

No. 50989-0-II

THE COURT OF APPEALS, DIVISION II

State of Washington

In re the marriage of:

WYATT POWELL,

Petitioner/Appellee

and

MONIQUE POWELL,

Respondent/Appellant,

APPELLANT'S OPENING BRIEF

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Statutes

RCW 26.19.071

Standards for determination of income.

- (1) Consideration of all income. All income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent. Only the income of the parents of the children whose support is at issue shall be calculated for purposes of calculating the basic support obligation. Income and resources of any other person shall not be included in calculating the basic support obligation.
- (2) Verification of income. . . .
- (3) Income sources included in gross monthly income. Except as specifically excluded in subsection (4) of this section, monthly gross income shall include income from any source, including:
 - (a) Salaries;
 - (b) Wages;
 - (c) Commissions;
 - (d) Deferred compensation;
 - (e) Overtime, except as excluded for income in subsection (4)(i) of this section;
 - (f) Contract-related benefits;
 - (g) Income from second jobs, except as excluded for income in subsection (4)(i) of this section;
 - (h) Dividends;
 - (i) Interest;
 - (j) Trust income;
 - (k) Severance pay;
 - (l) Annuities;
 - (m) Capital gains;
 - (n) Pension retirement benefits;
 - (o) Workers' compensation;
 - (p) Unemployment benefits;

- (q) Maintenance actually received;
- (r) Bonuses;
- (s) Social security benefits;
- (t) Disability insurance benefits; and
- (u) Income from self-employment, rent, royalties, contracts, proprietorship of a business, or joint ownership of a partnership or closely held corporation.
- (4) Income sources excluded from gross monthly income. The following income and resources shall be disclosed but shall not be included in gross income:
 - (a) Income of a new spouse or new domestic partner or income of other adults in the household;
 - (b) Child support received from other relationships;
 - (c) Gifts and prizes;
 - (d) Temporary assistance for needy families;
 - (e) Supplemental security income;
 - (f) Aged, blind, or disabled assistance benefits;
 - (g) Pregnant women assistance benefits;
 - (h) Food stamps; and
 - (i) Overtime or income from second jobs beyond forty hours per week averaged over a twelve-month period worked to provide for a current family's needs, to retire past relationship debts, or to retire child support debt, when the court finds the income will cease when the party has paid off his or her debts.

...

ASSIGNMENTS OF ERROR

The Superior Court erred in failing to properly calculate Mr. Powell's income for child support purposes because overtime was improperly excluded from income.

The Superior Court erred in awarding less than Ms. Bittner's reasonable fees because it had in mind an erroneous assessment of Mr. Powell's income when making its fee award.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

Must the Superior Court count overtime earnings for purposes of child support if the overtime is regular and recurring, not associated with a second job, and if there is no evidence the overtime is being worked to retire any past debts?

Must the Superior Court have properly calculated income of the parties before making its final fee award?

STATEMENT OF THE CASE

STANDARD OF REVIEW

This case calls upon the court to review a trial court's determination of Mr. Powell's income for purposes of child support and an award of fees to a relatively impoverished parent.

Child support decisions are reviewed for abuse of discretion. *In re Marriage of Choate*, 143 Wn.App. 235, 240, 177 P.3d 175 (2008). A trial court abuses its discretion when the decision is manifestly unreasonable or rests on untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). Discretion also is abused when it is exercised contrary to law. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

Fee awards are similarly reviewed for abuse of discretion.

IMPORTANT FACTS, LAW AND ARGUMENT

This case is a very ordinary divorce case that was decided by a trial to the court. CP 90-93; 94-97. There is one minor child of the parties, but Ms. Powell (nka "Bittner") cares for a second child from a prior relationship.

Child support issues were segregated for a post-decree hearing. CP 93 at paragraph 21.

At the time of the support hearing, fairly comprehensive income data was submitted to the court from all sides. Of the 26 pay stubs provided, Mr. Powell worked less than 40 hours work only 4 weeks, and importantly, even in those weeks, he earned significant overtime pay, presumably because he worked more than eight hours on some days, and less than eight hours on other days in some weeks. 74 hours was the most he worked in a week (week ending 3/5/17), and the average over 26 weeks for which pay stubs were provided was 50.56 hours a week. CP 107-112

All of Mr. Powell's overtime was from his one and only job. None of the overtime was from a second job.

There was no evidence to suggest, nor did the court find, that Mr. Powell was working overtime to pay down support debt, to meet some other specialized need, or that his overtime pay will cease once he's met a specialized debt repayment plan.

RCW 26.19.071(3)(e) governs calculation of income for child support purposes and it provides:

Income sources included in gross monthly income. Except as specifically excluded in subsection (4) of this section, monthly gross income shall include income from any source, including:

[then follows a list of all sorts of income of all varieties, including]

(e) Overtime, except as excluded for income in subsection (4)(i) of this section;

Subsection (4)(i) indicates that what's **excluded** from income is:

(i) Overtime or income from second jobs beyond forty hours per week averaged over a twelve-month period worked to provide for a current family's needs, to retire past relationship debts, or to retire child support debt, when the court finds the income will cease when the party has paid off his or her debts.

The overtime shown in all the pay stubs submitted does not demonstrate that Mr. Powell qualifies for the subsection (4)(i) exclusion from income because this is not overtime from a second job. Nor is there any showing **or finding** that it's being worked to retire some particular debt, and importantly there is no **finding** by the court that the income "will cease when the party has paid off his or her debts." This is just regular recurring overtime pay that Mr. Powell receives.

Failure of the court to include the overtime for purposes of calculating Mr. Powell's income was simply contrary to the plain statutory requirements relating to calculating income as set out in RCW 26.19.071(3)(e) and

accordingly the income used to calculate Mr. Powell's support debt was an abuse of discretion, being contrary to law.

As to the fee award, RCW 26.09.140 allows the court to make a fee award after "considering the financial resources of both parties." Here, the court did award Ms. Powell some fees, but implied in the language requiring the court to consider the financial resources of both parties, is the idea that the court properly have in mind each parties' income. Here, it seems that the court did not assign to Mr. Powell the proper income, and accordingly, the matter of fees should be remanded for review after properly assessing Mr. Powell's income.

Ms. Bittner's request for fees on appeal.

Pursuant to RCW 26.09.140 and RAP 18.1, Ms. Bittner requests an award of her fees for this appeal, which should be granted for the reason the trial court granted fees; Ms Bittner.

CONCLUSION

The trial court abused its discretion regarding the amount of child support because it's decision to ignore

significant overtime earnings was unreasonable inasmuch as there is no evidence at all that it's from a second job, or that it was for reasons allowing exclusion under 26.19.071(4)(i). Accordingly, the amount calculated to be Mr. Powell's income for purposes of this case was made in a manner contrary to law; it is therefore an abuse of discretion.

The case should be remanded with instructions to recalculate support including the overtime being earned.

Because the court made its award of fees without having the proper income of Mr. Powell in mind, the case should be remanded to reconsider the fee award also.

Ms. Bittner has a need for her fees to be paid and Mr. Powell has a relatively greater ability to pay and for reasons the trial court awarded fees, Ms. Bittner's reasonable fees for prosecuting this appeal should be granted.

DATED this 2nd day of April, 2018.



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STATE OF WASHINGTON

BY  DEPUTY

**SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE**

In re the marriage of:

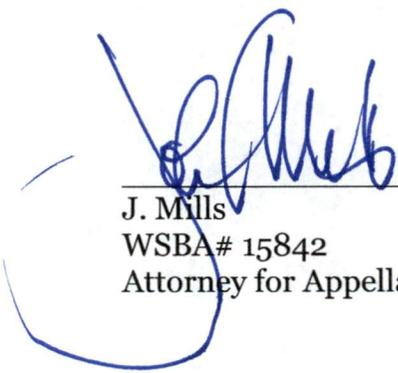
WYATT POWELL,
Petitioner,
and
MONIQUE POWELL,
Respondent.

COA No. 50989-0-II

DECLARATION OF SERVICE OF
APPELLANT'S OPENING BRIEF

THE UNDERSIGNED declares under penalty of perjury of the State of Washington that a true and correct copy of Appellant's Opening Brief was served on counsel for Mr. Powell by email to Rob Melvin, his attorney of record at melvinlawfirm@gmail.com, and that email is our customary means of communication/service.

DATED this 2nd day of April, 2018.



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SERVICE DECLARATION – OPENING BRIEF - 1

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