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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

NO. 349870

IN RE:

TY DORLAND,

APPELLANT

AND

SHELLEY DORLAND,

RESPONDENT

OPENING BRIEF OF APPELLANT

**Jason R. Nelson WSBA No. 25107
925 West Montgomery
Spokane, WA 99205
Phone: (509) 328-9499
E-mail: jasonnelsonlaw@gmail.com**

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ASSIGNMENTS OF ERROR

1. The trial court erred in imputing income to Ms. Dorland at a net of \$1,758.00 per month.
2. The trial court erred in its' determination of Mr. Dorland's child support obligation based on the error in imputation to Ms. Dorland.
3. The trial court erred in its' determinations regarding Ms. Dorland's need for spousal maintenance and her inability to generate an income to allow her to meet her need.
4. The trial court erred when it continued to include expenses related to both children in the home in determining Ms. Dorland's need for maintenance, even after support terminated for the oldest daughter of the parties.
5. The trial court erred in its determination of the length that spousal maintenance should be ordered, considering the division of assets.

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court erred in imputing Ms. Dorland's income at \$25,000.00 per year versus \$29,120.00, the full-time annual income based on her historical hourly rate of pay.

2. Whether the trial court erred when it based Mr. Dorland's child support obligation using a gross income figure of \$25,000.00 per year for Ms. Dorland rather than \$29,120.00.
3. Whether the court erred when it ordered Mr. Dorland to pay spousal maintenance based on suspect financial information submitted by Ms. Dorland and considering her part-time income.
4. Whether the trial court should have adjusted Ms. Dorland's need after the parties' oldest daughter graduated from high school and support for her was terminated per the court's ruling.
5. Whether the trial court erred in ordering to Mr. Dorland to pay spousal maintenance for 80 more additional months beyond what had already been paid pursuant to the court's temporary orders.

STATEMENT OF APPLICABLE FACTS

Ty and Shelley Dorland married on August 22, 1992. **(RP 13, lines 21-22)**. They separated in July 2015. **RP 14, lines 5-13)**. The parties had three children of their marriage: Reid Dorland who died in May 2010, Courtney Dorland, who was 18 at the time of trial, and Sidney Dorland, who was 16 at time of trial. **(RP 15, lines 9-14)** At the time of trial, Mr. Dorland was 49 years old. **(RP 13, lines 13-14)** Ms. Dorland was 46

years old. (CP 12)

Mr. Dorland obtained a degree in Construction Management from Eastern Washington University in 1991. (RP 17, lines 13-18) Ms.

Dorland obtained a degree in Sociology from Eastern Washington University in 1993. (RP 57, lines 23-25; RP 58, lines 1-6)

Mr. Dorland testified that he was employed at Travis Pattern & Foundry. (RP 18, lines 9-11) He began work there as a general laborer and held the position of Production Manager at the time of trial. (RP 18, lines 13-17) But for approximately five months in either 2000 or 2001, Mr. Dorland had worked for his employer for 24 years. (RP 19, lines 18-25; RP 20, lines 1-10)

Mr. Dorland testified that he received a gross monthly salary of \$4,549.56 and received an annual bonus in the month of December. (RP 22, lines 3-9, lines 16-25) The bonuses for the years 2012 through 2015 totaled approximately \$36,000.00 each year. (RP 24, lines 6-20)

Ms. Dorland testified at trial that she was employed on a part-time basis as a traffic flagger with Traffic Corp. (RP 155, lines 1-2; RP 156, lines 15-21) She testified that she worked on-call and that she was not

working full-time. **(RP 156, lines 15-21, RP 157, lines 12-13)** She further testified that she was paid \$14.00 per hour and that she was earning approximately \$400.00 per month. **(RP 157, lines 18-19; RP 159, lines 1-3)**

Ms. Dorland's previous work history included working for five years as a visitation officer at Airway Heights Correctional Center in Spokane County, Washington, earning \$30,000.00 per year. **(RP 58, lines 15-17; RP 228, lines 11-13)** As part of her employment, Ms. Dorland was required to transport family members of inmates to visitation areas. **(RP 221, lines 1-12)** Ms. Dorland testified that she quit that job after her employer learned that she had been fulfilling these duties while her license was suspended as a result of a DUI charge. **(RP 221, lines 1-12)**

Ms. Dorland then went to work as a pre-school assistant in Nine Mile Falls, Washington and then as an instructional assistant with the Cheney, Washington school district. **(RP 149, lines 8-14; RP 150, lines 11-10)** In December 2012, Ms. Dorland began working for the Mead School District at Mead High School as a para-educator and worked there for more than two years. **(RP 320, lines 15-20)** Her rate of pay at the time her employment ended with the Mead School District was \$14.00 per

hour. **(RP 153, lines 1-6)**

While Ms. Dorland was employed by the Mead School District, there were allegations that she allowed Mead High School athletes to use drugs and alcohol at her home. **(RP 221, lines 16-25)**. Ms. Dorland was placed on administrative leave without pay while the district investigated. **(RP 222, lines 1-25)** Ms. Dorland testified that the district conducted a thorough investigation. **(RP 223, lines 14-16)** After being verbally advised that the investigation had concluded that Ms. Dorland had knowledge of the activity in her home, and that the kids had been there with her permission, Ms. Dorland quit her job with the district. **(RP 223, lines 17-25; RP 223, lines 1-3; RP 226, lines 3-6)**

Ms. Dorland testified at trial that she was not seeking further education and did not see the need to do so. **(RP 229, lines 1-4)**

Ms. Dorland testified at trial that her monthly household expenses totaled approximately \$3,500.00. **(RP 236, lines 10-18)** These included expenses for Ms. Dorland as well as the parties two daughters. **(CP 12-16)** Without incurring any debt, Ms. Dorland testified she paid the \$3,500.00 per month from the \$400.00 she made in income and the \$1,800.00 she received from Mr. Dorland. **(RP 236, lines 10-18)**

Mr. Dorland testified that his monthly expenses totaled \$3,276.72, not including child support or maintenance. **(RP 28, lines 18-25, RP 39, lines 17-25; RP 40-48)**

Other than the retirement plans divided equally between the parties, the parties had no assets of significant value. **(CP 60-63; 64-70)**

Pursuant to temporary orders, Mr. Dorland paid maintenance and child support payments totaling \$1,803.00 per month, beginning October 2015. **(RP 25, lines 20-22; RP 52, lines 21-22)** Ms. Dorland was obligated to pay the house payment from the maintenance she received but failed to do so. **(RP 235, lines 11-22)**

Ms. Dorland originally testified that she was requesting four additional years of maintenance but then with prodding from counsel increased her request to an additional five to six years. **(RP 160, lines 11-20)**

At the conclusion of trial, the judge found Mr. Dorland's income from employment, including his annual bonus, to be \$5,502.00, net, per month. **(CP 46-52; 53-59)** The trial judge then imputed income to Ms. Dorland based on an annual income of \$25,000.00 gross per year. **(CP 46-52; 53-59)**

Mr. Dorland was ordered to pay spousal maintenance for an additional 71 months. (CP 64-70) The amount of monthly maintenance was set by the trial judge as follows:

\$1,000.00 per month for the period of 10/1/16 through 06/30/18;

\$1,800.00 per month for the period 07/01/18 through 09/30/18;

\$1,300.00 per month for the period 10/01/18 through 09/30/20; and

\$1,000.00 per month for the period 10/01/20 through 09/30/22.

(CP 64-70)

STANDARDS OF REVIEW

Although a trial court has broad discretion when determining requests for an award of spousal maintenance and determinations of child support in marriage dissolution actions, the trial court's decision is reviewable for an abuse of discretion. In re Marriage of Rockwell, 141 Wn. App. 235 (2007). A trial court abuses its discretion when the trial court's decision is manifestly unreasonable or made on untenable grounds or for untenable reasons. In re Marriage of Crump, 175 Wn. App. 1045 (2013). As set forth in In re Jannot, 110 Wn. App. 16, 22, affirmed in part, 149 Wn.2d 123 (2002):

The abuse of discretion standard is not, of course unbridled discretion. Through case law, appellate courts set parameters for the exercise of the judge's discretion. At one end of the spectrum the trial judge abuses his or her discretion if the decision is completely unsupported, factually. On the other end of the spectrum, the trial judge abuses his or her discretion if the discretionary decision is contrary to the applicable law.

And as stated in **In re Marriage of Littlefield**, 133 Wn.2d 39, 47 (1997),

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.

The trial court's challenged findings are reviewed for a determination of whether there is a sufficient quantity of evidence to persuade a fair-minded, rational person that the premise is true. **In re Marriage of Griswold**, 112 Wn. App. 333 (2002).

ARGUMENT

The trial court erred in its determination of child support

RCW 26.19.071(6) requires the court to impute income to a parent when that parent is voluntarily unemployed or voluntarily underemployed. The determination of voluntarily underemployment or voluntary unemployment is to be based on a consideration of that parent's work history, education, health, age and any other relevant factors. "The usual and ordinary meaning of 'voluntary unemployment' is that the unemployment is brought about by one's own free choice and is intentional rather than accidental." **In re Marriage of Blickenstaff**, 71 Wn. App 489 (1993). In imputing income to an unemployed parent, the court does not have to make a finding that the parent is purposefully unemployed in order to avoid a child support obligation. **In re Marriage of Didier**, 134 Wn. App. 490 (2006).

RCW 26.19.071(6) further provides that in the absence of records of a parent's actual earnings, the court shall impute income to a parent in the following order of priority:

- (a) **Full-time earnings at the current rate of pay;**

- (b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;**
- (c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;**
- (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, is recently coming off public assistance, aged, blind, or disabled assistance benefits, pregnant women assistance benefits, essential needs and housing support, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;**
- (e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.**

In the present case, the trial court imputed income to Ms. Dorland at a gross amount of \$25,000.00 per year. However, that imputation was

not based on the testimony and evidence at trial. Ms. Dorland testified that she was earning \$14.00 per hour, working part-time as a flagger for Traffic Corp. **(RP 156, lines 15-21; RP 147, lines 18-19)** Additionally, prior to working at Traffic Corp, Ms. Dorland worked for the Mead School District at an hourly rate of pay of \$14.00 per hour. **(RP 153, lines 1-6)** Prior to working for various school districts, Mr. Dorland had been employed for the Department of Corrections making \$30,000.00 per year. **(RP 228, lines 11-13)**

Looking at the factors in **RCW 26.19.071(6)** in order of priority, Ms. Dorland had a current rate of pay of \$14.00 per hour at the time of trial. Full-time earnings based on a 40 hour work week at \$14.00 per hour would be an annual income of \$29,120.00, not the \$25,000.00 imputed by the court. Further, even if it were appropriate to disregard **RCW 26.19.017(6)(a)**, the next factor in order of priority requires imputation based on full-time earnings at a historical rate of pay for which there is reliable information. It is undisputed that Ms. Dorland earned \$14.00 per hour working for the Mead School District and that she had earned \$30,000.00 per year working for the Department of Corrections.

The trial court's determination regarding the imputation of income to Ms. Dorland was an abuse of discretion. The error on the part of the court affected the court's determination of child support for Mr. Dorland and affected the court's later determinations regarding spousal maintenance.

The trial court erred regarding its determination concerning spousal maintenance.

RCW 26.09.090 provides that the trial court shall award maintenance in an amount and for a duration that the trial court deems just. The statute further directs the trial court to consider all relevant factors including those enumerated in the statute itself. The only limitation on the trial court is that the maintenance award must be just under the circumstances; otherwise the discretion of the court in maintenance determinations is wide. **In re Marriage of Bulicek**, 59 Wn.App 630 (1990) However maintenance is not awarded as a matter of right. **Friedlander v. Friedlander**, 80 Wn.2d 293 (1972). Further the purpose of spousal maintenance should be to support a spouse with a need until that spouse is able to earn a living or otherwise become self-

supporting. **In re Marriage of Irwin**, 64 Wn. App 38, review denied, 119 Wn.2d 1009 (1992)

In the present case, the trial court equally divided the two largest assets of the parties, those being the two retirement plans in Mr. Dorland's name. (CP 64-70) Other than those retirement accounts, and a small retirement account in Ms. Dorland's name which was awarded to her, the estate of the parties consisted entirely of personal property that was not found to be of significant value. At the time of dissolution, the parties did not own a home and in fact had a potential debt as a result of a short sale from their former family home. (CP 60-63; 64-70) Neither party had any separate property of significant value and all community property was divided equitably.

Both parties earned college degrees in the early 1990s. (RP 17, lines 13-18; RP 57, lines 23-25; RP 58, lines 1-6) At the time of trial, Mr. Dorland remained employed in his field. Although Ms. Dorland was only part-time employed at the time of trial, she testified that she did not need further education and had not plans to seek further education. (RP 229, lines 1-4)

The parties had a long-term marriage but during that marriage lived a modest lifestyle. They did not acquire fancy toys or cars and owned no real estate at the conclusion of their marriage.

At age 46, Ms. Dorland did not testify that she had any physical or emotional conditions that would prevent her from working on a full-time basis. In fact, Ms. Dorland testified that she was actively applying for work. **(RP 158, 10-25)** Ms. Dorland testified that she had household expenses, after adjustments during testimony, of \$3,500.00 per month to support herself and the two children in her household. **(RP 246, lines 10-18 and CP 12-16)** Mr. Dorland argued that Ms. Dorland was capable of earning \$2,183.75 net if she were employed full-time. **(RP 348, line 13)** Even including expenses for the parties 18-year-old daughter for whom child support terminated in June 2017, Ms. Dorland's maximum need if she were employed full-time was \$1,316.25 at the time of trial. That need should then have been reduced when the obligation to support the 18-year-old daughter of the parties terminated in June 2017. Ms. Dorland initially testified to a need for spousal maintenance of four years then revised her request to five or six years beyond the date of entry of the Decree. **(RP 160, lines 11-20)** Lastly, her stated need lacked credibility.

Mr. Dorland's net income was found to be \$5,502.00 per month. (CP 46-52) Before any obligations for maintenance and child support, he testified his projected minimum monthly expenses totaled \$3,276.72. (RP 28, lines 18-25, RP 39 lines 17-25, RP 40-48) Mr. Dorland's monthly expenses included paying the remaining community credit card debt. (CP 30-35; 36-42)

By the time of trial, Mr. Dorland had already paid maintenance for a period of one year. (RP 52, lines 21-22) The court's order for spousal maintenance required him to pay additional maintenance for a period of nearly six additional years. That is more than Ms. Dorland had originally requested in her testimony and the maximum amount she requested upon prompting from counsel. (RP 160, lines 11-20) There was no testimony at trial that Ms. Dorland needed six additional years of maintenance in order to become self-supporting. She did not testify as to any particular field of employment that she was planning to pursue that would take her such a length of time to become fully employed and she specifically testified that she had no plans to seek additional education.

The trial court did consider that in leaving the marriage, the parties were not left with assets of significant value other than the retirement

accounts that were equally divided between them and as such Ms. Dorland would have only those retirement accounts and her personal property. However, the court had already divided the property in a manner it felt was equitable between the parties considering their economic circumstances. In awarding additional maintenance to Ms. Dorland because there was no other property to award to her, the trial court essentially “double-dipped” by requiring Mr. Dorland to provide that non-existent property from his future earnings.

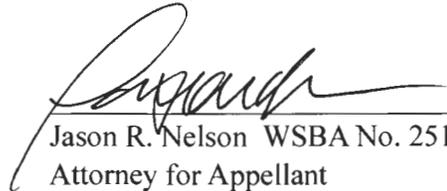
A maintenance award that amounts to a double recovery is not permissible under Washington law. **In re the Marriage of Barnett**, 63 Wn. App 385 (1991). To the extent that the court has already equitably divided the property, the court cannot then further divide the property through a maintenance award. The same approach should be applied in this case. The trial court erred when it awarded spousal maintenance to make up for the fact that there was not a more size-able estate to be divided between the parties, after making what the court found to be a just and equitable division of that estate.

Trial court’s determination of spousal maintenance, both as to amount and duration, was an abuse of discretion.

CONCLUSION

The trial court abused its discretion in this matter. The imputation of income to Ms. Dorland was not based on the evidence at trial and was contrary to existing law. The award of spousal maintenance to Ms. Dorland was based on an incorrect determination of her ability to support herself, an incorrect finding regarding the level of need both for herself and for her household and the court's desire to create a larger estate for Ms. Dorland in the future. The award amounts to an impermissible continuing lien on Mr. Dorland's earnings and is not supported by the relevant statutory factors. Mr. Dorland requests that the appellate court reverse the trial court's decisions regarding the above.

Respectfully submitted,

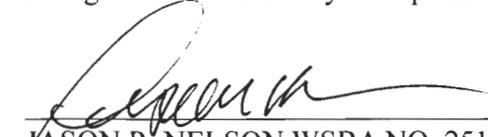


Jason R. Nelson WSBA No. 25107
Attorney for Appellant

DECLARATION OF SERVICE

I, Jason R. Nelson, under penalty of perjury pursuant to the laws of the State of Washington, declare that on this 11th day of September 2017, I sent via personal delivery a copy of this brief to attorney Gary Stenzel, 1304 W. College, Lower Level, Spokane, WA 99201.

Signed at Spokane, Washington on this 11th day of September, 2017.



JASON R. NELSON WSBA NO. 25107
Attorney for Appellant