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WASHINGTON STATE COURT OF APPEALS
DIVISION II

JOSHUA A. KNOWLES,

Appellant,

v.

HEIDI K. KNOWLES,

Respondent.

APPELLANT JOSHUA KNOWLES' REPLY BRIEF

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A. REPLY ARGUMENT

- 1. The trial court's findings of fact and conclusions of law regarding Mr. Knowles' income for purposes of child support are not supported by substantial evidence in the record.**

As Mr. Knowles argued in his Opening Brief, the child support worksheets and Order of Support (as well as the Findings and Decree which incorporate the Order) entered by the trial court are all based on the faulty premise that Mr. Knowles' net monthly income was \$8,000. See CP 1188 (Order) and 1199 (Worksheet). This number, however, has no basis in fact. Indeed, the objective, documentary evidence in the record shows Mr. Knowles' net monthly income to be much less: \$2,968. See 3/1/2018 VRP at 404 and Exhibit 110 (Joshua Knowles' financial declaration).

Ms. Knowles nevertheless contends the findings are supported.¹ The Court should reject her arguments because once

¹ Ms. Knowles' arguments are difficult to follow because even in her "amended" response brief, her citations to the record appear to be incorrect. For example, she repeatedly cites to a "September 11, 2018" verbatim report of proceedings, but there is no such verbatim report. Trial took place on February 27 & 28, and March 1 & 16 of 2018. We assume the "September 11, 2018" in the response briefing refers to the date the transcripts were filed with the Court of Appeals. Additionally, the page numbers cited by Ms. Knowles in her amended brief are still wrong. It appears she is referring to the page numbers of individual .pdf files rather than the page numbers assigned by the transcriptionist. We have done our best to interpret Ms. Knowles' arguments and citations to the record.

again, they are based on a combination of sheer speculation and mischaracterization of the evidence in the record. For example, she claims she testified to “deposits of over \$500,000.00 to the husband’s company in 2015” and that “the company grossed over \$480,000” in 2016. See Amended Response Brief at p.10. (Ms. Knowles cites to 9/11/2018 VRP at 48, but it appears she may be talking about her testimony from the February 27, 2018 VRP at 194-95). There are multiple problems with this argument. First, it is not disputed that this testimony is about deposits into the parties’ business account. See February 27, 2018 VRP at 194-95. Second, nowhere in this testimony does Ms. Knowles acknowledge that (1) the business would have to use those deposits to pay expenses; or (2) gross deposits into a business account are not the same thing as Mr. Knowles’ income. Id.

Ms. Knowles also claims the trial court’s findings are supported by her testimony about “cash withdrawals” in 2015 and 2016. See Amended Brief at 10-11. (Ms. Knowles cites to 9/11/2018 VRP at 54, but it appears she may be talking about her testimony from the February 27, 2018 VRP at about p. 201). Again, the Court should reject this argument. First, Ms. Knowles' testimony on this issue was

referring at least in part to Exhibit 11, which was nothing more than a summary she made and was not actually admitted into evidence. See id. at 201 (admitting for illustrative purposes only).

Secondly, and more importantly, it is clear from Ms. Knowles' own testimony that these withdrawals from the joint account the parties used were not only for personal uses, but did indeed include withdrawals for business expenses:

... you can have it withdraw directly from the bank, which we had ... And then we could spend it on our discretion to anyone. It could be to casual salaries, it could be to vendors, it could be cash out of the kiosk that could be spent for personal expenses, which I personally also did at times when I was in Kenya.

See id. at 200 (note: “casual salaries” refers to salaries for their laborers, which are referred to as “casuals.” See id. at 164).

In contrast to Ms. Knowles' mischaracterization of bank statements and her sheer speculation, Mr. Knowles provided the following financial documents: tax returns for 2010, 2011, 2012, and 2013 (see Exhibit 116); his financial declaration (see Exhibit 110); Highmark Construction Profit & Loss statements for July 2013 - June 2014 (see Exhibit 66); and Highmark Construction Profit & Loss statements for July 2016 – December 2017 (see Exhibit 118).

The tax returns for 2010-2013 showed combined joint business wages for both parties as follows: \$39,749 in 2010; \$56,226 in 2011; \$69,482 in 2012; and \$74,362 in 2013. See Exhibit 116. Mr. Knowles testified about how a terrorist attack in Kenya in 2013, along with subsequent State Department travel warnings decimated the tourism industry, forcing Highmark Construction to move completely out of the “safari” tourism industry. See 3/1/2018 VRP at 388-91. As such, the parties operated Highmark Construction at essentially a loss as they transitioned into residential construction. Id.

The Highmark Construction Profit & Loss statements reflect the difficulty the company had. Indeed, from July 2013 to June 2014, the total amount of profit the company earned was a mere \$2,130, which is just \$177 per month. See Exhibit 66. From July 2016 to December 2017, the total amount of profit the company earned was \$15,493.86, which pencils out to about \$860 per month. See Exhibit 118. This is in line with Mr. Knowles’ financial declaration, which states his monthly net income is \$2,968. See 3/1/2018 VRP at 404 and Exhibit 110.

This case is akin to State ex rel. Stout v. Stout, 89 Wn. App. 118, 948 P.2d 851 (1997). In that child support modification action, the father provided “extensive financial data to support his request,” including personal income tax returns and corporate tax forms. Stout, 89 Wn. App. at 124-25. The trial court ignored this documentation, and instead imputed the father’s income. The Court of Appeals reversed, finding the evidence was not sufficient: “In the face of this financial data, the trial court’s \$15,000 annual income estimate is inexplicable, especially where it found no basis upon which to impute income.” Id. at 125.

Here, as in Stout, there is not substantial evidence in the record to support the trial court assigning a net monthly income of \$8,000 to Mr. Knowles. Ms. Knowles’ testimony is not even “a mere scintilla of evidence,” Hewitt v Spokane P. & S. Railway Co., 66 Wn.2d at 286; rather, it is sheer speculation built on a foundation of pretending business account deposits equvalate to wages, and it cannot support the trial court’s findings in light of Mr. Knowles’ financial documents in the record. This Court should reverse.

2. The trial court erred by imputing Mr. Knowles' salary where he is gainfully employed on a full-time basis and is not purposely underemployed to reduce his or her support.

Ms. Knowles cites to and acknowledges the statute governing when and how income can be imputed. See Amended Brief at 12-13. She does not acknowledge, however, that the trial court may impute income only “in the absence of records of a parent’s actual earnings.” See RCW 26.19.071. Here, Mr. Knowles provided records of his actual earnings, and it was error for the trial court to impute.

Additionally, Ms. Knowles appears to argue the trial court made a finding that Mr. Knowles was voluntarily underemployed. See Amended Brief at 13. But the trial court made no such finding. Rather, the trial court found that Mr. Knowles’ income was “unknown.” This was error. Aside from the lack of evidence in the record to support this, the trial court here made no finding whatsoever that Mr. Knowles was voluntarily underemployed. Indeed, there is no dispute Mr. Knowles has consistently been gainfully employed operating his business in Kenya. As such, the trial court should have used his actual income, and in fact the court was prohibited from imputing his income

without making a finding that he was purposely underemployed to reduce his support obligation. RCW 26.19.071(6); In re Marriage of Peterson, 80 Wn. App. 148, 153, 906 P.2d 1009 (1995), review denied, 129 Wn.2d 1014, 917 P.2d 575 (1996).

3. The trial court erred by including a start date of October 1, 2016 for the April 13, 2018 Final Child Support Order.

Ms. Knowles claims Mr. Knowles “appears” to argue laches and estoppel preclude the award of back support, and then she urges this Court to reject the arguments. See Amended Brief at 16. Likewise, she cites several cases about modification actions and claims they do not apply here. Id. at 17-18. But these are mischaracterizations of Mr. Knowles’ argument and they should be rejected.

Again, this very question has already been addressed by the Court of Appeals in In re Marriage of Munn, 2014 WL 4792629, 183 Wn. App. 1035 (September 25, 2014). In that case, a parent appealed the decision of the trial court declining to award temporary child support. After noting that the appellant failed to properly prepare the record, this Court held that it was legally improper to retroactively

create a back-child support obligation where the issue had already been resolved at temporary orders:

Moreover, if the superior court did deny Ms. Munn's request for temporary child support as the undisputed testimony at trial suggests, then that order (or those orders) were subject to appeal but not to retroactive modification. RCW 26.09.170(1) establishes the conditions for modifying a child support order and states, in relevant part, that “[e]xcept as otherwise provided ... the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification.” In [In re Marriage of Shoemaker, 128 Wn.2d 116, 123, 904 P.2d 1150 (1995)], the Washington Supreme Court held that if an order has previously been entered that excuses a parent from paying child support, then RCW 26.09.170(1) bars a superior court from imposing a child support obligation retroactively, even if the facts would have supported imposing that obligation prospectively at an earlier time. Since the trial court is required by chapter 26.19 RCW to apply the same standards in its temporary and final orders for support, denial of temporary support forecloses retroactive modification.

See Marriage of Munn, 2014 WL 4792629 at *3 - *4.

This is exactly the situation here, and it was error for the Court to retroactively start the Final Child Support Order on October 1, 2016, nearly two years before the Order was entered. In doing so, the trial court instantly created nearly two years of back support, even though Mr. Knowles had been fully paying child support under the

July 26, 2017 temporary child support order. As such, this Court must vacate the award of back support, and instruct the trial court on remand to award no back support.

4. The trial court erred by awarding attorney fees to Ms. Knowles where Mr. Knowles does not have the ability to pay.

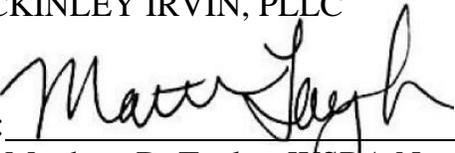
The trial court here awarded attorney fees to Ms. Knowles on grounds that Mr. Knowles has the ability to pay them. See CP 1159. To the extent the trial court erred in setting Mr. Knowles' income at \$8,000 per month, it also erred in concluding he has the ability to pay Ms. Knowles' fees. The Court should reverse the trial court on this issue as well.

B. CONCLUSION

For the reasons described herein and in Mr. Knowles' Opening Brief, we respectfully request that this Court reverse the trial court and remand for further proceedings.

RESPECTFULLY SUBMITTED this 6th day of May, 2019.

MCKINLEY IRVIN, PLLC

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2019, I caused to be served a true and correct copy of **APPELLANT'S REPLY BRIEF** on the parties listed below via electronic service:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Seattle, Washington this 6th day of May, 2019.



Becca Ebert
Paralegal

MCKINLEY IRVIN, PLLC

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