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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 43743-1-II

THE COURT OF APPEALS, DIVISION II

State of Washington

IN RE THE MARRIAGE OF:

MICHAEL KENICHI GRAY,

PETITIONER

AND

SARA JUNE GRAY,

RESPONDENT

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

The Superior Court erred by refusing to impute income to Ms. Gray as required by RCW 26.19.071(6).

The Superior Court erred in refusing to provide any deviation for Mr. Gray's substantial parenting time.

The Superior Court erred in refusing to provide any deviation for Mr. Gray's support paid on account of a child by other relationship.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

One party to a marriage holds a Bachelor of Arts in theology and philosophy. She owns an on-line business. At trial, she produces no financial records of any kind – no bank account records, no tax records, no pay or business records. She asserts that her income is \$500 a month. Must the court impute income in accordance with RCW 26.19.071?

Does RCW 26.19.071(2) place up every person seeking to avoid imputation of income, the burden of producing tax returns, pay stubs, or other equivalent indicators of income

or is a party's self-serving testimony sufficient to meet a person's duty of disclosure in a divorce proceeding?

Should the court have deviated from the "standard calculation" in this case because of Mr. Gray's substantial parenting time under the plan or support paid on account of a child from other relationship, or both?

STATEMENT OF THE CASE

STANDARD OF REVIEW

This case calls upon the court to review a trial court's decisions on issues of child support.

Child support orders are reviewed for a manifest abuse of discretion. *In re Marriage of Griffin*, 114 Wash.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 Wash.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.

In re Marriage of Littlefield, 133 Wash.2d 39, 47, 940 P.2d 1362 (1997). "The amount of child support rests in the sound discretion of the trial court." *In re Marriage of Stern*, 57 Wash.App. 707, 717, 789 P.2d 807 (1990). "The appellate court should not substitute its judgment for the trial court's where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances. *Id.* at 717, 789 P.2d 807.

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Marriage of Robin M. Freeman*, 169 Wn.2d 664, 239 P.3d 557 (2010) (citing *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)).

IMPORTANT FACTS

This case involves a very short term marriage and two young children who are three and one at the time of the

divorce. The parties were married in February of 2008, separated three years later, in February of 2011. The divorce was final May 11, 2012. CP 44-50.

The parenting plan provides generally that four weekends a month Mr. Gray will pick up the children after work Friday and deliver them back to daycare Monday morning. If there are five weekends in a month, Ms. Gray parents the children that fifth weekend. The Wednesday before and after such fifth weekend, Mr. Gray parents the children. Holidays and school breaks are shared. CP 12-25.

While few parenting plans can be summed up in a sentence or two, basically, Mr. Gray parents the children three nights a week and most weekends; Ms. Gray parents the children four nights a week and most weekdays. To these parents' credit, the parenting plan was entered by agreement at the beginning of the trial. CP 12.

Mr. Gray has a high-school diploma (GED) and works as a truck driver. Tr. Trans. At page 34, line 15-21 and page 35-37. Mr. Gray's income was not genuinely disputed because it all comes straight from an employer's pay check. In all events, the court found his monthly net income to be \$3,200 a month. He does not dispute that. Ms. Gray has not

filed any appeal of the trial court decision. Mr. Gray's income is thus a verity on appeal. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wash.2d 148, 169, 795 P.2d 1143 (1990).

Ms. Gray holds a Bachelor of Arts in theology and philosophy. Tr. Trans at page 49, line 22 through page 50, line 6.

Her income is harder to determine, as she is self-employed, although at times, she has worked part-time. She owns an Internet bead business and sells beads at local markets on weekends. Tr. Trans. At page 57, line 18 to page 60, line 4. She testified that her monthly income was about \$500 a month and the court found that her "Actual monthly net income" to be \$500.00 a month. ¹

Ms. Gray did not submit any tax returns, bank statements, pay stubs or other documents to substantiate her income. It was based solely on her self-reported statements at trial.

Central to this appeal is Mr. Gray's assertion that on this record, the applicable statute requires the court to impute income to Ms. Gray.

APPLICABLE LAW AND ARGUMENT

By statute, income must be imputed to Ms. Gray because of the absence of any documents substantiating her income.

While Washington trial courts have unquestionably broad authority to do equity in divorce cases, divorce itself is a statutory proceeding. See *Decker v. Decker*, 326 P.2d 332, 52 Wn.2d 456 (Wash. 1958) (dissenting opinion) quoting from *Palmer v. Palmer*, 42 Wash.2d 715, 258 P.2d 475 (1953). Thus, the court's equitable powers are such as are either expressly conferred by the divorce statutes, or as can be reasonably inferred from a broad interpretation of the statutes. *Id.*

RCW 26.19.071(2) indicates that in calculating child support: "Other sufficient verification shall be required for income and deductions which do not appear on tax returns or paystubs." Here, Ms. Gray did not submit tax returns or paystubs, and provided no other reliable or "sufficient verification" for income not appearing on tax returns or paystubs. All she did was testify that her earnings capacity was \$500 a month.

¹ Her income is actually stated a variety of ways, at points she testified she made between \$100 and \$500 *a weekend*. Tr. Trans at page 59, line 6.

Absent tax returns or pay stubs, or some other “sufficient verification,” RCW 26.19.071(6) controls. It provides as follows:

. . . 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, aged, blind, or disabled assistance benefits, pregnant women assistance benefits, essential needs and housing support, 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.

It's important to observe that the statute uses "shall," which is a word of command, essentially removing discretion.

Here, subpart (a) can't apply because we don't have Ms. Gray's current rate of pay to convert to "full time" basis.

Subpart (b) can't apply because there is no evidence showing historical rate of pay "based on reliable information, such as employment security department data."

Subpart (c) can't apply because the evidence doesn't provide historical full time rates of pay.

That leaves subpart (d) to guide the court. This is the imputed age/gender figures appearing in the support guidelines.

Not surprisingly, this statute basically puts the burden on a parent who does not have a regular full-time job with pay stubs, to come forward with something more than just a self-serving statement about wages. And, obviously if the court simply accepts at face value the bald assertion that "I only earn \$500 a month," then many litigants would come to court without actual evidence of pay; there would be a huge advantage to just testifying without records.

The applicable statute does not allow Ms. Gray to rely simply on a self-serving statement, but instead imposes an affirmative duty to come to court with some documentary evidence sufficient to meet the dictates of the statute. Otherwise, she “shall” be imputed at the age/gender numbers contained in the guidelines.²

The trial court’s decision refusing to impute income in this case was an abuse of discretion because there is no authority to deviate from the express provision of the support statute on imputation of income.

The court indicated at a reconsideration hearing that it was within **Mr. Gray’s** power to obtain income documentation via discovery.

As to that, first, it’s hard to imagine how exactly that could be done in a comprehensive way. If Ms. Gray is getting cash payments at farmer’s markets or has a variety of paypal or credit card deposits to banks and such from the Internet sales, it would be exceedingly difficult to track all that down via discovery.

² It is worth noting that she could have produced such records in response to Mr. Gray’s motion to reconsider, but did not produce any records even in response to that pleading.

More importantly, it would be exceedingly expensive.

The court needs to take into account Mr. Gray's net monthly income of \$3,200. From that, he's expected to make substantial maintenance and child support payments. Indeed, the final court order was that he pay a variety of community debt, \$400 a month in maintenance for three years, and \$772 a month in child support. Similar temporary orders existed throughout the divorce. These are not wealthy litigants, and any money spent simply constitutes a deprivation of resources better allocated to the children.

Surely, the law of Washington cannot be that parents can hide income information only to be pried out via discovery at great expense. If that's the law, it will often work a grave injustice to the children.

It is not impossible for Ms. Gray to prove that her income is only \$500 a month, but if she wants to avoid the imputation rules, it is her duty to affirmatively come forward with records sufficient to prove her actual income. That would not be difficult. She could have supplied State tax records for her business, or complete banking records to

show how she was meeting expenses with the money she was receiving.

The point here is that a parent cannot, and should not, be allowed to simply self-report self-employment earnings by mere self-serving testimony. And, if that becomes the standard, then dissolution cases in Washington are going to become prohibitively expensive for many ordinary litigants.³

Essentially, the support statute imposes a duty of disclosure on any litigant wishing to avoid having income imputed according to the statute. Cf. *In re Marriage of Daniel E. Fairchild*, 148 Wn.App. 828, 207 P.3d 449 (2009) (discussing in context of child daycare reimbursement a spouse's burden of production as to evidence.)

Because Ms. Gray did not provide any of the financial data needed to support her contention that notwithstanding her holding a four-year undergraduate degree, her earnings capacity was only \$500 a month, the trial court abused its

³ One hesitates to say that there is gender bias in Washington courts. Still, it is hard to imagine a male coming to court and saying: "Sure, I have a four-year college degree, but all I can possibly earn is \$500 a month." Typically, that gets disapproval expressed by the court. There is zero reason to allow Ms. Gray to get away with that kind of behavior. And, as a parent, part of her "core parenting function" is the provision of financial support for her child. See RCW 26.09.004(2)(f) which identifies "parenting function" to include "Providing for the financial support of the child." \$500 a month is not sufficient to provide for the support of Ms. Gray, muchless support for any of her children.

discretion in accepting that number as “actual income” and refusing to impute income according to the statutes.

The court’s decision to refuse deviations is arbitrary and therefore an abuse of discretion.

In this case, if income is properly imputed to Ms. Gray, then the parties have income that is not greatly disparate.

The parenting plan provides very substantial parenting time for Mr. Gray, and he therefore has a fair share of the parenting expenses. There is no evidence to suggest that Ms. Gray somehow has greater parenting expenses than does Mr. Gray.

RCW 26.19.075(1)(d) provides for a deviation whenever the child spends a “significant amount of time” with the parent who is obligated to make a support transfer payment. Here, it seems that Mr. Gray has a “significant” amount of parenting time. Yet, the court refused to deviate at all from the standard calculation.

It’s not exactly clear why. It seems that the court was relying on that part of RCW 26.19.075 providing that “The court may not deviate . . . if deviation will result in

insufficient funds in the household receiving the support to meet the basic needs of the child.” Obviously, if Ms. Gray’s monthly income is only \$500 there will insufficient income to provide for the children even if the whole standard calculation is made the transfer payment.

That brings us back, however, to the core problem in this case: there is virtually no substantial evidence to determine Ms. Gray’s true income. It might be very considerably more than Mr. Gray’s income. It might not. Certainly if it is calculated by reference to the statute on imputation, it is very close to that of Mr. Gray – certainly after considering the \$400 transfer monthly in the way of maintenance which both diminishes Mr. Gray’s income and augments Ms. Gray’s income.

Only by ignoring the income problem itself can the court conclude that Ms. Gray’s household income will be insufficient to meet the needs of the child, and that’s improper without some sufficient financial data being disclosed by Ms. Gray.

Because the parenting plan divides the time, and therefore the expenses of raising the children essentially equally, and because the income of the parents – after

imputing income to Ms. Gray and considering the maintenance transfer – is essentially equal, there is no reason to make a transfer to Ms. Gray, any more than to order a transfer from Ms. Gray.

Mr. Gray also has a son from another relationship for which he pays about \$256 a month in support. Tr. Trans. At page 38, line 21 to page 39 line 11. For similar reasons (inadequate funds in mother's home), it seems that the court denied any deviation on account of that child although RCW 26.19.075(e) provides for deviation based on children from other relationships.

In all events, the case should be remanded for more detailed findings if a transfer payment without deviation at all is going to be approved on appeal.

CONCLUSION

It is unimaginable that Ms. Gray, who holds a four-year college degree, has true earnings capacity of only \$500 a month. What's known is that she is, for the most part, self-employed and therefore the information about her earnings

is peculiarly within her control; it should have been produced.

The applicable statute mandates that income be imputed if a party fails to produce income tax returns, pay stubs, or other similar indicia of actual earnings. Here, the court erred in refusing to impute income as required by the statute. The decision not to impute income to Ms. Gray was therefore based on untenable grounds and was an abuse of discretion.

After properly imputing Ms. Gray's income, and considering the maintenance transfer, there is no tenable reasoning that justifies the transfer payment of the full standard calculation without deviation for Mr. Gray's substantial parenting time. Accordingly, the refusal to deviate was an abuse of discretion. At the least, the case should be remanded with instructions to provide some factual basis for refusing to deviate.

DATED this 3rd day of January, 2013.



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STATE OF WASHINGTON

BY C. [Signature]
CITY

WASHINGTON STATE COURT OF APPEALS

Division Two

MICHAEL KENICHI GRAY,
Petitioner,

and

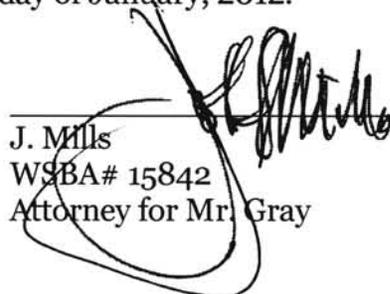
SARA JUNE GRAY,
Respondent

NO. **43743-1-II**

DECLARATION OF SERVICE

THE UNDERSIGNED declares under penalty of perjury of the State of Washington that a true copy of the APPELLANT'S OPENING BRIEF along with this Declaration of Service was served on Sara June Gray, pro se, today by emailing a copy to sarajunegray@gmail.com and that email is our customary means of communication in the case.

DATED at Tacoma, WA this 3rd day of January, 2012.



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Declaration of Service

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