FILED

DEC 12 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 343251

Court of Appeals of the State of Washington
Division III

Spokane Superior Court Case Number 11-3-02519-3

JONATHAN S. STEINBACH
Petitioner and Appellant,

v.

JANE E. STEINBACH
Respondent.

APPELLANT'S OPENING BRIEF

Jonathan Steinbach
Pro se
2944 West 21st Ave.
Spokane, WA 99224
(425) 760-8017
Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

I. INTRODUCTION 4

II. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES 5

III. STATEMENT OF THE CASE 6

IV. STANDARD OF REVIEW 6

V. ARGUMENT 6

1. The court should reverse the dismissal and remand with instructions to consider the substantial evidence in the record related to income because considering all income is required by the statute and the intent of the legislature.....6

2. The court should vacate the judgement for terms because the Superior Court did not use a method of determining terms or consider the needs and abilities to pay on the record which is required by the statute and common law.....10

VI. CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Anderson v. City of Seattle, 78 Wash. 2d 201, 202, 471 P.2d 87 (1970).....9

King County v. Seattle, 70 Wn.2d 988, 425 P.2d 887 (1967).....9

In re Estate of Kurtzman, 65 Wn.2d 260, 396 P.2d 786 (1964).....9

State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).....7

In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).....7, 11

Bay v. Jensen, 147 Wn.App. 641, 660, 196 P.3d 753 (2008).....10

In re Marriage of Knight, 75 Wn.App. 721, 729, 880 P.2d 71 (1994).....11

Statutes

RCW 26.19.001

RCW 26.09.002

RCW 26.09.170

RCW 26.19.071

RCW 26.09.140

Rules

RAP 18.1(d)

RAP 2.2 (a) (1)

Treatises

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §4402

Washington Appellate Practice Deskbook 4d §12.9

I. INTRODUCTION

In November of 2014 the appellant filed a motion for modification of child support citing a change in circumstances and more than two years since the last order was filed. The appellant provided three months of pay stubs (July, August, September) (CP 38-41) to substantiate income numbers. He also filed a spreadsheet showing estimates for the coming months. From the time of filing (November) to the time of the hearing (March) the financial circumstances of the Appellant worsened. The Appellant filed supplementary financial documents in January (CR 42-51) and a revised financial declaration (CP 110-116) reflecting the worsening circumstances. The court commissioner chose not to include the revised financial declaration and calculated child support on only the three months of 2014 substantiated in the original filing (CP 38-41). Both the Appellant and the Respondent requested a revision and, while the commissioner's order was revised, the child support calculation was still based upon the three months of financial information from the original filing. The November 2014 filing was drawn out to August 2015 due to the intransigence of the Respondent's counsel. Even after the January filing of supplemental financial data, the appellant's financial circumstances continued to worsen further. In May of 2015, the trial court issued her decision and required opposing counsel to draft the proposed order. At that time, the Appellant drafted new documents because there were eleven (11) months of substantially worse financial data to consider. Opposing counsel delivered three consecutive versions of the proposed order, all of which contained material errors benefiting the Respondent financially. A request to revise each of these erroneous orders was, in turn, filed and it took from May until August to correct. The order reflecting the trial court's decision and ultimately signed in August was written by the Appellant. The appellant collected financial data through May, with the intention of filing a new motion. Given his new, and substantially diminished financial circumstances, the child support decision was unreasonable and based on data nearly a year old. A child support order reflecting the facts of 2015 was necessary to save the family home and enable the appellant to support the four children in his care pursuant to the couple's parenting plan. This is consistent with the law requiring child support orders to be crafted with the best interests of the children in mind. In September of 2015, the appellant filed a new motion, citing a significant change of circumstances and the authority of RCW 26.09.170(5)(a),

allowing for a modification for such circumstances. Opposing counsel filed a motion to dismiss which was granted by the court commissioner and not revised by the trial court. Attorney's fees were requested by the respondent's counsel and granted by both the court commissioner and the trial court. The order reflecting only three (3) months of inflated income from summer 2014 persists.

II. ASSIGNMENT OF ERROR AND STATEMENT OF ISSUES

1. The Superior Court erred in dismissing the motion to modify child support on the grounds of a lack of evidence despite the record containing eleven (11) months of pay stubs.

Issue: Can the Superior Court invade the sphere of authority of the legislature by using its discretion to exclude the evidence that meets the burden of proof of a significant change of circumstances, thus negating the law allowing a modification for that reason?

2. The Superior Court erred in ordering the appellant to pay the Respondent's legal fees without using a method to calculate those fees and without considering the Respondent's need or the Appellant's ability to pay.

Issue: Can the Superior Court impose monetary judgements without consulting the requirements of statutes enacted as law by the legislature or the provisions of case law widely accepted by the judiciary?

III. STATEMENT OF THE CASE

1. The Court ignored relevant data in order to reach a dismissal decision. The Court quoted the appropriate statute then concluded incorrectly that the statute required her to exclude, versus include, the evidence in the record. CP 83-95 substantiate earnings every month from July 2014 through May 2015 and indicate declining resources. CP 82 substantiates a significant non-voluntary new debt. The only way to conclude that the Appellant's circumstances were not substantially changed, was to exclude most of the pay and debt data from CP 82-95. That is what the court did. That was an error.

2. Neither the court commissioner nor the trial court used a method or determined reasonable fees on the record. No documentation was offered to substantiate fees and none was requested. Additionally, the record shows the Respondent has $223,000 in cash (CP 66-68) and the Appellant has over $42,000 in debt (CP 82 & 122). These points were not discussed, with regard to fees, on the record and did not contribute to the determination of fees. The Appellant stated plainly to the trial court that he did not have money to pay fees (RP (2-25-16) 32 ln. 4) and the ability to pay was still not discussed in order to determine fees. This was an error. The court also applied res judicata as a basis for a judgement for fees. This was also an error.

IV. STANDARD OF REVIEW

Abuse of discretion. *In re Marriage of Jess*, 136 Wn. App. 922, 926, 151 P.3d 240 (2007); *In re Marriage of Fiorito*, 112 Wn. App. 657, 663-64, 50 P.3d 298 (2002); Bell v. Bell, 101 Wn. App. 366, 371, 4 P.3d 849 (2000) An order on modification of child support is also reviewed for abuse of discretion. *State ex rel. MMG v. Graham*, 159 Wn.2d 623, 633, 152 P.3d 1005 (2007); *In re Marriage of Scanlon & Witrack*, 109 Wn. App. 167, 174-75, 34 P.3d 877 (2001), review denied, 147 Wn.2d 1026 (2002).

V. ARGUMENT

1. The Superior Court erred in dismissing the motion to modify child support on the grounds of a lack of evidence despite the record containing eleven (11) months of pay stubs (CP 78-95). The trial court invaded the sphere of authority of the legislature by using its discretion to exclude the evidence that meets the burden of proof of significantly

changed circumstances. In doing so, the court negated the law allowing a modification for that reason.

A. RCW 26.09.170 (5)(a) states: "A party to an order of child support may petition for a modification based upon a showing of substantially changed circumstances at any time." RCW 26.19.071 states: "Standards for determination of income. (1) Consideration of all income. All income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent." There is no version of statutory construction, basic or complex, that would enable an interpretation of the statute that *required* the court to exclude any pay stub. The simplest interpretation suggests "all" means every pay stub in the record. A more complex interpretation could limit the court to consider "all" pay stubs that are not currently included in the order. Under this interpretation, it would be reasonable to exclude pay stubs from July, August, and September of 2014 because they are already represented in the current order. An interpretation in this way would *allow* the court to exclude those three months, but no interpretation *requires* the court to exclude anything. The court states clearly that she considers her duty to only consider income earned after the final order was signed. The court stated, "Thus my question for what's the income from April through September 2015." (RP (2-25-16) 26 ln. 20) This contradicts the edicts of RCW 26.19.071 requiring the consideration of "All income...." The April order was based on data from July, August, and September of 2014 (CP 38-41). The Appellant filed more pay stubs and an updated financial declaration with the court on January 22, 2015 (CP 42-51). These updates were argued but not considered by the court. Meaning, October 2014 through May 2015 had pay stubs in the record, but they were not considered by any court.

B. "Abuse of discretion occurs `when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons.'" *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). 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 Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

(1) The court's decision to exclude pay stubs in the record that have not been considered when determining income is manifestly unreasonable because it is outside the range of acceptable choices given the Appellant's low income and high debt, and the statutory requirement to support the best interests of children and support their basic needs. RCW 26.09.002 establishes the best interests of the children as the correct standard when making child support decisions. RCW 26.19.001 establishes the legislature's intent for child support is to meet the basic needs of children. Therefore, use of discretion that subordinates the best interests of children and/or hinders the meeting of a child's basic needs is abuse. Since neither counsel nor the court cited a statutory requirement to exclude income from consideration, then the interpretation that all income in the record must be considered remains the standard.

(2) **The decision, based on the court's stated findings of fact below, is manifestly unreasonable because it is based on untenable grounds, in that the court's factual findings are unsupported by the record.** CP 83-95 are all of the pay stubs for the Appellant from July 2014 through May 2015. They total eleven (11) months of pay data. They indicate an average monthly take home pay of $1371.68. The record shows, at CP 38-41, that pay stubs from July, August, and September of 2014 were filed in the November 2014 motion for modification. The record also shows, at CP 42-51, that updated financials were provided on January 22nd of 2015. CP 38-51 are also present in CP 83-95, as alluded to earlier. CP 82 shows a new debt of $40,374.67 levied by the IRS in 2015. At RP (2-25-16) 26 ln. 22 through RP 27 ln. 6, the court states as fact,

> I have documents filed with no updated or current financials. As I sit here today in February of of 2016, I have no updated financials. The numbers used in the worksheet of basically below a minimum wage, I don't know where they come from. I see where they come from prior to the modification and prior to the entry of the April 2015 order. I'm not seeing any income evidence that would apply to the September 2015 modification request, which is where I have to find it based upon a short period of time. [errors in original]

The court reiterates her finding of fact with regard to a lack of evidence at RP (2-25-16) 29 ln. 23-25, "Now, the other thing that I point out in looking at whether I can find a substantial change in circumstances is the lack of evidence." And again at RP 30 ln. 25 through RP 31 ln. 6, but with the added clarification that the lack of evidence is specifically why she is denying the revision.

> I'm left with whether I have the authority, under this petition, the September 2015 petition, to find a substantial change in your circumstances, and the evidence is not in this file. It might be out there somewhere, but it's not before the court today. I can't grant the relief that you're asking for and I'm going to deny your revision.

The existence of CP 78-95 does not support these facts. The IRS notice at CP 82 and the pay stubs at CP 83-95 substantiate the numbers and where they come from. The record shows updated financials filed in January of 2015 and in May of 2015. The record shows that earnings are substantiated by pay stubs and debt is substantiated by a notice from the IRS.

(3) The decision is manifestly unreasonable because it is based on untenable reasons, in that the wrong standard was used to exclude evidence. The evidence in the record does support the correct standard explained in 1.A. above.

C. The decision to exclude evidence in order to dismiss a motion is abuse, manifestly unreasonable, because it is based on untenable reasons, in that it is based on an incorrect standard. This decision nullifies the law allowing for a modification in the event of significantly changed circumstances. Allowing this decision to stand has statewide implications because it sanctions and effects judicial nullification.

(1) It is neither the function nor the prerogative of courts to modify legislative enactments. *King County v. Seattle*, 70 Wn.2d 988, 425 P.2d 887 (1967); State v. Spino, 61 Wn.2d 246, 377 P.2d 868 (1963).

(2) The proper objective of all statutory construction is to ascertain and give effect to the legislative intent where that intent is not made explicit in the statute itself. E.g., *In re Estate of Kurtzman*, 65 Wn.2d 260, 396 P.2d 786 (1964); *McKenzie v. Mukilteo Water Dist.*, 4 Wn.2d 103, 102 P.2d 251 (1940); *Shorts v. Seattle*, 95 Wash. 531, 164 P. 239 (1917)" [quoting *Anderson v. City of Seattle*, 78 Wash. 2d 201, 202, 471 P.2d 87 (1970)].

(3) The intent of the legislature, with regard to child support, is made explicit in the statute itself. RCW 26.19.001, Legislative Intent and Findings,

> 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.

Meeting the child's basic needs and ensuring equitable apportionment are the two considerations when trying to determine intent for statutory construction purposes. Given the evidence in the record, it is clear that the current order does not meet the children's basic needs and it is clear that the burden of support is not equitable. Demonstrating $6972 in monthly bills and $1371 in monthly income, in the absence of financial reserves, demonstrate well that the children's basic needs are being threatened. The Appellant did that at CP 117-122. Likewise, the record shows (CP 110-116) the Appellant has involuntarily assumed more than $42,000 in debt since the last order of child support, while the Respondent has $223,000 in cash available and works part time. (CP 58-65) These changed circumstances are significant. Disregarding the evidence, as the trial court did, de facto nullifies the law for cases of significant changes in circumstances, thus invading the province of the legislature. This is an error. This type of statutory nullification should be overturned with clear instructions to consider the evidence in the record in order to avoid future abrogation of the legislature's intent.

2. The trial court erred in ordering the appellant to pay the Respondent's legal fees without using a method to calculate those fees and without considering the Respondent's need or the Appellant's ability to pay. Can the Superior Court impose monetary judgements without consulting the requirements of statutes enacted as law by the legislature or the provisions of case law widely accepted by the judiciary?

A. The law says.

(1) Statute. RCW 26.09.140.

> "The court from time to time *after considering the financial resources of both parties* may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment." [Italics added]

(2) Case law.

"Where a trial court fails to provide sufficient findings of fact and conclusions of law to develop an adequate record for appellate review of the fee award, we will vacate the judgment and remand for a new hearing to gather adequate information and for entry of findings of fact and conclusions of law regarding the fee award." *Bay v. Jensen*, 147 Wn. App. 641, 659 (Wash. Ct. App. 2008). "When considering an award of attorney fees under this statute, the trial court generally must balance the needs of the party requesting the fees against the ability of the opposing party to pay the fees." *Id.*

(3) Case law (cont.).

"The trial court must indicate on the record the method it used to calculate the award. *In re Marriage of Sanborn, 55 Wn.App. 124, 130, 777 P.2d 4 (1989).* Further, the trial court must balance the needs of the spouse seeking the fees against the ability of the other spouse to pay." *In re Marriage of Nelson, 62 Wn.App. 515. Quoting In re Marr of Knight,*

B. The court's decision.

(1) The trial court upheld the court commissioner's order of terms in the amount of $1000 and ordered an additional $500 for the trial court hearing. Neither the commissioner nor the trial court considered the need of the Respondent when awarding fees. Neither considered the ability of the Appellant to pay for fees. Neither requested substantiating documents or explained a method of determining appropriate fees based on the evidence, need, or ability to pay. RP (12-21-15) 26 ln. 19 & RP (2-25-16) 31 ln. 15.

(2) The court claimed to have reviewed the file and transcripts (RP (2-25-16) 2 ln. 11). Given this, any consideration of need would have resulted in the conclusion that with $223,000 in cash available (CP 58-65), the Respondent does not have a demonstrable need. Likewise, reading the file reveals that the Appellant has no savings, is substantially in debt, has bills far exceeding his income,(CP 117-122) and has roughly equal parental time to feed and care for the children. These facts, represented in the file, had they been considered on the record, would have indicated an utter inability for the Appellant to pay the Respondent's attorney fees.

(3) The trial court abused its discretion by not consider the need of the Respondent, ability of the Appellant to pay, and by ordering fees that are manifestly unreasonable given the Respondent's high assets and the Appellant's high debt and low income. The court's order regarding fees is outside the acceptable choices given the facts. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)

C. Res judicata. At RP (2-25-16) 29 ln. 16-20, the trial court stated, "I'm not going to overturn the terms that were ordered by commissioner Pelc because they were appropriate under those circumstances based upon the fact that it had been ruled on and was, at that point in time, res judicata." Again, at RP (2-25-16) 31 ln. 11-14, the court states, "You did not appeal that finding so we are now here for the fourth time with you asking for the same relief. That is the basis for the prior terms."

(1) The first error is that the commissioner made no reference to the events the trial court labeled as "res judicata" when she levied her judgement for terms. The commissioner, at RP (12-21-15) 26 ln. 19, was referencing her assessment that there is not a significant change, stating, "I'm looking at the paystubs and I do not see a significant change. I will be ordering the denial of this. I will also be ordering $1,000 in attorney's fees. Any questions on my ruling?" The court erred by concluding the commissioner's cause for terms was identical to her own, which the court labeled, "res judicata."

(2) The second error is the misapplication of res judicata altogether. "...substantial progress has been made toward a convention that the broad 'res judicata' phrase refers to the distinctive effects of a judgement separately characterized as 'claim preclusion' and 'issue preclusion.'" Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §4402. Claim preclusion applies to the same parties under the same claim. When a plaintiff wins a judgement, all of his claims "merge" in the judgement and he may not seek further relief on that claim in a separate action. Claim preclusion also acts as a "bar" when a judgement is rendered for a defendant, the plaintiff's claim is extinguished, and, similarly, may not seek further relief. Issue preclusion (or collateral estoppel) generally refers to the effect of a prior judgement in foreclosing successive litigation of an issue of fact or law actually litigated and resolved whether or not the issue arises on the same or different claim. Given these definitions, neither preclusion can apply to a motion for modification for child support, because the law allows for a modification upon a showing of significantly changed circumstances. Each motion is a separate claim. In this case, the Appellant submitted 2014 data and was given a modification based on that data. In 2015 he submitted new data that are significantly different from the current (2014) order. These are separate claims and the motion is allowed by the statute. Moreover, counsel and the trial court refer to a point of the Appellant's argument as res judicata. The claim is a significant change in circumstances, and the Appellant argued for the court's discretion to be applied

to effect changes he needed to support the family. Res judicata cannot bar an argument from ever being applied to any circumstance. Conceivably a parent who once argued for a deviation under one circumstance can never argue for a deviation under any other circumstance if res judicata is allowed to apply to points of argument. This point is a significant issue of law that needs to be addressed at the appellate level because this type of application may preclude proper claims throughout the state. A modification under significantly changed circumstances is allowed, so res judicata cannot be used to preclude a claim of this kind. Furthermore, if the court wishes to preclude the whole issue of modification for changed circumstances, the statute allowing such modifications would have to be reconciled with that wish on the record. It was an error to base a financial judgement on this misapplication of res judicata.

(3) Finally, the invocation of res judicata as a basis to award terms punitively is subterfuge altogether. Terms can be awarded punitively based upon a finding of intransigence. *Marriage of Morrow*, 53 Wash.App. 579, 590, 770 P.2d 197 (1989) Since intransigence was neither present nor argued, there could be and are no findings of fact supporting intransigence. Awarding fees based on res judicata is an abuse of discretion because it is outside the range of acceptable choices given the facts and the applicable legal standard.

VI. Conclusion

A basic use of a statutory construction process reveals that the court has invaded the province of the legislature by modifying the enactment of RCWs 26.19.001, 26.19.071, 26.09.002, and 26.09.140 to an extent that obliterates the legislature's intended application. This is an error. This error can be remedied by this court and I ask you to do so by remanding the dismissal with instructions to consider all of the income data present in the record and vacating the judgement for financial terms.

Respectfully submitted,

Jonathan Steinbach
Pro se
Appellant