

DIVISION III COURT OF APPEALS  
STATE OF WASHINGTON

No. 34090-2

**FILED**

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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 OPENING BRIEF**

**In Re:**

**ASHLEY EIERDAM, PETITIONER**

**V.**

**BENJAMIN EIERDAM, RESPONDENT**

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## I. Facts

The parties have three children RE (8), KE (5), and GE (3). CP 3. The parties agreed to an exactly 50/50 custodial schedule for both parents. RP 12-15. The dissolution trial was basically about incomes and child support. RP 36-37.

At trial the father testified that he 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 just 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 goes on to show that Ms. Eierdam also voluntarily quit her full time job of almost a year, which was for a much higher rate of hourly pay just a few weeks before trial. RP 44. The oral findings of the court were that the previous job was for \$12.00 an hour and was for between 32 and 40 hours a week. RP 228. The mother also confirmed that although she was evicted from their expensive marital apartment after living there for a long time, she was now 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 and personal 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.

With regard to Ms. Eierdam's new job, she told the court that she took the job at Moran Vista Care Facility making \$9.48 an hour and at 16 hours a week because she didn't like her \$12.00 job. RP 43-44 & 78. After being asked if she felt she was voluntarily underemployed, she indicated that she did not feel she was because she was basically bored with her higher paying job and sarcastically said if she continued working there she would have to "kill herself". RP 56 Even though she said she felt she was not "voluntarily underemployed", she indicated that she had in fact voluntarily quit her full time job at "Alorica" (later clarified as a company called West; see RP 136). RP 44 & 79 Ms. Eierdam further confirmed on adverse direct that she earned at least \$12 an hour at her previous full time job. She also said she enjoyed the new part time job but she could not corroborate any other reason for voluntarily leaving that full time job other than she simply did not like it. RP 47-51.

Ms. Eierdam testified that she had \$2,486 a month in expenses but did not say how she paid those bills on a part time income. RP 53 & See RP 87-96. Although she claimed these expenses, she could not prove that she actually had these expenses and indicated that her father paid all of them for her. Id. It was also clear that some of these expenses were for things like a Victoria Secret account, or legal costs for being evicted from their marital apartment. Id. The upshot of this cross examination was that she was spending hundreds of dollars on miscellaneous things that she could not afford, that she did not know how much her father was paying for her

monthly expenses to live in a comfortable manner, and that she spent a lot of money on general items and expenses worth hundreds of dollars that were of little or no value to her as a parent RP 87-96.

At the end of testimony the judge made her ruling. Her specific ruling was as follows:

1. The 50/50 parenting plan was approved. RP 30-33, 229-230.
2. Mr. Eierdam's gross income would be set at \$3,478.00. RP 230.
3. Ms. Eierdam's income would be imputed by the court because she was voluntarily underemployed at full time hours (40), yet using her lower income of \$9.48 an hour setting her income at \$1,665 a month. RP 231.
4. Child support would be set at the amount reflected in an appropriately completed worksheet, the above numbers. RP 231-232.
5. Ms. Eierdam received a child support deviation to zero child support, based on the court's finding that even though she was imputing \$1,674 a month to her she did not really earn that much a month, ignoring what she historically earned RP 231-232.
6. Mr. Eierdam was to pay \$765.00 a month, with no deviation, leaving him with approximately \$1,909.48 per month for he and the children's in his home. RP 232.
7. In comparison, the court's ruling basically netted Ms. Eierdam the amount of \$2,439 a month. RP 231-32.

8. The findings and conclusions of law did not explain the court's reason for this economic disparity other than the parties incomes are "not set" CP 213-220, 205.

Mr. Eierdam appeals this ruling as unfair and directly affecting the child in his home, while not providing the same economic circumstances for the mother, even though she had substantial financial assistance and could earn a good additional living historically.

## **II. Assignment of Error**

The Superior Court Judge erred in the following manner:

1. By failing to deviate from the standard child support calculation for the Appellant, even though he has all three children exactly half-time;
2. Although the court imputed income to the mother for her being voluntarily under-employed, the court failed to actually consider that imputed income in ordering the father to pay his entire standard calculated child support, leaving him a substantial deficiency every month, versus the mother who had a substantial windfall and no child support;
3. By deviating the mother's support responsibility to zero;
4. By not imputing a proper amount of income for the mother;
5. By entering deficient Findings of Fact required by statute.

## **III. Law and Argument**

- A. With changes to the Parenting Act re equal parenting time, there is a need to take a closer look at how child support is determined between the parents.

RCW 26.09.187(3)(b) states,

(b) Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.

This new statute, seems to now encourage Family Law Judges to order that there be what was in the past called “joint custody”. Prior to the enactment of this statute our state rejected the notion of “joint placement of children” and opted for an analysis that considered the effect of frequent contact between parents first, before any parenting plans even began to be ordered outside the traditional lop-sided custody/visitation schedules of the past. [See e.g. *In re Marriage of Littlefield* at 133 Wn.2d 39, 940 P.2d 136 (1997) for a discussion on the transition to a more “equal” parenting system in family law cases.]

Currently with the passing of the new amendment to RCW 26.09.187(3)(b), judges seemed to be encouraged to order more 50/50 plans. Such a circumstance seems to also be creating a need for a closer look at this new statute’s effect on child support. See e.g. *In re Marriage of Rusch*, 124 Wn.App. 226, 236, 98 P.3d 1216 (2004); *In re Marriage of McCausland*, 159 Wn.2d 607,

152 P.3d 1013 (2007); *In re Parentage of A.L.*, 185 Wn.App. 226, 340 P.3d 260 (Div. 3 2014). A majority of appeals courts have rejected the need for a “formula” and have left it in the hands of the trial judge to fashion a child support remedy that is equitable, given the unique facts of each case. In such cases, the judge must determine what is the best way to deal with differences in income between “joint custodial” parents, which was made even more important with the removal of the “residential credit” laws. See *Id.* With this circumstance in mind the *Parentage of A.L.*, superior court clearly indicated that the legislature should have made it clearly on how to handle such situations. *Id.* at ¶ 25. It is the Appellant’s opinion that this present state of the law has created a problem that needs to be resolved to avoid an unfair child support and financial result.

B. In any parenting plan case the trial judge has a duty to properly impute a correct amount to the voluntarily underemployed or unemployed parent, based on statutory factors.

Imputation of income is required when the court finds that one of the parents in a parenting plan case, is either voluntarily unemployed or underemployed pursuant to statute. RCW 26.19 Provides that “[t]he court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed.” RCW 26.19.071(3)(p), (6). The statute enumerates several methods of imputing income in order of priority:

- (a) Full-time earnings at the current rate of pay;
- (b) Full-time earnings at the historical rate of pay;
- (c) Full-time earnings at a past rate of pay where information is incomplete;
- (d) Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage

earnings [or] is recently coming off public assistance;  
(e)Median net monthly income of year-round full-time workers as  
derived from [government statistics].

By imputing only \$9.48 an hour (minimum wage), the judge failed to consider the mother's historical rate of pay, and the fact that she had no long term "history" of minimum wage work where she made \$12 an hour. The mother should have been imputed at \$12.00 an hour rather than minimum wage; otherwise we are rewarding her for intentionally reducing her income.

C. The imputation of income is to be used to calculate support, make equitable decisions, and otherwise insure a proper way to have the imputed party take care of their "duty of support".

A "duty of support" is defined in both RCW 26.18 and .21 et seq. Case law has also defined this duty. The case of *In re Parentage of O.A.J.*, 190 Wn.App. 826, 363 P.3d 1 (Div. 3 2015), has indicated that a "duty of support" may be imposable by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, separate maintenance or otherwise. Additionally, our statutes have indicated that when any court order is entered outlining either custody, visitation, or a parenting plan of any kind, the court must impose a duty of support for the parties to the order. RCW 26.19 et.seq. Further, child support is so important to the state (under the *parens patriae* doctrine) that the parties really have no control over the amount of support ordered, that is the sole province of the court. RCW 26.19.075(5).

Imputation of income is an integral part of the determination of support. RCW 26.19 et seq. See also *In re Marriage of Wright*, 78 Wn.App. 230, 234, 896 P.2d 735 (1995). A court errors if it simply imputes an income and then does nothing with it, like order a support responsibility. *Id.*

D. The Judge's failure to deviate for the father and her deviation for the mother, in spite of the facts of her voluntary underemployment as inequitable and an abuse of discretion.

Deviation of a child support amount is governed by RCW 26.19.075 and .011. It indicates that a judge may deviate as long as it bases the decision on such factors as the parents' income and expenses, obligations to children from other relationships, the children's residential schedule, and whether the deviation will affect the financial circumstances of the children in the payee's home. *Id.* See also *In re Parentage of A.L.*, supra, where in the court indicated:

The court may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment. The court may not deviate on that basis if the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child or if the child is receiving temporary assistance for needy families. When determining the amount of the deviation, the court shall consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the parent making the support transfer payment. *Id.*

The *A.L.* case also indicated that the trial court must enter written findings of fact supporting the reasons for any deviation or denial of a party's request for deviation. RCW 26.19.075(3); *State ex rel. M.M.G. v. Graham*, 159 Wn.2d 623, 627-28, 152 P.3d 1005 (2007). It is conceded that a court's decision to deviate from the standard calculation based on residential time is discretionary, but that court cannot deviate if it will result in insufficient funds in the household receiving the support. RCW 26.19.075(1)(d); *In re Marriage of Rusch*, 124 Wn.App. 226, 236, 98 P.3d 1216 (2004), abrogated on other grounds by *In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007). After determining the standard calculation and any deviations, the trial court then orders, or does not order, the other parent to pay a support transfer payment. RCW 26.19.011(9).

The father understands that the court has very broad discretionary authority to deviate the amount of child support or not. However, given the mother's intentional underemployment just before trial, her family's substantial financial assistance<sup>1</sup>, her spend thrift behavior, and the drastic financial effect on the children financially in the father's home, that giving the mother a deviation to zero child support in this 50/50 plan, is inequitable and seems clearly like an abuse of that discretion, actually hurting the children in the fathers home. The financial effect of this ruling is as follows: Father's income \$2,674 - \$765 =

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<sup>1</sup> See the case *Brandli v. Talley*, 98 Wn.App. 521, 991 P.2d 94 (1999) for consideration of all financial help.

\$1,909 in his home; Mother's income  $\$1,665 + \$765 = \$2,080$  in her home, even though her family admittedly pay her bills. Had the court imputed the historic pay of \$12 an hour for 40 hours, her income would be \$1,900 (after tax/ss) + \$765 support is \$2,665 a month. In either case the mother has anywhere from \$2,080 to \$2,665 in her home when her parents help her with all of her bills and she could be making a larger sum per hour had she not quit her job.

E. The court's findings are insufficient to satisfy statutory requirements.

As indicated below the court is required to make specific findings as to why they granted or did not grant a deviation, and that finding must satisfy the statutory requirements. RCW 26.19 et.seq. In this case, the findings say nothing as to the effect of this deviation to zero support on the children while in the father's family. This is especially poignant when considering the father's excess expenses. Should he have to pay this support of almost \$800 a month he will be looking at bankruptcy and garage sales soon. Compared to their mother who will have to do very little "belt tightening" at all.

#### **IV. Conclusion**

The trial court erred by not appropriately imputing Ms. Eierdam's income appropriately and not deviating by taking into account the parties' shared residential schedule. The effect of the trial court's decision is that Mr. Eierdam is left with insufficient funds in his home, affecting his ability to properly care for the parties' children. He respectfully requests that the decision of the court in

regard to child support be overturned and remanded for a more equitable determination of his child support obligation.

Respectfully submitted on this 5<sup>th</sup> day of October 2016 by:



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**Declaration of Mailing**

I, Lisa Burns, 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 October 5, 2016, a copy of this Appellant's Opening Brief was delivered by mail to the office of Suzanne Bartleson, Attorney for Petitioner, at 1307 W. 8th Ave, Spokane, WA 99201.

Dated this 5<sup>th</sup> day of October 2016.

  
Lisa Burns