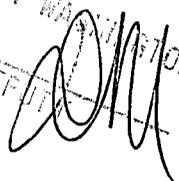


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COURT OF APPEALS
DIVISION II
2019 FEB 14 AM 11:31
STATE OF WASHINGTON
BY  DEPUTY

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.

REPLY BRIEF OF APPELLANT/CROSS RESPONDENT

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

This Court should reverse the fee award to the mother based on the incomplete records provided by her counsel, which included dates that there was no court, matters were set over, and no detail was provided by which the court could objectively award fees. The Court should reject mother's request for further fees as the trial court did not abuse its discretion in failing to award them.

RESTATEMENT OF THE CASE AND PROCEDURAL HISTORY

- A. 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 documents in support of her request. Ms. Halme is married and the income of her husband was not introduced or considered by the court in the awarding of fees to the mother under RCW 26.09.140

- B. Mr. Kysar did not fail to perform his responsibility under RAP 9.6 (b) (1)(d) to “include in the record all evidence relevant to the disputed verdict or finding”. The order awarding fees to Kimberly Halme is located at CP 835.
- C. Mr. Kyser properly and timely appealed the court’s order of January 13, 2017, because that order reserved the right for Kimberly Halme to request fees on the matter and was not a true final order. (CP 706-715).

ARGUMENT

The trial court made no findings of fact as to the financial need of Kimberly Halme, other than the fact she did not work and Mr. Kysar did. (CP 707). The court did not receive information on the wealth of her husband or other adults in her household which the court should have considered before an award of fees was given under RCW 26.09.140. 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. The summary provided by Ms. Halme's counsel was insufficient to justify the award. While the trial court has complete discretion over the amount of attorney fees to award *Marriage of Firchau* 88 Wn. 2d 109 (1977), the award must be made on tenable grounds. *Marriage of Knight*, 75 Wn. App. 721 (1994), rev. denied, 126 Wn. 2d. 1011 (1995). The court did not engage in a full review of the mother's financial need and father has properly raised this issue in his appeal. Not only did the trial court completely overlook the wealth of her spouse and other adults in her household, the court impermissibly allowed Ms. Halme's counsel to a "do-over" of his billing records which were still fraught with errors. Father argues that the method by which the fees were awarded were the result of guesswork and conjecture because of the complete failure by Ms. Halme's counsel to properly document his time spent on two separate cases. (CP 805-820).

Mr. Kysar properly sought discretionary review of the trial court's determination that mother should be imputed at minimum wage. The Commissioner did not find that his motion was Frivolous. *Kinney v.*

Cook, 150 Wn. App 187 (2009). Just as his appeal before this court is not frivolous. It was clear error for the trial court to award fees under RCW 26.09.140 when it had not made any inquiry as to the mother's actual financial need and to further base the award on the incomplete and accurate billing records presented (CP 805-820). If the mother was unemployed as she claimed, then how could she have paid the fees that she claimed that she had paid to her attorney? Where did the money to pay for the attorney come from? (CP 747,750). The mother did not state where the money came from, and the court failed to inquire of her household income. (CP 822-836). Father is not arguing over \$875.00 (Respondent brief p.17), but the unfairness of the presumption of the court that because Ms. Halme was not working, that she, individually, did not possess wealth and was in need of payment of contribution to her fees pursuant to RCW 26.09.140. That presumption is unsupportable and untenable. The determination to award fees upon the conclusion of a domestic case is determined by an examination of the income and other resources, and the expenses and debts of the parties. In Re Marriage of Fernau 39 Wn. App. 695 (1984). The trial court abuses its discretion if it fails to follow statutory standards or uses criteria other than those set forth in the statute. Custody of Halls, 126 Wn. App. 599 (2005).

The order of January 13, 2017 reserved further action by the parties. (CP 706-15) and therefore was not a completely final order. If the appellate court finds that because the issue of fees was reserved for future action by the court, then the action was not finalized until May 5, 2017 and Mr. Kysar's appeal of Ms. Halme's imputed minimum wage is timely. Mr. Kysar agrees that the language of the order of January 13, 2017 states it is a final order of child support, but the reservation clause by the trial court gives rise to Mr. Kysar making a timely appeal of both the income imputed to Kimberly Halme as well as the issue of attorney fees. If the Appellate court finds that the reservation of action on fees did not stay the finality of the child support order then Mr. Kysar agrees this court should not address the argument regarding the imputed income of Ms. Halme. (CP.714).

Mother's request for additional fees should be rejected. (Cross appeal) If the appellate court accepts the mother's proposition that the trial court has complete discretion over the amount of attorney fees to award Marriage of Firchau 88 Wn. 2d 109 (1977), then the trial court's decision not to award attorney fees for the motion for discretionary review must also remain unaltered. The trial court took into consideration the arguments of

counsel regarding the motion for discretionary review, including mother's rejected argument that the motion was frivolous and did not award attorney fees for the motion for discretionary review. (CP 822-836). The court did not just reject her request for fees for the motion for discretionary review, it also rejected incomplete entries and allegations of excessive fees which was argued by Mr. Kysar's counsel. *In Re Marriage of Sanborn*, 55 Wn. App. 124 (1989). If Ms. Halme argues that the discretion of the trial court should be given the greatest weight, then this court should equally apply that principle. Mr. Kysar properly prepared his record for appeal and included the court's order on fees. He has satisfied RAP 9.6 (b) (1)(d).

CONCLUSION

Father's Appeal to this court should be granted and mother's cross appeal should be denied.

Respectfully submitted this February 11, 2018

s/ Josephine C. Townsend,
Attorney for Nathan Kysar

WSBA 31965

CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing REPLY BRIEF OF APPELLANT postage prepaid, via email and U.S. mail on the 11th day of February 2018, to the following counsel of record at the following addresses:

Counsel for Respondent

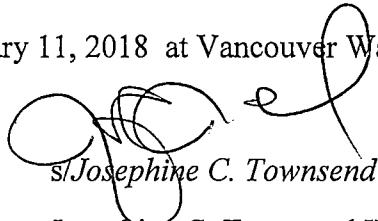
Catherine W. Smith

Valerie A. Villacin

1109 First Avenue, Suite 500

Seattle, WA 98101-2988

Signed this February 11, 2018 at Vancouver Washington

A handwritten signature in black ink, appearing to read 'Josephine C. Townsend', with a stylized flourish at the end.

Josephine C. Townsend WSBA 31965

Attorney for Nathan Kysar