

FILED  
COURT OF APPEALS  
DIVISION II  
2015 MAR 31 PM 3:09  
STATE OF WASHINGTON  
BY  DEPUTY

No. 46600-7-II

COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

---

TERRY LEE BROWN, SR.,  
Appellant,

v.

JENNIFER ANE CRANE (fka BROWN),  
Respondent.

---

**BRIEF OF APPELLANT**

---

Andrew Helland, WSBA 43181  
Attorney for Appellant

HELLAND LAW GROUP, PLLC  
960 Market Street  
Tacoma, WA 98402  
(253) 572-2684

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES.....iii**

**ASSIGNMENTS OF ERROR.....iv**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....v**

**STATEMENT OF THE CASE.....1**

**Factual Background.....1**

**Procedural Background.....4**

**ARGUMENT**

**I. THE TRIAL COURT ERRED BY FAILING TO PROVIDE THE APPELLANT WITH STATUTORILY REQUIRED DEDUCTIONS FROM HIS INCOME FOR PURPOSES OF CALCULATING CHILD SUPPORT.....5**

**a. Standard of Review Pertaining to Modification of Child Support.....5**

**b. The Trial Court Failed to Deduct Mr. Brown’s Labor and Industry Contribution.....7**

**c. The Trial Court Failed to Deduct Mr. Brown’s Mandatory Union Dues.....7**

**d. The Trail Court Failed to Deduct Mr. Brown’s Mandatory Retirement Contributions.....8**

**II. THE TRIAL COURT ERRED BY FAILING TO INCLUDE THE RESPONDENT’S BONUSES IN HER INCOME FOR PURPOSES OF CALCULATING CHILD SUPPORT.....8**

**III. THE TRIAL COURT ABUSED ITS DESCRETION IN DENYING APPELLANT’S REQUEST FOR A**

<b>WHOLE FAMILY DEVIATION OR RESIDENTIAL CREDIT.....</b>	<b>10</b>
<b>CONCLUSION.....</b>	<b>14</b>

## TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

### Cases

<i>In re Custody of B.M.H.</i> , 315 P.3d 470, 179 Wn.2d 224 (2013).....	6
<i>In re Jannot</i> , 37 P.3d 1265, 110 Wn.App. 16, 22 (2002).....	12
<i>In re Marriage of Dodd</i> , 120 Wn.App. 638, 643, 86 P.3d 801 (2004).....	5, 6, 13
<i>In re Parentage of M.F.</i> , 170 P.3d 601, 141 Wn.App. 558, 572 (2007).....	12
<i>Norfolk Redevelopment &amp; Hous. Auth. v.</i> <i>Chesapeake &amp; Potomac Tel. Co. of Virginia</i> , 464 U.S. 30, 35-36, 104 S.Ct. 304, 78 L.Ed.2d 29 (1983).....	6
<i>State v. Estill</i> , 50 Wash.2d 331, 334-35, 311 P.2d 667 (1957).....	6
<i>State ex rel. M.M.G. v. Graham</i> , 152 P.3d 1005, 159 Wn.2d 623, 627-28 (2007).....	12

### Statutes

RCW 2.24.050.....	5
RCW 4.04.010.....	6
RCW 26.19.071.....	6, 7, 8, 14
RCW 26.19.075.....	9, 10, 12

## ASSIGNMENTS OF ERROR

1. The trial court erred by declining to provide the Appellant statutorily required deductions for Labor and Industry, Mandatory Retirement, and Mandatory Union Dues as required by RCW 26.19.071  

Final Order of Child Support, 6/19/14 (CP 259-274)  
Order on Motion for Revision, 7/25/14 (CP 286-287  
6/19/14/6/12 Verbatim Report of Proceeding (VRP)  
26-27 (oral finding)  
7/25/14 VRP 18-19
  
2. The trial court erred when it denied including the Respondent's bonus income as a source of income for purposes of determining income for child support under RCW 26.19.071  

Final Order of Child Support, 6/19/14 (CP 259-274)  
6/19/14 VRP 26-27 (oral finding)  
7/25/14 VRP 18-19
  
3. The trial court erred by denying Appellant's request for a whole family deviation and residential credit as allowed under RCW 26.19.075.  

Final Order of Child Support, 6/19/14 (CP 259-274)  
6/19/14 VRP 27  
7/25/14 VRP 19

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err by improperly excluding mandatory income deductions required by RCW 26.19.071 when determining the Appellant's income for purposes of child support?  
Assignment of Error 1.
2. Did the trial court err by declining to include the Respondent's bonus income as income for child support calculation purposes as directed by RCW 26.19.071?  
Assignments of Error 2.
3. Did the trial court err by denying the Appellant's request for a whole family deviation and residential credit for child support as allowed in RCW 26.19.075?  
Assignments of Error 3.

## STATEMENT OF THE CASE

A Final Order of Child Support resulting from a modification proceeding underlies this appeal. At issue is the trial court's final order excluding Appellant's statutorily required income deductions, exclusion of respondent's bonus income, and denial of a deviation.

### **Factual background**

Terry Lee Brown and Jennifer Crane married in 1997 and subsequently divorced in 2004. The court entered the most recent order of child support for the two minor children, Hadley and Lane, on 6/27/12. CP 165. The 2012 order of support set Ms. Crane's net income at \$2,897.52 a month and Mr. Brown's net monthly income at \$6,456.94 resulting in a standard calculation of \$1,502.13 increasing to \$1,660.14 effective September 1, 2012 due to Hadley changing age brackets. CP 57-58.

For purposes of calculating income in 2012 the court attributed to Mr. Brown his full-time employment earnings, his full VA Disability income, and an additional \$764.40 of overtime income based upon an average of approximately seven years of overtime. CP 67, 71. The court did provide Mr. Brown all of his statutorily required deductions from his income. CP 67, 71. The court provided Mr. Brown a whole family

deviation of approximately \$273.24 due to Mr. Brown having a new child to support. CP 58-59.

During the pendency of the 2012 child support modification, Ms. Crane received notice from her employer of a pending raise CP 51, 165-166, 227. The Respondent's pending raise was not disclosed to the trial court nor was it disclosed to the Court of Appeals during the pendency of the appeal of the 2012 child support order. CP 165-166, 228. The parties agree that Respondent's current base gross income is \$4,832.53. CP 165. The Respondent admits she received a bonus from her last two years of employment; however, she denies that it is reoccurring. CP 238.

Mr. Brown filed with the court Sealed Financial Source Documents consisting of his paystubs and tax returns. CP 1-51. Mr. Brown works two jobs: a union firefighter and the Vice President of PR for his union. CP 164. Mr. Brown works 56 hours a week straight time as a firefighter. CP 164. Mr. Brown is also employed by the Union in an elected position that terminates in February 2015. CP 164-65. The elected position requires Mr. Brown to work approximately 20 additional hours every week. CP 165. Lastly, Mr. Brown receives approximately \$1,615 in VA Disability pay. CP 49.

On 5/14/13 the parties filed an Amended Final Parenting Plan. CP 77-87. The amended parenting plan considerably increases Mr. Brown's residential time with the children by approximately 51 overnights resulting in him having the children 47% of the time. CP 166. On 5/19/14 the Respondent filed a motion to adjust child support. CP 88.

On 6/19/14 the matter came before Pro Tem Commissioner Stephen Gregovich. The Pro Tem Commissioner advised the parties that he had not read any of Mr. Brown's materials beyond the first six pages of his declaration. 6/19/14 VRP pg. 2, 50; CP 258. The Pro Tem Commissioner set Mr. Brown's income as the total of his firefighter income, his VA Disability, and second job (Union) income. 6/19/14 VRP at 27; CP 270-74. The court did not provide father any mandatory deductions beyond federal income tax and FICA despite providing them in 2012 order of child support. CP 70-74; 6/19/14 VRP at 27; CP 270-74. The court declined to include mother's bonus income. CP 270. This resulted in the court setting the standard calculation for support at \$1,847. CP 262.

Mr. Brown has two children from his current relationship to which he provides financial support. CP 166. Mr. Brown submitted to the court three different versions of proposed child support worksheets. CP 202-25. The three versions consist of the following variations in calculating his

income: the first worksheet includes income from all three possible income sources; the second worksheet provides income only from his firefighter wages and VA Disability; and the last worksheet provides income only from his firefighter wages. CP 202-25. Each worksheet provides not only the standard transfer calculation, but also provides the amount of any deviations based upon both the whole family deviation and a residential credit. CP 202-25.

The Pro Tem Commissioner denied both the whole family deviation and residential credit formulas and instead opted to provide a deviation of \$347.48 to set the transfer payment at \$1,500. 6/19/14 VRP at 27; CP 262.

Mr. Brown moved to revise the Pro Tem Commissioner's Order. CP 277-79. The Court denied Mr. Brown's motion for revision and adopted the Order of Child Support as determined by the Pro Tem Commissioner. 7/25/14 VRP at 19; CP 286-87.

Mr. Brown now appeals.

### **Procedural Background**

The Respondent filed a motion and declaration to adjust child support on 5/19/14. CP 88. The matter came before Pro Tem Commissioner Stephen Gregovich on 6/19/14. 6/19/14 VRP. The Appellant filed a motion for revision on 6/19/14. CP 277. The motions

came before the trial court on 7/18/14. 7/18/14 VRP. The court took the matter under advisement and issued its ruling on 7/25/14. 7/25/14 VRP; CP 286-87.

## ARGUMENT

### I. THE TRIAL COURT ERRED BY FAILING TO PROVIDE THE APPELLANT WITH STATUTORILY REQUIRED DEDUCTIONS FROM HIS INCOME FOR PURPOSES OF CALCULATING CHILD SUPPORT.

#### **Standard of Review Pertaining to Modification of Child Support.**

A superior court commissioner's actions "are subject to revision by a superior court judge." *In re Marriage of Dodd*, 120 Wn.App. 638, 643, 86 P.3d 801 (2004). When the evidence before the commissioner did not include live testimony, the superior court judge's review is de novo. *Dodd*, 120 Wn.App. at 643. "The superior court revision order supersedes the commissioner's ruling." *Dodd*, 120 Wn.App. at 644.

The Court reviews the superior court's revision of a commissioner's modification ruling for abuse of its discretionary authority under RCW 2.24.050. *Dodd*, 120 Wn.App. at 644. The superior court has "broad discretion in its decision to modify the child support provisions of a divorce decree." *Dodd*, 120 Wn.App. at 644.

The reviewing court cannot substitute its judgment for that of the trial court unless the trial court's decision rests on unreasonable or untenable grounds. *Dodd*, 120 Wn.App. at 644.

In general, our state is governed by the common law to the extent the common law is not inconsistent with constitutional, federal, or state law. RCW 4.04.010. The legislature has the power to supersede, abrogate, or modify the common law. See *State v. Estill*, 50 Wash.2d 331, 334-35, 311 P.2d 667 (1957).

It is a well-established principle of statutory construction that ‘ [t]he common law ... ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.’ " *In re Custody of B.M.H.*, 315 P.3d 470, 478, 179 Wn.2d 224 (2013) citing: *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35-36, 104 S.Ct. 304, 78 L.Ed.2d 29 (1983).

RCW 26.19.071 provides to the court the standard for determining income for child support purposes. RCW 26.19.071(5) provides in part:

**(5) Determination of net income.** The following expenses shall be disclosed and deducted from gross monthly income to calculate net monthly income:

(a) Federal and state income taxes;

(b) Federal insurance contributions  
act deductions;

(c) Mandatory pension plan  
payments;

(d) Mandatory union or professional  
dues;

(e) State industrial insurance  
premiums... (emphasis added)

The court is bound by the statute as enacted by the legislature.

**The Trial Court Failed to Deduct Mr. Brown's Labor and Industry Contribution.**

The trial court did not provide Mr. Brown with a deduction for his Labor and Industry payment as required by RCW 26.19.071(5)(e). CP 259-74. Mr. Brown has provided the court of proof of payment of this deduction as evidenced on his paystubs filed under seal. CP 2-6. The statute does not provide any discretion to the trial court for this deduction and as such it is an error of law to fail to provide the deduction to Mr. Brown.

**The Trial Court Failed to Deduct Mr. Brown's Mandatory Union Dues.**

Mr. Brown is a member of the Pierce County professional Firefighters IAFF Local 726 union. CP 2-6; 164. Mr. Brown has offered proof of payment to the court as evidenced on his paystubs filed herein.

CP 2-6. RCW 26.19.071(5)(d) is extremely clear to provide that such dues shall be deducted from income for purposes of determining child support. The trial court made an error of law by failing to provide Mr. Brown with the statutorily required deduction in the final support order. CP 270-74.

**The Trial Court Failed to Deduct Mr. Brown's Mandatory Retirement Contributions.**

Mr. Brown is subject to a mandatory retirement contribution under the LEOFF-II program. CP 2-6. Mr. Brown has filed proof of payment of his contribution with the court. CP 2-6. Under RCW 26.19.071(c) the court is required to deduct the contribution from his income for purposes of determining child support. The trial court committed an error of law by failing to provide this mandatory deduction.

**II. THE TRIAL COURT ERRED BY FAILING TO INCLUDE THE RESPONDENT'S BONUSES IN HER INCOME FOR PURPOSES OF CALCULATING CHILD SUPPORT.**

RCW 26.19.071(3) provides that for purposes of calculating income for child support, "Except as specifically excluded in subsection (4) of this section, monthly gross income shall include income from any source..." (emphasis added). The statute goes on to specifically list

“bonuses” under subset (r). The statute is extremely clear that bonuses must be included in income for the purposes of calculating support.

The respondent admits that she has received a bonus for each of the past two years. CP 238. The respondent simply asserts that bonus income should not be included, as it is not guaranteed every year. CP 238.

RCW 26.19.075 provides in part:

(b) **Nonrecurring income.** The court may deviate from the standard calculation based on a finding that a particular source of income included in the calculation of the basic support obligation is not a recurring source of income. Depending on the circumstances, nonrecurring income may include overtime, contract-related benefits, bonuses, or income from second jobs. Deviations for nonrecurring income shall be based on a review of the nonrecurring income received in the previous two calendar years.

There is no dispute that the Respondent received bonus income for the past two years. The Respondent did not provide any statement / evidence from their employer that the bonuses are unlikely to continue. As such, the bonus income is clearly reoccurring and the statute requires the court to include it for purposes of calculating income. Likewise, the trial court did not made any findings as to why the income is excluded from the worksheets as required by statute. CP 270-74; 286-89.

Respondent's bonus income is income as defined by the statute and must be included for purposes of determining child support.

**IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR A WHOLE FAMILY DEVIATION OR RESIDENTIAL CREDIT.**

RCW 26.19.075(3) provides in part:

The court shall enter findings that specify reasons for any deviation or any denial of a party's request for any deviation from the standard calculation made by the court. The court shall not consider reasons for deviation until the court determines the standard calculation for each parent.

Therefore, it is not appropriate for the court to determine what, if any, deviation is appropriate until such a time as the court properly determines the standard support calculation and percentages for each party.

Without waiving Appellant's argument that a deviation cannot be properly evaluated until such a time as support is properly calculated, the Appellant contends that the court abused its discretion by denying a whole family deviation and residential credit without entering any findings. The Appellant requested deviations based upon two additional children he supports along with providing for the two children at issue in this matter approximately 47% of the time.

At time of the hearing the Pro Tem Commissioner simply provided:

For purposes of - - I'm not going to do a whole family. I'm going to deviate that the new - - we got two kids, are they both under 12? Is there - - what's the - - ...Okay. So they're both over that. So we're going to end up at 750 a piece, which gives us a new transfer payment of 1500. ...End of story on that." 6/19/14 VRP at 27.

The Pro Tem Commissioner signed a final order of child support that provides, "A whole family deviation is provided to the father." CP 262.

This is despite the fact that the court denied the whole family deviation on the record without providing any factually basis for the denial. On revision the trial court provides:

So now we move on to deviation. Was there not a deviation? The answer is, well, all these deviations, except for the RV (Arvie) deviation, which isn't in play here because we don't have that kind of situation, they're all discretionary. And, certainly, I can't see any reason for saying that a different amount should be the amount of deviation that the commissioner said. It's a reasonable deviation. So, basically, I'm not revising the commissioner's ruling at all on either issue. 7/25/14 VRP at 19.

The trial court fails to provide any findings as to support its denial of both a whole family deviation and a residential credit and instead implements an arbitrary unsupported deviation.

When a party requests a deviation from the standard child support calculation, the superior court "shall enter findings that specify reasons for any deviation or any denial of a party's request for any deviation from the standard calculation made by the court." RCW 26.19.075(3). Failing to fully consider Mr. Brown's downward deviation request for his other two children is a failure to apply the applicable law, and thus an abuse of discretion. See *In re Parentage of M.F.*, 170 P.3d 601, 141 Wn.App. 558, 572 (2007); *In re Jannot*, 37 P.3d 1265, 110 Wn.App. 16, 22 (2002).

For a residential credit 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(1)(d). The trial court must enter written findings of fact

supporting the reasons for any deviation or denial of a party's request for deviation. RCW 26.19.075(3); *State ex rel. M.M.G. v. Graham*, 152 P.3d 1005, 159 Wn.2d 623, 627-28 (2007). Again, the trial court has not provided any findings or evidence on the record that the court examined the economic situations of both homes prior to ordering a deviation as required by statute.

When considering the totality of the facts it is clear that the court abused its discretion and reached a result that rests on unreasonable or untenable grounds. *Dodd*, 120 Wn.App. at 644. The 2012 Order of Support provides for a transfer payment of \$1,386.90. This amount factors in a \$273.24 whole family deviation. In comparison, Mr. Brown now receives a \$347.48 deviation based upon worksheets that exclude over \$700 a month in mandatory deductions and despite him providing for a new child and having the two children at issue herein approximately 47% of the time.

It is also notable that since the 2012 order was entered, Mr. Brown now has an additional new child to support and a modification of the parenting plan occurred placing the children at issue with him 47% of the time. CP 77-87. Mr. Brown's gross income, as determined by the trial court, increased \$551.13 from the 2012 support order whereas by comparison Ms. Crane's income increased \$1,625.83 (not including Ms.

Crane's disputed bonus income of \$291.67 a month). Given the totality of the circumstances and the court's failure to provide adequate findings in denying Mr. Brown's requested deviations the court has abused its discretion.

### CONCLUSION

The trial court committed errors of law by failing to provide Mr. Brown statutorily required deductions in his income despite Mr. Brown providing the court proof of payment of all claimed deductions. Likewise, the trial court abused its discretion by declining to provide Mr. Brown a whole family deviation or a residential credit.

For the reasons set forth above and upon the authorities cited, the Appellant respectfully requests that this Court vacate the Final Order of Child Support and Worksheets and remand to the trial court for proper calculation of income consistent with RCW 26.19.071 and a determination of what deviation is appropriate.

DATED this 31 day of March 2015.

RESPECTFULLY SUBMITTED,



---

Andrew Helland, WSBA #43181  
Attorney for Terry Brown, Appellant

**Declaration of Transmittal**

Under penalty of perjury under the laws of the State of Washington  
I affirm the following to be true:

On this date I transmitted the original document to the Washington  
State Court of Appeals, Division II, by personal service and delivered a  
copy of this document via personal service to the following:

Law Office of McGavick Graves for Barbara Jo Sylvester  
1102 Broadway, Suite 500  
Tacoma, WA. 98402

Signed at Tacoma, Washington on this 31 day of March 2015.

  
\_\_\_\_\_  
Robert Helland

FILED  
COURT OF APPEALS  
DIVISION II  
2015 MAR 31 PM 3:10  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY