

NO. 50392-1-II

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

In re the Marriage of:

NATHAN KYSAR

Appellant,

and

KIMBERLY KYSAR (KKA HALME)

Respondent.

BRIEF OF APPELLANT

Josephine C. Townsend Attorney At Law

WSBA 31965

211 E. 11th Street Suite 104

Vancouver WA 98660

360-694-7601

Josie@jctownsend.com

Attorney for Appellant

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INTRODUCTION

When the parties' marriage ended in divorce, the trial court entered a decree ordering Mr. Kysar to pay child support for the children. Mr. Kysar was a licensed plumber, owned his own business where his ex-wife had worked with him and had prior work experience. She was also a college graduate. At the time of the divorce the court imputed the mother at median income. Throughout the years since the divorce the parties have modified the child support figures. Each time the mother was imputed at median income. In the most recent modification, the Commissioner again imputed the mother at median income. Upon revision, the court impermissible and arbitrarily reduced mother's income to minimum wage. At the conclusion of the proceedings, mother's attorney moved for an award of fees based upon a billing statement that contained no details of any kind. The court granted mother's attorney a "do over" to allow him to fill in gaps and then the court made an award of attorney fees based on guesswork engaged by the court. Upon filing appeal, mother's attorney moved for an award of suit fees to pursue her own appeal. She filed no financial documents to support her claim and the court ordered Mr. Kysar

to advance \$7,500.00 in suit money so she could pursue her own cross appeal. This Court should reverse.

ASSIGNMENTS OF ERROR

1. The trial court erred in entering its order of modification of child support, imputing mother's income at minimum wage. CP 706-715 .
2. The trial court erred in entering its order re attorney fees to the mother based on incomplete records and for granting fees which were not supported by evidence. CP 745-748, 769-776,800-803, 755, 831.
3. The trial court erred in granting mother \$7500 in suit money to file a counter appeal in this case.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion by decreasing mother's income to minimum wage?
2. Did the trial court abuse its discretion by increasing father's child support obligations pro rata share when it arbitrarily reduced mother's income to minimum wage ?
3. Did the trial court abuse its discretion in awarding attorney fees to the mother based on incomplete, altered records and for which mother's

counsel did not separate out fees for appeal (and which had already been denied)?

4. Did the trial court abuse its discretion by ordering the father to pay \$7500 advance suit money to mother so she could pursue a cross appeal without providing any financial documents to the court to substantiate her claim and without the ability for the father to file a supersedeas bond?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

A. When the Couple Divorced, Wife's Income was imputed at median income. The parties stipulated to this provision. CP 228-229. Mother's income had never been established at minimum wage. CP 225. According to the father, Ms. Halme made \$20.00 per hour when she worked for him during the marriage. CP 175. Ms. Halme did not dispute the hourly wage in her responsive documents. Ms. Halme admitted to working for her husband and earning an associates degree. CP 181. The historical income figure for hourly wage was \$20.00 for Kimberly Halme.

B. When the child support was modified in 2016, the Commissioner ordered the mother's income to continue to be imputed at median income

CP 239. “Court sets income at census level \$2714.00 figure which was previously stipulated to, and now the law of the case.” CP 239. The Court found that Ms. Halme was voluntarily unemployed. CP 231. The parties agreed that Ms. Halme entered a stipulated order at the time of her divorce that her income should be placed at median level. CP 228-229. The temporary child support order reflected that Ms. Halme being imputed at median level was the law of the case. RP 257.

C. Court granted fees to the Mother based on erroneous accounting and argument on the part of Ms. Halme. There was no support in the record to award the fees as indicated in the court order. CP745-748. The billing records contained no detail whatsoever. CP 769-776. Father moved to have the court deny the fees based on the failure of the mother to provide support for her request. CP 769-776. The court granted leave for the mother to adjust her billing record which were still erroneous, contained mistakes, added billings, and repeated billings from the appeal which had been denied. CP 800-803. Father had filed a motion for discretionary review. CP 395-401. The Court of Appeals denied his motion, and the Court did not award fees to either party. CP 729-736. Mother moved the trial court to award her attorney fees which included

fees which had already been paid, and the fees for litigating the motion for discretionary review which had already been denied. CP 745-748. Father responded indicating that there was no authority for a second bite at the apple for appellate fees, that Mother had not provided sufficient information to the court regarding fees incurred, paid or otherwise, and the bills had been padded. CP 745-748, CP 769-776. After the court allowed mother's attorney to modify her billing records, father filed a sur-reply again arguing that the records were flawed, incomplete, excessive and new billings had been added. CP 800-803. Over father's objections, the court ordered fees to the mother, which was error.

D. When father filed his appeal, Ms. Halme filed a counter notice of appeal. The trial court ordered Mr. Kysar to pay \$7500 in suit money for Ms. Kysar to pursue her appeal without benefit of Mr. Kysar availing himself of a supersedeas bond and without requiring Ms. Halme to file any financial document in support of her request.

ARGUMENT

- A. Standard of review. The Appellate Court reviews child support orders on an Abuse of Discretion Standard. *In Re Marriage of*

Griffin, 114 Wn.2d. 772, 791 P.2d. 519 (1990). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *In Re Marriage of Littlefield*, 133 Wn. 2d 39, (1997). Discretion is also abused when the court uses an incorrect legal standard. *State v. Rundquist* 79 Wn. App 786 (1995). Substantial evidence must support the trial court's factual findings. *In Re Parentage of Goude*, 152 Wn. App 784, 219 P. 3d 317 (2009). Child support is set by statute with the support obligation divided proportionately to the parent's respective incomes. RCW 26.19.01.080(1). A parent's duty to support their children is defined in RCW 26.18. "Duty of Support: means the duty to provide for the needs of a dependent child, which may include necessary food, clothing, shelter, education and health care. The duty includes any obligation to make monetary payments, to pay expenses, including maintenance in cases where there is a dependent child, or to reimburse another person or an agency for the cost of necessary support furnished to a dependent child. The duty may be imposed by court order, by operation of law, or otherwise.

RCW 26.18.020(3). The statute sets a broad duty of supporting dependent children.

- B. The Trial Court Erred by Imputing Minimum Wage Income to the Mother. The statute sets forth a hierarchy for imputing wages. Because Ms. Halme earned more than minimum wage when she worked, the trial court erred in imputing income to her at that level. RCW 26.19.071 states: (6) Imputation of Income. The Court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed...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.

A court's decision on imputation of income due to voluntary underemployment is reviewed for an abuse of discretion. *In Re Marriage of Wright*, 78 Wn. App. 230, 896 P. 2d 735 (1995). The statute sets a priority order for the court to apply when imputing income to a parent. Current rate of pay, historic rate of pay based on reliable information, historic rate of pay based on incomplete information, minimum wage and median monthly income. By failing to follow the statutory priority order, the trial court abused its discretion in arbitrarily selecting minimum wage as the mother's wage. Mr. Kysar had indicated in his papers that his ex-wife's historical earnings were \$20.00 per hour. Ms. Halme did not dispute her historical earnings, only that she had decided to not work and

stay home to raise her children. CP 175. Therefore under the hierarchy, Ms. Halme's historical income of \$20.00 per hour should have been used by the court to establish her income level.

B. The trial court erroneously decreased mother's contributions to the childrens' support obligation when it arbitrarily reduced her income to minimum wage; While the mother receives child support from the father, by reducing the mother's wage, it also reduced the pro rata share of her portion of the children's uninsured medical expenses and other expenses which were ordered by the court to be paid. CP 706-715.

C. The Court erred when it awarded attorney fees to the mother based on a demand by Ms. Halme that father contribute to her legal expenses, including the cost of appeal (motion for discretionary review) which had been denied and then failed to credit the father with the payments he had already made. RP 1-11 -24. CP 755, 831. Ms. Halme also misquoted her fees to the court. In her initial papers, she reported paying Mr. Sundstrom \$3940.63 for her appeal and for which she sought reimbursement. CP 755. After the court allowed her to re-submit her billing statements, she modified the fees she allocated to appeal down to \$3065. CP 831. The

fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked and the actual work performed. *Hensley v. Eckerhart*, 461 U.S.424 (1983). The party seeking fees has the burden of submitting billing records with enough detail to establish that the number of hours it has requested are reasonable and were spent on the litigation for which fees are sought. See *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir.1994), *aff'd* in part 19 F.3d 1306. In determining reasonable attorney's fee, trial court should consider total hours necessarily expended in litigation by attorney, as documented by counsel, multiplied by reasonable hourly rate of compensation considering difficulty of problem, lawyer's skill and experience, amount involved in case, and quality of work performed. *Singleton v. Frost* (1987) 108 Wash.2d 723. This is important in this case because the work performed by the mother's counsel was not distinguished in any way, nor were the hours which were denied at the appellate court matter separated. CP 745-748. In fact the records which were initially submitted by the mother contained no detail of any kind of what the hours billed were for. Mother co-mingled the hours from two separate cases and expected the court to award fees. Mother provided no distinction of time or costs that they

claim to have incurred as a result of actions regarding the trial court. She did not distinguished those actions for which she had already received fees and her accounting gave no credits for amounts which had already been paid by Mr, Kysar. CP 769-776, 800-803. The court had to engage in guesswork to determine an arbitrary amount of fees to be awarded to the mother. CP 831. RP 1-11. Mother created an impossible task for the trial court to distinguish which fees were incurred as a result of the appeal and the lower court actions because the matters were intricately intertwined; she failed to credit Mr. Kysar for all of the fees he paid. CP 769-766, 800-803. Mother would have had to meet with her attorney, prepare legal briefs, research, write and prepare for trial against the father in the same manner as they would with the motion for discretionary review. Because the billing submitted by the mother contained virtually no detail, the court could not determine what, if any fees were owed to Ms. Halme. CP 745-748. The court impermissibly then allowed counsel for the mother, to re-write his bill, filling in whatever he chose, adding dates and amounts for court hearings that did not occur. There was also no indication in the record that the mother had actually paid any fees. RP 16. More importantly, it was not for the trial court to have to decide which entry belongs to the trial court case and which time and effort belong to the

appeal; which fees had actually been paid, and if they had been paid, what they had been paid for; that requirement fit squarely on the shoulders of the mother and she failed to do so and therefore her request for fees should have been flatly denied.

D. The Trial Court Erred When It Directed Mr. Kysar to Advance \$7500 to his Ex Wife Upon the Filing of the Appeal and Then Refusing to Allow him to file a supersedeas bond. In general, attorney fees are available on review on the same grounds on which they are available in the trial court. The general rule is that each party bears its own attorney fees. *Seattle School Dist. No. I v. State*, 90 Wn.2d 476 585 P.2d 71 (1978). Reasonable attorney fees may be claimed, however, where provided for by contract, statute, or recognized ground in equity. *Western Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293,716 P.2d 959 (1986). Attorney fees may also be available as a sanction against a party pursuing a frivolous appeal or abusing the court rules and procedures. RAP 18.9 CR 11; *Rich v. Starczewski*, 29 Wn. App. 244, 628 P.2d 831, rev. denied, 96 Wn.2d 1002 (1981); *Bryant v. Joseph Tree*, 119 Wn.2d 210, 829 P.2d 1099 (1992); however, these are decisions for the Appellate court not for the trial court. The procedure for requesting attorney fees on appeal was simplified

greatly by the 1990 amendments to the Rules of Appellate Procedure. RAP 18.1, which governs the claim for attorney fees, formerly required that: (i) the request for fees be made in the brief, (2) that an affidavit supporting the request be filed seven days prior to oral argument, and (3) that the request be repeated at oral argument. Fees were frequently denied due to counsel's failure to comply with one or more of these procedural prerequisites. RAP 18.1(c); *In re Marriage of Leland*, 69 Wn. App. 57, 847 P.2d 518, review denied, 121 Wn.2d 1033 (1993). The amended RAP 18.1 only requires that the request for attorney fees be made in the brief or motion on the merits and, if the court states in its opinion that fees should be awarded, an affidavit of fees and expenses must be filled within 10 days after the opinion is issued. Ms. Halme motioned the trial court for fees to pursue her appeal and the trial court granted her \$7500 over the objection of Mr. Kysar. Ms. Halme provided no financial documents nor affidavit in support of her request. Mr. Kysar argued that he was fully paying his court ordered support and Ms. Halme was married to an individual who makes over \$100,000.00 per year. Her complete failure to present her financial situation to the court precluded any consideration by the trial court to award advance fees for appeal. Further, the court abused its discretion when it then refused to allow Mr, Kysar to file a supersedeas

bond to stay the payment of the fees. It is black-letter law that a court's legal conclusions must be supported by factual findings that are in turn supported by substantial evidence. *In re Marriage of Fahey*, 164 Wn. App. 42, 55-56, 262 P.3d 128 (2011), rev. denied, 173 Wn.2d 1019 (2012). There were no findings made by the court to support its decision to pre-award fees to Ms. Halme and Mr. Kysar moves this court to reverse that ruling and to disgorge the fees he paid to Ms. Halme and award him fees for having to pursue this appeal.

CONCLUSION

This Court should reverse the order modifying child support and find that the mother be imputed at median income rather than minimum wage. No justifiable award of attorney fees could have been made to Ms. Halme based upon the record produced by her counsel and finally this Court should also reverse the order that directed Mr. Kysar pay his ex-wife \$7500 in advance of this court's ruling for suit fees and those fees should be disgorged.

Respectfully submitted this October 15, 2017

s/Josephine C. Townsend, Attorney for Nathan Kysar

WSBA 31965

CERTIFICATE OF SERVICE BY MAIL and E-Mail.

I certify that I caused to be mailed, a copy of the foregoing BRIEF OF APPELLANT postage prepaid, via email and U.S. mail on the 15th day of October, 2017, to the following counsel of record at the following addresses:

Counsel for Respondent

Catherine W. Smith

Valerie A. Villacin

1109 First Avenue, Suite 500

Seattle, WA 98101-2988

Signed this October 15, 2017 at Vancouver Washington

s/Josephine C. Townsend

Josephine C. Townsend WSBA 31965

Attorney for Nathan Kysar

TOWNSEND LAW

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