

COURT OF APPEALS DIVISION TWO
OF THE STATE OF WASHINGTON

DARNELL MOSLEY, Petitioner,

v.

ANGELIQUE MOSLEY, Respondent,

No. 53359-6

REPLY BRIEF OF APPELLANT

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Ang v Martin, 154 Wash.2d 477, 481, 114 P.3d 637 (2005).

Dix v ICT Grp., Inc, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

Kadoranian v Bellingham Police Dept., 119 Wash.2d 178, 185,
829 P.2d 1061 (1992).

Motor Contract Co. v Van Der Volgen, 182 Wash.449, 454, 298 P. 705
(1931)

Tapper v State Emp't Sec. Dep't, 122 Wn.2d 397, 406, 858 P.2d 494 (1993).

5. Washington Court of Appeals Cases

In re Parentage of A.L., 185 Wn.App. 225, 238, 340 P.3d 260 (Div. 3, 2014).

In re Marriage of Daubert 499 124 Wn. App. 483, 99 P.3d 401 (Div. 1, 2004).

State v Esters, 84 Wn.App. 180, 184-5, 927 P.2d 1140 (Div. 2, 1996).

In re the Marriage of Fiorito, 112 Wash.App. 657, 663-4, 50 P.3d 298
(Div. 1, 2002).

In re Parentage of K.R.P., 160 Wn.App. 215, 223, 247 P.3d 491 (Div.1, 2011).

In re Marriage of Maples, 78 Wn.App. 696, 700, 899 P.2d 1 (Div. 2, 1995).

In re the Marriage of McCausland, 129 Wn.App. 390, 118 P.3d 944 (Div. 2 2005).

Pierce v Yakima County, 161 Wn.App. 791, 800-1, 251 P.3d 270 (Div. 3, 2011).

6. Statutes

RAP 14

RCW 26.09.001

RCW 26.09.140

RCW 26.19.020

RCW 26.19.071

RCW 26.19.075

RCW 26.19.080

7. Other Authorities

A. Assignment of Error

No. 1. The trial court erred in entering the Child Support Order and Child Support Worksheets of Mrs. Mosley and denying Mr. Mosley's deductions for taxes paid for Military Pension income.

No. 2. The trial court erred in adding income of the spouse of Mr. Mosley to his gross monthly income

B. Issue Pertaining to Assignment of Error:

No. 1. Should the court follow RCW 26.19.071(5)(a) and deduct taxes paid on income in calculating net monthly income for purposes of determining child support?

No. 2. Can the court include income of a spouse in determining gross monthly income in violation of RCW 26.19.071(4)(a) which specifically excludes?

C. Response to Appellee Brief.

1. Review. Counsel for Mrs. Mosley failed to address that review of statutory interpretation is done de novo.

A. When a pure question of law is presented, a de novo standard of review should be applied. *Dix v ICT Grp., Inc*, Supra; citing *Ang v Martin*, 154 Wash.2d 477, 481, 114 P.3d 637 (2005). Questions of law are reviewed de novo. *Motor Contract Co. v Van Der Volgen*, 182 Wash.449, 454, 298 P. 705 (1931).

Here there is a statutory interpretation at issue with mandatory "shall" language and Mr. Mosley should receive a de novo review.

The clear intent of the Legislature is "that the child support obligation should be equitably apportioned between the parents," which cannot be achieved when gross

income is overinflated and taxes are not calculated and deducted for income received to accurately calculate net monthly income. “In interpreting the child support statute our primary objective is to carry out the legislature’s intent.” RCW. 26.09.001; In re Marriage of Daubert, Supra, citing: State v Esters, 84 Wn.App. 180, 184-5, 927 P.2d 1140 (1996). The court must give effect to the legislature’s intent and purpose. “If the statutes meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. Statutory interpretation is a legal issue that this court reviews de novo.” In re Parentage of K.R.P. Supra. “Where the meaning of the statute is clear from the language of the statute alone, there is no room for judicial interpretation.” In re Marriage of Maples, Supra; citing Kadoranian v Bellingham Police Dept., 119 Wash.2d 178, 185, 829 P.2d 1061 (1992). Here the court did not follow the legislature’s intent and purpose in utilizing mandatory “shall” language and failed to deduct taxes paid on Mr. Mosley’s Military Pension and erroneously included income of Mr. Mosley’s spouse as his income for determination of his gross monthly income.

B. Even if the court determines the appropriate review is abuse of discretion there are multiple areas that support this.

i. Failure to follow RCW 26.19.071, which outlines what is considered gross income and requires that the income of a new spouse shall not be included in determining the gross income of a party. The statute is very clear that income and resources of any other person shall not be included in determining a parent’s gross monthly income. The court made no specific findings on these issues. Further remarriage to a previous spouse, as argued by Mrs. Mosley’s counsel, does not negate

their Decree of Dissolution award of property. The court made no specific findings on this issue. The court, just took a split the baby approach, which was an abuse of discretion in direct violation of the mandatory “shall” language of the statute.

RCW 26.19.071(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;

The trial court “must first independently determine child support according to the statutory requirements.” In re Marriage of McCausland, Supra. “The court must adhere to the following procedure in setting support: compute the total income of the parents, RCW 26.19.071; determine the standard child support level from the economic table, RCW 26.19.020; decide whether to deviate from the standard calculation based on specific statutory factors, RCW 26.19.075; and allocate the support obligation to each parent based on each parent’s share of the combined net income. RCW 26.19.080.” In re Marriage of Maples, 78 Wn.App. 696, 700, 899 P.2d 1 (1995).

Further the legislature chose to use mandatory language in RCW 26.19.071 when it stated that “monthly gross income shall include” and specifically lists what is gross monthly income. Additionally, the legislature chose to use mandatory language that “following income and resources shall be disclosed but shall not be included in gross income” and specifically listed “income of a new spouse.” The court has held that “shall” indicates mandatory action. Pierce v Yakima County, 161 Wn.App. 791, 800-1, 251 P.3d 270 (2011). “Thus as a general rule, this court interprets statutory

directives using the word ‘shall’ as mandatory or imperative in character.” In re Parentage of K.R.P., Supra.

The decision to include some of Mr. Mosley’s current spouses income as Mr. Mosley’s income violates RCW 26.19.071, is based on unreasonable or untenable grounds, with an erroneous view of the law and an incorrect legal analysis. Further the decision warrants a de novo review based on an appeal dealing with statutory interpretation.

ii. Failure to follow 26.19.071 that states that federal and state income taxes shall be disclosed and deducted from monthly gross income. The evidence supports that there were taxes paid on Mr. Mosley’s Military Pension and taxes should have been deducted per the mandatory language of RCW 26.19.071. See pages 43-51, previously admitted EX. 11 with the trial court and corresponding testimony in Transcript pages 56-60 dated 4/17/19. For purposes of determining net monthly income, RCW 26.19.071 should be complied with which mandates under

RCW 26.19.071 that:

(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;

Here, the court made no specific findings about the tax liabilities. The legislature chose to use the mandatory language “shall” deduct federal and state taxes from income and therefore they are to be “taken into account when establishing the basic support obligation.” In re Marriage of Daubert 499 124 Wn. App. 483, 99 P.3d 401 (2004). The court in Daubert, held that a finding of fact was warranted where the

court did not apply a requested back tax debt to the calculation. Id. Here the court made no finding regarding its decision to not allow tax deductions for Mr. Mosley's Military Pension and the court's decision was in direct violation of the statute. RCW 26.19.071. There are no exceptions to this mandatory language. Here Mr. Mosley's taxes paid on his Military Pension received must be deducted from his gross monthly income to determine his net monthly income.

The decision to exclude Mr. Mosley's taxes paid on his Military Pension from being deducted from gross income violated RCW 26.19.071, is based on unreasonable or untenable grounds, with an erroneous view of the law and an incorrect legal analysis. Further the decision warrants a de novo review based on an appeal dealing with statutory interpretation.

2. Taxes. At the presentation of documents on 4/26/19, Mrs. Mosley's counsel argued that since the DFAS doesn't show taxes being removed, then he receives the income tax free and their worksheets did not provide any tax deduction for his pension income with the addition of the split the baby approach. Mrs. Mosley's counsel stated "If taxes aren't deducted, and if he's not paying taxes, it's not fair or appropriate under the statute to give him essentially a credit which would effectively reduce his child support obligation." Transcript Page 14 lines 11-14 dated 4/26/19. Evidence shows that Mr. Mosley pays taxes to the IRS on his military pension. See Exhibit 11. The court took both proposed worksheets from both counsel, but signed Mrs. Mosley's worksheets with no taxes computed for Mr. Mosley for his pension income. Now new counsel for Mrs. Mosley also alleges that the court made rulings on taxes, but no findings were made by the court, Judge Ashcraft simply entered Mrs.

Mosley's proposed worksheets and child support order, which did not take into consideration the previous award of pension to Mr. Mosley's first wife and did not calculate any taxes for Mr. Mosley's pension that was being assigned to him. Of note, taxes for Mrs. Mosley under her proposed worksheets were higher for her than they were for Mr. Mosley, whose income without consideration of any pension was higher than hers. It is clear that no taxes were calculated for the pension and that the parties were treated differently for calculation of taxes on base pay.

RCW 26.19.071 is clear that federal and state taxes shall be disclosed and deducted from gross monthly income to calculate net monthly income. The trial court, although, trying to find middle ground, signed the proposed worksheets of Mrs. Mosley that had no taxes calculated for Mr. Mosley's military pension in direct violation of the statute. There are no exceptions to this mandatory language and Mr. Mosley's taxes should be correctly calculated.

3. Pension. Mrs. Mosley's attorney stated that "we believe that as a result of the remarriage, and they are in the same household, that the total amount he has is 2,221." Counsel for Mrs. Mosley argued that all pension previously awarded to first wife was now Mr. Mosley's income and should be calculated into the worksheets. Transcript Page 137 lines 8-11 dated 4/19/19. After hearing argument, Judge Ashcraft was clear that he intended to split the baby when he stated "I think the easiest thing to do is basically just split the difference and say – take half of the disputed amount and add it into his income." Transcript Page 140 lines 8-11, dated 4/19/19. Mr. Mosley addressed his pension within the Temporary Order of Support and worksheets entered on 2/5/19 and fully argued at that time. Additionally child support and pension were

addressed in Mr. Mosley's testimony on page 61 lines 7-9, when Mr. Mosley was asked and answered that he wished to retain the temporary order of support, which correctly stated his pension amount and provided that taxes were calculated and removed on the pension received. Further, closing argument did address child support and Mr. Mosley's position on support and his pension income in the Transcript page 117 line 14 to 24 dated 4/17/19. Of note, Mrs. Mosley's counsel, knowing that pension was an issue, failed to ask any questions regarding support or income in her cross examination pages 62 – 67 dated 4/17/19 or in re-cross pages 69-70. Nor with her client on pages 89-91 direct or redirect pages 107 – 108 or further redirect page 112.

No legal argument was provided to substantiate the position that remarriage makes null and void previous awards of pension in a dissolution. Now new counsel for Mrs. Mosley is trying to claim that no evidence or testimony was elicited regarding the prior retirement division order. Evidence was presented in Exhibit 6 and 11 on Mr. Mosley's portion of his pension income and transfer payment to his first wife and Mr. Mosley provided testimony regarding income and asked that the temporary support order be adopted as the final order. Transcript page 60 dated 4/17/19. Here the evidence admitted supports that there was an award of Mr. Mosley's Military Pension to his first wife, therefore this was not his income and should not have been included in his gross income per the mandatory language of RCW 26.19.071. See pages 39-41, previously admitted EX. 11 with the trial court and see Transcript pages 56-60. Here the court made no specific findings about the award of Pension to Mr. Mosley's first wife and no specific findings about Mr. Mosley's gross income or why the court

used a split the baby approach. RW 26.19.071 is very clear that income and resources of any other person shall not be included in determining a parent's gross monthly income. The trial court, although trying to find middle ground, split the baby, which added Mr. Mosley's current spouse's income into his gross monthly income in direct violation of the statute. There are no exceptions to this mandatory language. The parties standard income must be recalculated to exclude income awarded to Mr. Mosley's current wife.

4. Testimony. New counsel for Mrs. Mosley claims limited testimony regard support, but Mr. Mosley testified that he wanted exhibit 6, the temporary order of child support to be entered as the final order. This exhibit was admitted into evidence on page 61 line 5 dated 4/17/19. Mr. Mosley also introduced into evidence under Ex. 11 his pay, his pension, proof that his pension was treated as taxable income and proof that he paid the court ordered pension to his first wife. This exhibit was admitted into evidence on page 58 line 9-10 dated 4/17/19.
5. Amount alleged Nominal. New counsel for Mrs. Mosley claims the amount is nominal that is being requested, but the temporary support orders, that correctly stated Mr. Mosley's pension income and correctly included taxes under circle e for that income, had his support at \$720 and his percentage of responsibility at 57%. The final orders of the court proposed by Mrs. Mosley, which included the split the baby on increasing Mr. Mosley's gross income and failed to list any taxes for Mr. Mosley's pension had his support at \$863.11 and his percentage of responsibility at 63% for transport, daycare, uncovered medical, and extracurricular activities. This works out

to a substantial increase, especially over time and if it was so inconsequential, why would Mrs. Mosley contest it and not amicably settle the issue.

6. Attorney's fees. Under RAP 14 and/or RCW 26.09.140 the court can award fees to a prevailing party.

D. Conclusion.

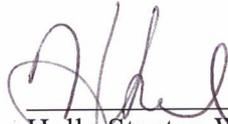
The mandatory language of RCW 26.19.071(5)(a) should be followed to give effect to the legislative intent of determining net monthly income by deducting federal and state income taxes. RCW 26.19.071 mandates that "federal and state taxes" "shall" be disclosed and deducted from gross monthly income. Mrs. Mosley requested that the court not include taxes for Mr. Mosley's Military Pension income even though Mr. Mosley showed proof of taxes being paid on his pension income and the court approved the worksheets of Mrs. Mosley that were in direct violation of RCW 26.19.071. Further, Mrs. Mosley argued that all of Mr. Mosley's Military Pension should be included in his gross income, including an amount that was previously awarded to his first wife and the court split the baby and ordered half of that income be included in the Mr. Mosley's gross income even though there was evidence provided that showed that it had been awarded to his first wife and was not his income for determination of gross income per RCW 26.19.071 (3)(n). This was in direct violation of RCW 26.19.071(4)(a) that mandates that the following income "shall not be included in gross income: (a) income of a new spouse ..."

RCW 26.09.001 details the intent of the legislature "that the child support obligation should be equitably apportioned between the parents," which cannot be achieved when gross income is overinflated and taxes are not calculated and

deducted for income received. The Order of Child Support should be recalculated based on actual gross income of the Petitioner and all taxes on the Petitioner's pension must be included for purposes of determining net monthly income so that the legislative intent is achieved.

Dated this 25th day of November, 2019.

Respectfully Submitted,



Holly Stanton, WSBA#26853
Attorney for Appellant

E. Appendix.

- A-1 Child Support Order dated April 26, 2019 (page 1-14)
- A-2 Exhibit 11 admitted into evidence (page 15-66)
- A-3 Exhibit 6 admitted into evidence (pages 67-87)
- A-4 Transcript dated 4/17/19, 4/19/19 and 4/26/19. (pages 88-238)

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