

DIVISION III COURT OF APPEALS
STATE OF WASHINGTON

No. 34090-2

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**Spokane County Superior Court Case No. 14-3-01867-1
The Honorable Linda Tompkins
Superior Court Judge**

APPELLANT'S REPLY BRIEF

In Re:

ASHLEY EIERDAM, PETITIONER

V.

BENJAMIN EIERDAM, RESPONDENT

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I. IMPORTANT FACTS RELATED TO THIS REPLY BRIEF

The parents in this matter have 3 children from 4 to 9 years old. The parties went to mediation and a final parenting plan entered on January 15, 2016 that was agreed and looks like this, using Monday as the start of the week, and "AM" meaning school time is when their time starts:

1st week: To Father – Monday AM to Wednesday AM – To Mom AM to Friday AM – To Father AM Friday – Mom Wednesday AM

2nd week: To Father – Wednesday AM to Friday AM – To Mom to Monday AM – To Father (start over on 1st week schedule).

This schedule, along with the holiday, special occasions, and summer schedule is exactly 50/50 with neither parent having over 50% of the time with the children. The parties could not resolve the child support issue and went to trial on that sole issue.

It was found by the court that the father worked at Spokane Community College (RP 117), and earned a net income of \$2,674.48. RP 159-160, & ruling at RP 229. The mother testified that she voluntarily started a new job one month before trial as a part time care nurse and earned the minimum hourly wage of \$9.48. RP 44. She also indicated that she could only get 16 hours a week of work at this new job. RP 50. However, the record shows that she also *voluntarily quit her full time job* of almost a year, which was for a much higher rate of hourly pay of \$12.00 an hour,

just a few weeks before trial. RP 44 & RP 228. The mother also confirmed that she was living *rent free* with her father and he was paying all her significant bills. RP 88-89. In contrast, the father indicated that he did not make enough to pay all his household bills, being about \$100 shy. CP 95-101 (Father's financial declaration, which showed at least \$100 more in bills than he brought home.) See Exh. 103.

Ms. Eierdam told the court that she took the new job at Moran Vista Care Facility because she didn't like her \$12.00 job. RP 43-44 & 78. She indicated that she did not feel she voluntarily quit her job because her fulltime job was so boring to her. RP 56.

II. REPLY ARGUMENT

- A. The court failed to impute a proper amount of income to the mother since she was voluntarily under employed, and she provided no testimony from any experts that would justify why she left the higher paying job; it was merely her preference to change jobs regardless of the pay.

The testimony elicited by the father's counsel from the mother was that she had only her desire to quit her higher paying employment that she had since the case was filed, for a much lower paying and less "stressful" employment. RP 43-56. Although the mother's appeal counsel, indicated that the mother had a "psychological evaluation", and that examination concluded that she was better suited for the new lower paying job, this was not

the testimony at trial, nor was it corroborated with any expert or psychological exam. The Mother's Responsive brief states:

"Ms. Eierdam employment with West [higher paying job] due to the results of a mental health evaluation she submitted to. (RP 46-47)

Ms. Eierdam testified to the effect of sitting in a cubicle had on her emotional health. She had a psychological evaluation (RP 49) and that confirmed she was better suited to work around people, in a caregiving [sic] capacity. (RP 50) The psychological examination had been in a court order." [No reference to any CP by Ms. Eierdam]

However, the discussion and testimony at these "RP" references do not corroborate counsel's argument. Ms. Eierdam's testimony was to the affect that she quit her job because of some "complications" at work; and when she tried to say that she had a psychological examination, and that that evaluation corroborated her reasons for quitting, the use or reference to that mental health evaluation had already been disallowed. The judge had already stricken the use of that evaluation earlier in the testimony. See RP 47 line 1 to 48 line 11. More specifically, after an objection for hearsay by Mr. Eierdam's counsel, the Judge agreed to not allow the psychological's results into the record, which reads as follows:

"The Court: Ms. Bartleson[?]

Ms. Bartleson: The only thing I'm using the exhibit for, Your Honor, is for the date in which the psychological

evaluation was done to correlate that with Ms. Eierdam's change in employment.

The Court: *All right. Under that limited purpose, the Court will permit the inquiry." Id.*

Other than for this limited purpose, the Trial Judge struck the use of the evaluation for any purpose but to correlate the date of Ms. Eierdam quitting her job. It was never admitted for any purposes to corroborate why Ms. Eierdam quit her job, as counsel misstated in their Responsive Brief. Therefore, there was no mental health diagnostic reason for Ms. Eierdam to quit her higher paying job. There was only the mother's reason, which appeared to be that she "liked to be around people" and the higher paying job bored her. RP 50.

The case of *Goodell v. Goodell*, 130 Wn.App. 381, 122 P.3d 929 (2005) indicates that in a child support determination, that simply quitting your present employment for even such an important reason as it affected a parent's ability to secure daycare, is not a valid reason to change jobs. In such a case the parent who lowered their earnings intentionally should be prepared to be imputed at what they had made when working at the higher wage full time. RCW 26.19.071(3)(p), (6) clearly states that the court should use the last "full-time earnings at [that] historical rate of pay" when a parent is voluntarily underemployed.

The court in this case, although finding that the mother was voluntarily under-employed, set her income at the new minimum wage job amount, which was also for half time employment and did not qualify as a proper historic amount to impute to her. *Id.* The court failed to follow the statutes on this imputation and can be considered an abuse of discretion, since the court could only look to the higher historic full time rate for what to impute. See *In re Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 1362 (1997), where the court said, “[a] court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re OAJ* 190 Wn.App 826, 363 P.3d 1 (2015)

In this case, the trial court seemed to completely disregard the statutes on the proper hierarchical way to impute income to the mother, given the fact that she was found to have voluntarily reduced her income for personal reasons, and then the court did not use her last full time wage as mandated. *OAJ*, *supra*.

B. The court does have broad discretion to order a proper amount of child support, and in an equal parenting situation must order an amount for both households that does not leave one of the parents without sufficient resources to take care of the children during their parental time.

There is no question the mother in this matter intentionally reduced her income just before trial RP 45-52. The father had no control over this, yet he was made to pay full support to the mother because she simply had a lesser amount of income after intentionally quitting her higher paying job. Case law does say, along with the statutes at RCW 26.19, that the court has the right to adjust the support paid by the parties to ensure that the children can be cared for properly. However, there does not seem to be a distinction between which household this should be for and it would appear that it is the intent of the law to look at both households, especially in an equal parenting plan situation. See e.g. *OAJ supra*.

In interpreting RCW 26.19.001 the case of *In re Marriage of Maples*, 78 Wn.App. 696, 899 P.2d 1 (1995), overruled in part on other grounds by *In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007), the court cited this statute and its intent as follows:

The legislature intends, in establishing a child support schedule, to insure that child support orders are adequate to meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living. The legislature also intends that the child support obligation should be equitably apportioned between the parents.

RCW 26.19.001. The legislature has further specified that "[w]hen the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail." RCW 13.34.020. For purposes of this argument the father asks the court to focus on the latter part of RCW 26.19.001 wherein it states that "The legislature also intends that the child support obligation should be equitably apportioned between the parents." However, and just as important in the analysis of whether there should be a deviation or not is the statute at RCW 26.19.075 wherein the court must also consider the affect in Mr. Eierdam's home of payment of a large amount of support, along with "all resources" in the homes of both parties [which parenthetically would include the fact that the mother lives for free in the maternal grandfather's home where she basically pays nothing to live].

In this case, the child support was not equitably apportioned between the parents. While Ms. Eierdam received a kind of reprieve for her voluntary underemployment by receiving full child support from Mr. Eierdam; Mr. Eierdam was made to both subsidize Ms. Eierdam and reduce his finances below what he needed monthly for he and the children. Using the lower income of \$9.48 an hour drastically made it appear as though Ms. Eierdam was almost destitute; when she had substantial

resources at her disposal. Again, she had basically everything paid for by her father, including free rent at the time of trial. This was not properly considered by the judge in the denial of a deviation.

In this case, it must be remembered that both parents have an exactly equal number of days with their children. And it is acknowledged that there is no more residential credit any more, and instead we are left with the discretion of the court to adjust the support to accommodate the potential needs of the children in each home. RCW 26.19.075. As pointed out by the mother counsel in their responsive brief, the trial court now has greater latitude to insure equity reins in such cases given for example the statutes recommending half time custody such as RCW 26.09.187(3)(b) where both parents have no limitations. The father received less than an equitable decision on the monthly support since it did more damage to what he is to live on as compared to the mother. This primarily left the father's household in a negative financial situation.

C. The statutes and case law indicate that in determining child support in a shared custodial arrangement the court should be mindful not to leave one of the households in a financially difficult position.

The child support ordered for the father in this case is the "standard calculation" amount from the parties' worksheets, given the imputation of only minimum wage to the mother. This caused

the father's household to be left with insufficient funds to pay his monthly bills, and gave the mother what basically amounted to "pseudo spousal maintenance" disguised as child support, financially filling the void she created by her bad own choices. This higher child support amount leaves the father in terrible financial difficulties. This difficulty is shown when looking at testimony about the father's monthly expenses from his financial declaration, minus the new child support amount. An actual look at the effect of this higher support order is as follows:

Father's monthly expenses	
from his financial dec:	<\$2,748.71> (RP 160)
Father's new support pyt:	<\$ 765.00> (RP 232)
Father's net income:	<u>\$2,674.48</u> (RP 159-160, 229)
Father's shortfall:	\$ 839.23

As the court can see, the father now is short \$839.23 per month to pay his bills, plus he also now has the children half time, so everything financial is magnified by having the children half time. Having the children there half-time also obviously increases his water and electricity usage, his heat costs, his clothing costs, his furnishing costs, and all the things that come along with having children live with you half time. With no room for these other things, it is hard to conceive that his children would fair very well in his home.

In contrast the mother, who now receives full child support, was in a much better situation than the father. Her father was

actually paying for her monthly expenses and letting her live in his home for free. See RP 87-94. Testimony showed that she had enough money to pay for cable TV, Victoria Secret items, presents, and what other items she wanted, because of her household resources. Id.

Looking at these two household's, the fact remains that the father's home does not have enough money to pay for things that the children need, and he is left with subsidizing the mother's household because of her bad choices. This cannot be an equitable decision. It also seems it was not in line with the purposes of the statutes.

It also seems that the use of the IRS tax issue is somewhat misleading since taxes change drastically from year to year, depending a lot on federal budgets, who is running the White House and the legislature. No one can really predict, as the mother's counsel has, that for this or that year a tax deduction or two will help a parent realize a makeup amount for what is almost \$10,000 per year in support payments.

III. CONCLUSION

The court entered an order for the father to pay full support, without a downward deviation dramatically affecting his monthly financial circumstances, and imputed the mother at minimum wage because she was under employed, failing to follow the

statutes on imputation. The parties agreed to an exact 50/50 parenting plan and if the father had to pay full support he could not do that without giving up important financial necessities, according to his financial declaration, and testimony.

To compound this, the court imputed minimum wage to the mother without a proper basis for that small amount. In only imputing minimum wage to the mother, the court failed to follow the statutory process for proper imputation. The statutes require the court to impute the last full time wage the party made if they were either underemployed or voluntarily unemployed. Since the mother had voluntarily quit a much higher paying full time job for the lower paying part time job the trial court should not have used the lower minimum wage for the mother.

The failure of the court to impute a higher wage for the mother made it appear that the mother was much more destitute than if she had made better employment choices. She had created her own poor financial situation, however, the maternal grandfather paid for virtually all the mother's monthly expenses. This meant that Mr. Eierdam was ordered to subsidize his ex-wives self-imposed lower income due to her own inappropriate fiscal decisions, but that seemed to only mean she now had almost \$800 more a month to use on other things than her monthly expenses.

Although the court has the discretion to not deviate in an equal custodial plan, it is to be based on whether it will leave the children in financial peril or not in one of the parent's homes. In this case, a failure to deviate to the higher amount for the mother, and subsequent failure to deviate even for a few hundred dollars downward for the father drastically affected his household because he is now left with little or no money to pay for almost 25% of his monthly costs to live, thereby directly affecting his children.

The court erred by imputing the wrong amount for the mother, and by not considering all the household resources for the mother, and the affect that such a large child support amount would have on the children when in the father's home.

Respectfully submitted this 20th day of April 2017 by,



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Declaration of Mailing

I, Gary Stenzel, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on April 21, 2017, a copy of this Appellant's Reply Brief was delivered by mail to the office of Suzanne Bartleson, Attorney for Petitioner, at 1307 W. 8th Ave, Spokane, WA 99201.

Dated this April 21, 2017.



Gary R Stenzel, WSBA #16974