

**FILED**

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 33301-9-III

COURT OF APPEALS, DIVISION III OF THE STATE OF  
WASHINGTON

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In Re the Marriage of:

DAWN MARIE WALKER n/k/a KIGHT, Respondent,

and

TOMMY RAE WALKER, Appellant.

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APPELLANT'S BRIEF

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
A. Table of Authorities	3
B. Assignment of Error	4
C. Issues Pertaining to Assignments of Error	5
D. Statement of the Case	6
E. Argument	7
F. Conclusion	11

## TABLE OF AUTHORITIES

<u>Table of Cases</u>	<u>Page</u>
<i>Brandli v. Talley</i> , 98 Wash.App. 521, 523, 991 P.2d 94 (1999)	7
<i>Lambert v. Lambert</i> , 66 Wn.2d 503, 510, 403 P.2d 664, 668 (1965)	9,10
<i>Lee v. Kennard</i> , 176 Wash. App. 678, 685, 310 P.3d 845, 850 (2013)	8, 10
<i>Medcalf v. Dep't of Licensing</i> , 133 Wash.2d 290, 297, 944 P.2d 1014 (1997).	7
<i>In re Marriage of Peterson</i> , 80 Wash.App. 148, 152, 906 P.2d 1009 (1995)	7
 <u>STATUTES</u>	
RCW 26.19.035 (1)(c)	8
RCW 26.19.07 (6)	8

**I. Assignment of Error**

1. The trial court erred in its order of revision of March 13, 2015, and in its order of child support imputing income to Mr. Walker based solely on findings that he voluntarily decreased his income without any finding that he was either voluntarily unemployed or voluntarily underemployed as required by RCW 26.19.07 (6).

**Issues Pertaining to Assignments of Error**

1. Did the trial court commit an error of law in imputing income to Mr. Walker absent any finding that Mr. Walker was either voluntarily unemployed or voluntarily underemployed?

(Assignment of Error 1.)

## II. STATEMENT OF THE CASE

The parties' dissolution decree was entered September 27, 2001. CP 96. On December 19, 2007, the court entered a modified order of child support, CP 216, and Mr. Walker again moved to modify the child support more than two years later by filing a Petition for Modification of Child Support on September 30, 2011, which is the subject of the present appeal. CP 222.

Following dissolution, Mr. Walker received lottery winnings which he elected to take in the form of an annuity. CP 253-254. However, Mr. Walker sold his lottery annuity for a lump sum and then over the course of several years lost the money he received in payment for the annuity sale and eventually became unable to comply with his child support obligations under the prior order. CP 253. He then requested a modification of the order of child support more than two years after entry of the 2007 child support order. CP 222. In the trial court below, Ms. Walker's counsel argued to the commissioner who heard the petition that Mr. Walker should have income imputed to him based on his bad faith loss of this annuity income. CP 265. The commissioner below, Tony Rugel, did not impute income to Mr. Rugel finding instead that Mr. Walker was employed full-time and that the money was gone and that imputing the income to him would be an unsupported legal fiction. CP 265; CP 261. Ms. Walker moved to

revise this ruling. CP 266. On March 13, 2015, the court entered its order on revision finding that Mr. Walker had “in bad faith...voluntarily decreased his stream of income, putting himself in a situation of not being able to pay child support for his own children, incurring a number of debts for expensive toys, when he could have chosen to pay his child support obligation.” CP 277. The trial Court’s order on revision contains no finding that Mr. Walker is either voluntarily unemployed or voluntarily underemployed. CP 266-268. This appeal followed. CP 279.

### III. ARGUMENT

The Court of Appeals reviews a modification of child support for abuse of discretion where the challenging party must demonstrate that the trial court's decision is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons. *In re Marriage of Peterson*, 80 Wash.App. 148, 152, 906 P.2d 1009 (1995). In addition, the reviewing court must determine whether findings of fact are supported by substantial evidence and whether, as here, the trial court made an error of law. *Brandli v. Talley*, 98 Wash.App. 521, 523, 991 P.2d 94 (1999). The interpretation of a statute is a question of law that is reviewed *de novo*. *Medcalf v. Dep't of Licensing*, 133 Wash.2d 290, 297, 944 P.2d 1014 (1997).

“Since 1988, chapter 26.19 RCW provided the *exclusive means* for calculating periodic adjustments and modifications of child support, including automatic modification clauses authorized by RCW 26.09.100(2). RCW 26.19.035(1); RCW 26.19.020.” *Lee v. Kennard*, 176 Wash. App. 678, 685, 310 P.3d 845, 850 (2013)(emphasis added). Similarly, RCW 26.19.035 (1)(c) provides that the child support statutes *must* be applied to determine an obligor’s support obligation, in pertinent part (emphasis added):

**(1) Application of the child support schedule.** The child support schedule shall be applied:

**(c) In all proceedings in which child support is determined or modified.**

In the present case, the trial court erred when it imputed income to Mr. Walker without the statutorily required finding that he was either voluntarily unemployed or underemployed. RCW 26.19.071 (6) sets forth the statutory requirements for imputation of income. It provides, in pertinent part:

**(6) Imputation of income.** The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation.

By its plain language, this statute ties the concept of imputed income to employment. It does not provide for imputation of income for a parent's voluntary loss of income from sources other than employment. In the present case, the trial court made no findings whatsoever that Mr. Walker was either voluntarily unemployed or voluntarily underemployed. CP 276-278. Instead, the trial court apparently found its authority in pre-child support act *dicta* from the case of *Lambert v. Lambert*, 66 Wn.2d 503, 510, 403 P.2d 664, 668 (1965), cited at oral argument on revision by Ms. Walker's counsel, RP 6, which involved a request by an optometrist for a reduction in child support due to a substantial change in circumstances in that his business had fallen off after his divorce as a result of publicly made allegations of "misconduct" with his two daughters. *Lambert*, 66 Wn.2d at 504, 403 P.2d at 665. The *Lambert* court found that this reduction in business income could not be considered a substantial change in circumstances because the fact that his business income was reduced because of his transgressions had already been considered by the trial court in its initial decree. *Id.*, 66 Wn.2d at 509-510. The Court then added, in *dicta*: "Voluntary reduction in income or self-imposed curtailment of earning capacity, absent a substantial showing of good faith, will not constitute such a change of circumstances as to warrant a modification." *Lambert v. Lambert*, 66 Wash. 2d 503, 510, 403 P.2d 664, 668 (1965)(citing *McKey v. McKey*, 228 Minn. 28, 36 N.W.2d

17 (1949); *Commonwealth ex rel. Mazon v. Mazon*, 163 Pa.Super. 502, 63 A.2d 112 (1949); *Crosby v. Crosby*, 182 Va. 461, 29 S.E.2d 241 (1944)).

The statement by the court in *Lambert* regarding income and earning capacity is made in the context of the petitioner in that case's employment. As acknowledged by Ms. Walker's counsel in the proceedings below, RP 7, there are no Washington cases directly on point which have followed this *dicta* from *Lambert* and allowed a court to impute income based solely on the loss of income from sources other than employment. The statement of law recited, *supra*, was not necessary to the *Lambert* court's determination of the issue before it since they had already found that the optometrist's reduction in income presented to the trial court did not constitute a substantial change of circumstances. *Lambert*, 66 Wn.2d at 509-510. Indeed, no other Washington cases have expanded the concept of imputed income due to a finding of voluntary unemployment or underemployment to allow income to be imputed due to the alleged voluntary or bad faith loss of income from sources other than employment. This is not surprising since the statute does not allow for income to be imputed unless there is predicate finding of voluntary unemployment or underemployment, neither of which were found by the trial court below. In fact, since the statute provides the "exclusive means" for a trial court in Washington to impute income for the purposes of establishing a child support obligation, *Lee v. Kennard*, *supra*, 176 Wash. App. at 685, 310 P.3d at 850, absent any findings that Mr. Walker is either unemployed

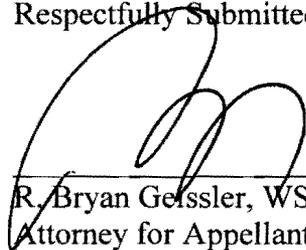
voluntarily or underemployed and doing so purposely to avoid his obligations, income cannot be imputed as a matter of law. Respectfully, the trial court erred when it imputed income to Mr. Walker based solely on its finding that Mr. Walker had dissipated non-employment related income.

#### **IV. CONCLUSION**

Appellant respectfully requests that this Court find that the trial court abused its discretion in imputing income to Mr. Walker without a required statutory finding that he is either voluntarily unemployed or underemployed, and based solely on his dissipation of non-employment related income. Based on this abuse of discretion, the orders below should be reversed and this case remanded for further proceedings.

Dated: July 20, 2015.

Respectfully Submitted,



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