision reached by the Trial Court was within the Trial Court's discretion, yet he has filed an appeal claiming that the Trial Court abused that discretion. His argument defies even basic logic.

Once again, and frustratingly for Ms. Crane who is forced to respond, Mr. Brown's appeal is nothing more than a request that this Court substitute its judgment for that of the Trial Court, which it cannot do. His argument is wholly without merit and should be denied.

5. The Trial Court did not abuse its discretion by ordering Father to pay Mother's attorney fees because the Court considered the need of Mother as compared to Father's ability to pay, pursuant to RCW 26.09.140.

The Trial Court, when hearing a modification of child support, may order one party to pay the attorney fees of the other party pursuant to RCW 26.09.140, which reads:

> 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 attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.
>
> 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 attorneys' fees in addition to statutory costs.
>
> The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

RCW 26.09.140.

In considering the parties' financial resources, the Court must balance the needs of the party seeking the award of fees against the other party's ability to pay those fees. In re Marriage of Trichak, 72 Wn. App. 21, 26, 863 P.2d 585 (1993).

In the present case, the Trial Court awarded Ms. Crane attorney's fees based on RCW 26.09.140. Mr. Brown now argues that the Trial Court erred by failing to consider the statutory factors. However, a review of the record, and of Mr. Brown's own appellate brief, shows that the Court clearly reviewed the relevant factors.

The Trial Court had before it Financial Declarations from each party and a plethora of financial records including tax returns, pay statements, bank account statements, etc. The Trial Court also had the testimony of each party and the argument of their respective counsel to consider. In rendering his decision, Judge Tollefson made the following statement: "It's clear that Ms. Crane has a need for attorney's fees and Mr. Brown has the ability to pay."

Judge Tollefson's statement, which is actually cited in Mr. Brown's brief at page 3, clearly demonstrates the fact that the Trial Court considered the financial resources of the parties and weighed Ms. Crane's needs versus Mr. Brown's ability to pay. This is all that is required under the statute.

Mr. Brown next argues that the lack of an attorney fee affidavit or testimony regarding the amount of fees should have prevented the Trial Court from awarding attorney's fees. Mr. Brown cites to no authority to support this position. Furthermore, Mr. Brown is simply wrong about the lack of evidence.

Ms. Crane's Financial Declaration, filed in response to Mr. Brown's Petition for Modification of Child Support indicated that she already had paid attorney's fees in the amount of $4,000. The Financial Declaration was filed on September 23, 2011, long before

the extensive discovery was had and multiple trips to court were required. It was perfectly reasonable for the Trial Court to rely on this Financial Declaration as evidence. Curiously, Ms. Crane's Financial Declaration was not made part of the appellate record by Mr. Brown, who argued that no evidence existed to substantiate the award of fees. Ms. Crane was forced to supplement the Clerk's Papers in order to include this vital information.

The Trial Court considered the statutory requirements and acted well within its discretion in awarding attorney's fees in this matter. This Court should affirm the decision of the Trial Court.

6. The Court should award Ms. Crane her reasonably incurred attorney's fees for having to defend against this appeal.

   A. The Court should award Ms. Crane her reasonably incurred attorney fees because she has the need and Mr. Brown has the ability to pay.

Pursuant to RCW 26.09.140, the appellate court has the ability to award attorney fees for actions falling within the purview of RCW 26.09. The statute states in pertinent part as follows:

> 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 attorneys' fees in addition to statutory costs.

Ms. Crane asks the Court to provide an award of attorney fees to her pursuant to RCW 26.09.140. Pursuant to Washington

State Rule on Appeal (RAP) 18.1, Ms. Crane will file an Affidavit of Financial Need, which will show that she does not make a substantial income, and her expenses, including those related to this appeal, exceed her income. She submits that Mr. Brown has the ability to pay her fees.

The Court should find that Ms. Crane has the need for an award of fees and that Mr. Brown has the ability to pay.

B. The Court should order Mr. Brown to pay Ms. Crane's costs incurred herein in the event Ms. Crane is the prevailing party.

RAP 14.2 provides in pertinent part, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review."

In the event Mr. Brown's appeal is denied, Ms. Crane will be the substantially prevailing party. Ms. Crane requests that the court award her with costs in the event Mr. Brown's appeal is denied.

C. The Court should order Mr. Brown to pay Ms. Crane's attorney's fees as compensatory damages pursuant to RAP 18.9 because Mr. Brown's appeal has no merit and is frivolous.

Pursuant to RAP 18.9, the Court may order a party to pay compensatory damages to a harmed party in the event that the

party files a frivolous appeal. This is such a case. Mr. Brown has failed to identify one single error in law made by the Trial Court. Rather, Mr. Brown's entire appeal is nothing more than a request that this Court substitute its judgment for that of the Trial Court. Yet even Mr. Brown's own brief to this Court recognizes the fact that this appeal is not a *de novo* review and therefore this Court cannot simply substitute its judgment for that of the Trial Court.

Mr. Brown's arguments all relate to the weight given to evidence by the Trial Court. He is simply upset that the Trial Court chose to believe Ms. Crane over his own assertions. His appeal has no basis in law and this Court should find that it was a frivolous appeal and should order compensatory damages. In this case the damages suffered by Ms. Crane are the additional attorney's fees incurred in responding to Mr. Brown's appeal.

The Court should order Mr. Brown to compensate Ms. Crane for having to respond to this appeal by ordering that Mr. Brown pay all of Ms. Crane's attorney's fees and costs.

CONCLUSION

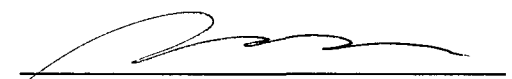
The argument set forth by Brown in this appeal is an inappropriate waste of time and resources of both the Court and the parties. Brown fails to identify a single error of law committed by

the Trial Court. Rather, Brown simply asks this Court to substitute its judgment for the judgment of the Trial Court. He does this despite acknowledging in his brief that this Court is not permitted to make such a substitute of judgment. The simple fact is that Brown did not like the decisions made by the Trial Court and is desperately looking to this Court for help. However, each and every decision made by the Trial Court was well within its discretion. Frustratingly for Crane, who has had to incur additional attorney fees in defending against this appeal, Brown as much as admits this in his opening brief to this Court.

The Court should affirm the decision of the Trial Court in this matter and should require Brown to pay all attorney's fees and costs incurred by Crane in defending against this appeal.

Respectfully submitted this 23rd day of July, 2012.

McGavick Graves, P.S.



Barbara Jo Sylvester, WSB#7856
Attorneys for Crane

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 23rd day of July, 2012, he hand delivered the original Brief of Respondent plus one true and correct copy thereof for filing with the Court of Appeals, Division II, and a true and correct copy of the same for delivery to the following counsel of record:

Andrew Helland, WSB#43181
Attorney for Appellant Terry L. Brown, Sr.

and placed in the US Mail, postage pre-paid, at Tacoma, Washington, a true and correct copy of Brief of Respondent to Andrew Helland, attorney for Appellant, at the address below:

Law Office of Robert Helland
960 Market Street
Tacoma, WA 98402

DATED this 23rd day of July, 2012, at Tacoma, Washington.

McGAVICK GRAVES, P.S.

Thomas E. Hudson

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