

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

NO. 333019-III

FILED

OCT 05 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN RE:

DAWN MARIE WALKER n/k/a KIGHT, PETITIONER

AND

TOMMY RAE WALKER, APPELLANT

BRIEF OF RESPONDENT

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STATEMENT OF CASE

Mrs. Dawn Kight and Mr. Tommy Walker were divorced on September 27, 2001. **(CP 27-30)**. After the parties were divorced, Mr. Walker won several million dollars in the Washington State lottery. **(CP 76-80)** Mr. Walker elected to take his lottery winnings in the form of an annuity. **(CP 76-80)**

After Mr. Walker won the lottery and elected to receive payments in the form of an annuity, Mrs. Kight moved to modify Mr. Walker's monthly child support obligation. **(CP 47-49)** On December 19, 2007, agreed final orders were entered regarding that modification action. **(CP 60-70)**. Mr. Walker signed the final Washington State Child Support Schedule Worksheet entered on December 19, 2007, stipulating that his income consisted of \$3,500.00, gross, from employment and the \$10,000.00 per month, gross, he was receiving from the annuity payments. **(CP 227-231)** Mr. Walker's net income was set at \$9,988.52 per month. **(CP 227-231)** Based on his income from employment and from his annuity, Mr. Walker's monthly child support obligation was set at \$1,946.06 per month. **(CP 63-70)**

On September 30, 2011, Mr. Walker moved the court to modify his child support obligation. **(CP 71-75)** His basis for the modification was that "The previous order was entered more than two years ago and there has been a change in the income of the parents." **(CP 71-75)**

At hearing, Mr. Walker alleged that he had sold the annuity on which his child support obligation was based and that all of the money from the annuity sales was gone. **(CP 76-80)** Mrs. Kight alleged that discovery provided by Mr. Walker did not support his claims and further argued that even if his claims were true, Mr. Walker's actions were a voluntary reduction in income and therefore not a substantial change of circumstances for purposes of modification. **(CP 92-98)**

The court commissioner hearing the modification action granted Mr. Walker's petition and based his income on what Mr. Walker claimed to be earning from employment at the time of hearing. **(CP 118-145)** On revision, the Honorable Tari Eitzen, reversed the court commissioner, finding that 1) Mr. Walker's declarations in support of his petition for modification were not credible.; 2) There was no evidence of where the lottery winnings received by Mr. Walker went; 3) Terrific sums of cash had been dissipated

by Mr. Walker.; 4) The annuity received by Mr. Walker was income and was locked in as an annuity before his child support obligation was set; 5) By electing the annuity option, Mr. Walker knew he was creating a consistent, significant stable source of income for a number of years.; 6) Mr. Walker knew his child support obligation was based, in part, on the income from the annuity.; 7) Mr. Walker made an affirmative decision to sell the annuity payments in favor of cash; and 8) Mr. Walker, acting in bad faith, voluntarily decreased his stream of income, incurring a number of debts for expensive toys, when he could have chosen to pay his child support obligation, thereby putting himself in a situation of not being able to pay. (CP 208-210) Judge Etizen granted the motion to revise, vacated the orders entered by the court commissioner and denied the Petition for Modification of Child Support. (CP 210-212)

STANDARD OF REVIEW

Absent a legal error, the standard of review on a modification of child support is abuse of discretion. **Lambert v. Lambert**, 66 Wn.2d 503, 508 (1965). An abuse of discretion occurs when a judge exercises his or her discretion on a ground, or to an extent, that is clearly untenable or

manifestly unreasonable. **Curran v. Curran**, 26 Wn.App. 108, 110 (1980).

Findings of Fact supported by substantial evidence will not be disturbed on appeal. **In re Marriage of Hunter**, 52 Wn.App. 265, 268 (1988). Credibility issues are for the trier of fact, not the appellate tribunal. **Olivares v. Olivares**, 69 Wn.App. 324, 336 (1993).

ARGUMENT

RCW 26.09.170(7)(i) allows a party to seek a modification of child support after two years have passed since the date of entry of the previous order, without a showing of a substantial change of circumstances, and based on changes in the income of the parents.

In determining a party's income for child support purposes, **RCW 26.19.071(3)** sets forth a list of income that shall be included in a party's gross income. **RCW 26.19.071(3)(l)** states that annuities received by a party shall be included in that party's gross income for child support purposes.

The burden of demonstrating the required change of circumstances rests upon the party petitioning to modify his or her child support

obligation. **Lambert v. Lambert** 66 Wn.2d 503, 508 (1965). "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** at 510. A court is prohibited from modifying child support when the only change of circumstances is a voluntary loss of income. **Marriage of Blickenstaff**, 71 Wn.App. 489, 493 (1993) "The usual and ordinary meaning of "voluntary", according to Webster's New World Dictionary (2d College ed. 1976) at page 1592, is "brought about by one's own free choice . . . intentional; not accidental."

In this case, prior to the modification of his child support obligation in 2007, Mr. Walker began receiving annuity payments in the amount of \$10,000.00 per month. (CP 76-80) The annuity payments would have continued for a period that would have exceeded the period of Mr. Walker's support obligation. (CP 76-80). In December 2007, Mr. Walker agreed to the inclusion of the annuity income of \$10,000.00 per month in the worksheet signed by the court. (CP 227-231) Judge

Eitzen found that the annuity was locked in before Mr. Walker's child support obligation was set and that Mr. Walker knew that his continuing child support obligation was based, in part, on the income from this annuity. **(CP 18-22)**

Mr. Walker petitioned to modify his child support obligation on September 30, 2011 and during the course of that modification action alleged that the annuity had been sold and that all proceeds from the sale were gone. **(CP 76-80)** It was Mr. Walker's burden to prove this claim. Judge Eitzen, as the trier of fact, concluded that Mr. Walker failed to do so. Judge Eitzen found that Mr. Walker presented no evidence as to where the lottery winnings received went, that terrific sums of cash had been dissipated by Mr. Walker and that there was evidence he had chosen to purchase expensive toys. **(CP 208-212, 215-217)** Judge Eitzen's findings were based in part on the declaration of Mrs. Kight which detailed information obtained during discovery including records of large cash withdrawals from Mr. Walker's bank accounts on a monthly basis. **(CP 92-98)** Mr. Walker failed to prove the loss of this source of income which was a component of the support obligation he sought to modify.

In addition, even had Mr. Walker proven that the source of income

was depleted, Mr. Walker's actions in depleting the source of income were entirely voluntary and therefore not a basis for a finding that his income had been reduced. Judge Eitzen found that Mr. Walker had established the annuity before the 2007 child support modification action. **(CP 208-212, 215-217)** Therefore under **RCW 26.19.071(3)(l)**, the annuity was a source of income that was required to be included in Mr. Walker's gross income for child support purposes. Judge Eitzen further found that Mr. Walker knew that his child support obligation was based, in part, on the annuity payments. **(CP 208-212, 215-217)**

Judge Eitzen further found that Mr. Walker made a voluntary decision to sell the annuities in favor of cash. **(CP 208-212, 215-217)** There is no evidence to establish that Mr. Walker's actions were anything but voluntary. Judge Eitzen further found that Mr. Walker's actions were in bad faith. **(CP 208-212, 215-217)**

Contrary to Mr. Walker's argument on appeal, Judge Eitzen did not impute income to Mr. Walker. Judge Eitzen found that Mr. Walker had failed to prove a reduction in his income as determined in 2007 and further found that if there was a reduction in Mr. Walker's income, it was due

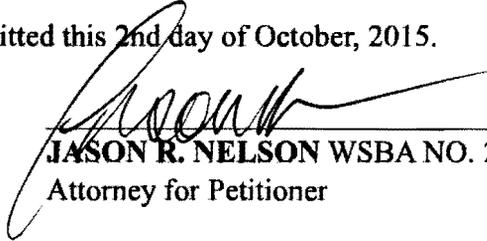
entirely to Mr. Walker's voluntary actions, taken in bad faith. As it was Mr. Walker's burden to establish the reduction in income and Mr. Walker's burden to establish that any such reduction was involuntary and in good faith, Judge Eitzen rightfully found that Mr. Walker had not met his burden, revised the court commissioner, vacated the orders and denied the petition for modification.

CONCLUSION

The previous Order of Child Support and the accompanying worksheet included the annuity received by Mr. Walker as a source of income for purposes of calculating child support. But for Mr. Walker's actions, taken in bad faith, the annuity would have guaranteed monthly payments of \$10,000.00, gross, to Mr. Walker during the period of time coinciding with his child support obligation. Mr. Walker made a voluntary choice to curtail this income by selling the annuities. Mr. Walker then failed to prove to the court what became of the proceeds from the sale. Judge Eitzen's decision to deny the modification due to Mr. Walker's failure to establish his reduction in income, as well as that any reduction

was voluntary and in good faith, was correct and Ms. Kight respectfully requests that the appeal be denied.

Respectfully submitted this 2nd day of October, 2015.

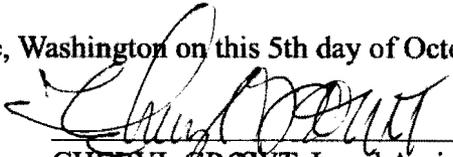


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DECLARATION OF SERVICE

I, Cheryl Growt, under penalty of perjury pursuant to the laws of the State of Washington, declare that on this 5th day of October, 2015, I sent via legal messenger a copy of the Responsive Brief of Petitioner to attorney R. Bryan Geissler, 205 N. University, Suite 3, Spokane, WA 99206..

Signed at Spokane, Washington on this 5th day of October, 2015.



CHERYL GROWT, Legal Assistant