

In the Court of Appeals
Division I
State of Washington

FILED

MAY 16 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

An Appeal from
Spokane Superior Court
Cause no. 15-3-01543-3
The Honorable Julie M. McKay

In re

Ty Dorland, Petitioner/Appellant

And

Shelly Dorland, Respondent/Respondent

Responsive Brief of Respondent

Court of Appeals
Cause No. **349870**

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I. FACTS

The Dorland's had been married since August 22, 1992 to the date of trial on October 3, 2016. CP 60. Their marriage was of long-term of 24 years. Mr. Dorland was the primary "bread winner" in the home, having worked for his employer for 24+ years. RP 19-20. In contrast, Ms. Dorland held several different jobs and by the time of trial was only working part-time, after having been forced out of her job by an investigation about allowing students to party at her home. RP 141-159.

At the time of trial, Ms. Dorland had one child at home who was and is dependent on her as a minor. CP 63. This child was 16 years old at the time of trial and in high school. Id. She also had her oldest daughter living with her who had just graduated from high school at the time of trial. RP 160 & 213.

Mr. Dorland agreed to not visit his daughter and to give Ms. Dorland custody and sole decision making on the record. RP 110-111¹. Tragically, Mr. Dorland had committed domestic violence on his daughter which was disgusting and he was basically restrained from contact with her unless it was through counseling. RP 140-145. This obviously left Ms. Dorland with full responsibilities for her youngest and with the task of helping their 16 year old daughter with her future. There was no help driving them back and

¹ A final parenting plan was entered by the court based on Mr. Dorland's acquiescence under oath that he agreed to no visitation with his youngest daughter unless she wanted to see him, and Ms. Dorland having full decision making power; again, the Appellate failed to request that a copy of the parenting plan be filed with this court, yet argues that the support is too high. Mr. Dorland stipulated to Ms. Dorland's parenting plan that only gave him visitation with his daughter if she wanted to have visitation.

forth to schools, buying gifts, clothing, shoes, car expenses, etc. In addition, Ms. Dorland had no extensive schooling or employment experience that would bode well for her to make much more than what was imputed to her by the judge. RP 147-154. Because of her situation, the judge ordered maintenance, considering the statutory factors, in what she felt was a fair amount of \$1,800.00 a month (which also included child support) until September 2018. CP 64-70. Then it was reduced to \$1,300.00 a month until September 2020, with a final two years of \$1,000.00 a month. CP 64-70. The court's findings were that Mr. Dorland had the ability to pay and Ms. Dorland had the need. CP 60-63. Additionally, Mr. Dorland did not have to pay attorney's fees from the case, even though there seemed to be a clear need and ability to pay between the parties. CP 68-70.

Mr. Dorland has filed an appeal of the maintenance award, citing as his basis that Ms. Dorland should have been imputed more income than she was, and the court should not have considered the fact that the parties oldest daughter was living with Ms. Dorland. (See opening brief Statement of Issues, Errors by the Judge, and recitation of the facts from his point of view).

Regarding Ms. Dorland's income, she never had consistent employment and with the loss of her job with the school district she testified that she had very little ability to regain a similar job. RP 152-154. Additionally, since Mr. Dorland would not be having parenting time with his daughter she had the entire responsibility to transport a busy teenager back and forth to

activities, as well as be there for her to supervise. This obviously meant that her ability to work, from the court's perspective would have been germane to her economic circumstances.

Regarding Mr. Dorland's economic circumstances, Ms. Dorland testified that he had been the main source of income in their family, the "bread winner". RP 159. This also led to a discussion about Ms. Dorland's various jobs, some part time, others full time, which did not last long. RP 147-155. Ms. Dorland's job at the time of trial was being flagger, where she made \$14.00 an hour but only made about \$400-\$490 a month at that part time job, which was "winding down" for the winter season. RP 231 & 239.

Regarding the determination of child support, the judge imputed the amount of \$25,000.00 annual gross income to Ms. Dorland. CP 46-59. As indicated, her job as a flagger was winding down, and she had only averaged \$12.00 an hour at other part-time jobs. She also had to move because they sold the family residence and had nowhere to live. And had been living on temporary maintenance since the case was newly filed.

Given the fact that Ms. Dorland lost her job at the prison and then her full time position at the school was ostensibly a forced resignation, and given the overall facts of the case, the court's imputation of \$2083.00 a month seemed reasonable. The court ordered a hybrid maintenance amount combining the child support for their 16-year-old daughter which also took into consideration Mr. Dorland superior income and Ms. Dorland's need. CP 46-70. This amount was spread over a little less than 6 years. Id. There

graduation for their oldest child. CP 46-70. Additionally, Ms. Dorland, testified that she had approximately \$3,500 in monthly expenses with the children in her home. RP 239 & CP 12-16., R122.

The Appellant indicates that the court erred in several ways, however, what it boils down to is that the court imputed a wrong gross and net figure for Ms. Dorland, making the maintenance and child support amounts inappropriate. However, in reality since Ms. Dorland did not have a full-time job, had a dependent child at home, without help from Mr. Dorland, and had little or no good job history, she could not live off of “imputed wages”, which funds were only used to determine a proper amount of support, and were not designated as money in her wallet. What Mr. Dorland would have this court do is make Ms. Dorland even more destitute by taking away maintenance because of what he calls a discretionary violation by the judge in her imputation to Ms. Dorland for just over \$400.00 a month in imputed income. Ms. Dorland challenges this proposition.

II. LAW AND ARGUMENT IN RESPONSE

- A. The court did not error in imputing the income they imputed to Ms. Dorland, given the facts and circumstances of her employment history and the history of this marriage.

Under Washington law the court is vested with broad discretion in the imputation of income to a party, regarding child support and other financial matters. *In re Marriage of Shui and Rose*, 132 Wn.App. 568, 588, 125 P.3d 180 (2005). Further, regarding imputation of income, "The court shall

impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors." RCW 26.19.071(6). In re Marriage of Shui and Rose, supra.

In terms of Ms. Dorland's ability to work, she had a sociology degree from college but never had a job as a sociologist. RP 146-148. During their marriage, and approximately 20 years before the divorce was filed she worked out at the Airway Heights prison facility as a visitation guard in 1995 but that job only lasted about 5 years. RP 148. She quit that job because her husband had received a raise at his work and they decided she would be a stay at home with the children. RP 148.

Ms. Dorland's next job, while married was as a preschool assistant teacher at \$10.00 an hour. RP 149. She only worked there for 3 months and they moved so she had to quit that job. RP 149-150. She then obtained another job with the Cheney School District as a part time classroom instructional assistant at \$12.00 an hour. RP 150-152. After being hired there and working just 3 months, the Dorland's moved again, and she had to quit that Cheney job for a job in Mead. RP 152-153. They moved to Mead and it was too long a drive to keep the Cheney job. Id. She next got a job as a para-educator at \$12.00 an hour. RP 153. She felt she was doing a good job there, however, she was approached by the principle of Mead High School wherein he alleged there was a student gathering at her home when

she was not there, and he had given her a letter that basically told her she should quit her job there because of those allegations, true or not. RP 153-154. She did not agree with the principle's allegations but no longer felt she was wanted at the school and so she left that position. RP 154. This put a substantial damper on her ability to find similar positions since her references would not be favorable, even though she did not agree with the principle's position. Id. So instead of a school job she only could find a part time position as a traffic flagger. RP 155. She only earned \$14.00 an hour and was a part time on-call position. RP 155-157. That job was only for five to ten hours at a time and there was no indication that it could work into a full-time position. RP 157.

In addition to only having a part time position, Ms. Dorland had to do 100% of the caretaking of their youngest daughter since the father had no parenting time with her because of his actions which included DV threats, substantial threats toward the children and Ms. Dorland, spitting in the daughter's face over car insurance costs, and basically destroying that relationship. CP 140-145. As Ms. Dorland was being examined about her financial statement and that it included both children, she explained that she felt taking care of both children, even after graduation and turning 18 was part of their "lifestyle" that they planned on doing as the girls graduated. RP 211. For this reason, Ms. Dorland included their oldest daughter in her expenses in her financial declaration. RP 210-211.

In contrast to Ms. Dorland, Mr. Dorland not only made a wage of \$5,502.00 net per month, with an average bonus alone of \$36,000 a year. CP 46-47.

As for Ms. Dorland's income, the court made a discretionary decision to impute income to Ms. Dorland in the amount of \$25,000.00 gross a year. CP 46-47. Although it was true that if Ms. Dorland could work as a full-time flagger she could have made over \$29,000 a year, but she made it very clear that this was only part time and that there was no indication this could be turned into a full-time position. RP 155-157. The amount of \$25,000.00 gross income for Ms. Dorland was close to full time as a construction flagger at \$29,000 a year, however, the judge seemed to take into consideration that she testified that could not have worked that job fulltime and it was seasonal. The court had other facts to help determine the right amount to impute to Ms. Dorland and came up with a fair figure to use.

Regarding the determination of incomes for the purposes of establishing a child support figure, a reviewing court reviews child support awards, including a decision whether to impute income and whether to grant a deviation, for an abuse of discretion. See *In re Marriage of Pollard*, 99 Wn. App. 48, 52-53, 991 P.2d 1201 (2000); *In re Parentage of O.A.J.*, 190 Wn.App. 826, 831, 363 P.3d 1 (2015). The trial court must take into consideration all the factors bearing on the children's needs and the parents' ability to pay. *Pollard*, 99 Wn.App. at 52. Child support orders should meet each child's basic needs and provide any "additional child support

commensurate with the parents' income, resources, and standard of living.” Id. (quoting RCW 26.19.001). To facilitate these goals, the legislature has directed that the child support obligation be “equitably apportioned between the parents.” Id. See also RCW 26.19.001.

In this case, Ms. Dorland did not have a very consistent or attractive job history. It was made up of part time work, 12 dollar an hour jobs to accommodate her husband’s job and their desire to move. And only one or two-part time jobs where she was either forced out of the job or quit because her husband got a raise and they wanted her to stay home with the “kids”. The Appellant indicates it was error for the judge not to order her income at \$29,000.00+ a year because her last job was at \$14.00 an hour and that is the full time figure she “could” arguably earn as a flagger. To reach this conclusion one would have to have provided evidence that discounted her testimony that this was a very part time “on-call” position with no chance for full time work. Certainly, in the spirit of the *Polland* case and the statutory requirements in setting incomes, the judge had the discretion to decide whether to order the \$29,000+ income based on testimony that this was a very short term on-call job, or come up with an appropriate annual figure, given her income and job history, and the fact that she stayed at home much of the time. With that in mind, the judge set her gross income only \$5,000 less than Mr. Dorland wanted her to be imputed at, or just over \$400 less per month. All of which appears clearly within the court’s reasonable discretion in this case.

B. The court did not error in ordering the amount of maintenance for the period of time it was ordered.

The court ordered the following maintenance in this case: \$1,000 a month plus child support for the youngest daughter; After the youngest daughter graduates \$1,800 for two more months; Then, \$1,300 a month for 2 years, followed by 2 more years of \$1,000 a month in maintenance. This is based on a substantial difference in incomes seen on the child support worksheets (CP 46-52) and the reality that most of Ms. Dorland worksheet income was imputed which does not actually pay bills.

The determination of a proper amount of maintenance under the law is a discretionary decision by the trial court. "The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of relevant factors, the award must be just." *In re Marriage of Bulicek*, 59 Wn.App. 630, 633, 800 P.2d 394 (1990).

In this case, the judge saw the amount of years they were married being 24 years at the time of trial, the amount of part time low paying jobs Ms. Dorland had in her employment history, the lack of consistency of the type of jobs, the basis' for being unemployed, the parties' agreement to have her stay at home with the children, that she would be the only one at home taking care of their youngest daughter, the parties lifestyle of helping their children in many areas of their lives, and her needs and decided upon the maintenance amount and duration. Without considering the temporary maintenance, the Judge ordered just 5 years 11 months of maintenance

which after almost 25 years of marriage and part time jobs seems eminently just and consistent with the judge's discretionary rights.

C. Although Ms. Dorland included some of her oldest child's expenses, there was no evidence that those expenses affected her need so drastically that the discretionary amount of maintenance ordered was inappropriate.

Mr. Dorland's counsel cross examined Ms. Dorland about her financial need for an extensive amount of time. RP 235-241. That cross examination simply showed that a few things were included for her oldest daughter who was still somewhat dependent on the parties for assistance. Id. However, what the Appellant is missing from his argument regarding her financial declaration, is the fact that Ms. Dorland was imputed the amount of \$1,666.00 per month in income to live on but that in reality she did not pocket that amount at the time of trial since the little job she actually had at most paid her only \$400 to \$490 a month. She testified clearly that she only earned money when she was called out to work and that that was part time, with an occasional increase in that amount depending on the job, and that the "flagging" season was almost over. RP 155-157, This then left her with very little income on those off months, and she did not actually take home enough to cover her expenses regardless of any imputation.

When you look at the amount the judge ordered in maintenance, she seemed to take several things into account from all the statutory requirements at RCW 26.09.090. That statute requires the judge to consider the following things in fashioning a maintenance remedy:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage or domestic partnership;
- (d) The duration of the marriage or domestic partnership;
- (e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and
- (f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

As can be seen from this mandatory statute, the judge can consider a myriad of things when ordering a proper amount of maintenance. Regarding those factors, this Respondent presented the following evidence as to her own need for maintenance: Considering her financial resources, Ms. Dorland had no real income than \$400 to \$490 a month for short term construction flagging. The income that the husband's counsel uses in his analysis is just imputed income and cannot be considered a resource to actually pay bills when addressing a proper maintenance. Note that the statute on determining maintenance says that the court is to consider the financial resources of the party seeking maintenance; this does not imply that the court must use an imputed amount to satisfy this request/need. Rather it specifically states that the court should consider an actual financial

resource. Imputed income on a child support worksheet is not a financial resource, it is a fiction to help determine a fair child support amount, not something the party actually have in their possession to pay bills.

Regarding her community financial resources, Ms. Dorland was given a portion of Mr. Dorland's pension that was not easily accessible without penalties and some personal property and a small sum from the proceeds from the sale of their home. CP 64-70. Her ability to pay her needs was compromised by her lack of job experience and inconsistent job history. And the parties' life style of helping their children financially fell completely on her shoulders because of the husband's abusive behavior. The parties were married almost 24-year marriage, and she had to take care of their youngest teenager by herself without any respite care so she could work more hours, and help her oldest daughter, as she had planned as a family without any help from Mr. Dorland. In comparison, the husband had a job that paid an excellent wage and annual bonus. And finally, that the wife helped Mr. Dorland maintain and keep his good job all these years, giving up her jobs so he could be closer to work and do a better job for his employer.

There is nothing in the statute about using imputed income to determine maintenance. Everything about the factors under section .090 seems to deal with issues of reality, rather than what was hypothetically what the person requesting maintenance could earn. In addition, the determination of a proper amount of maintenance is not just based on

income issues, there are many other factors than just income. All of which appear clearly to mitigate in favor of the court's determination of a proper de-escalating maintenance amount over the 5.9-year period. And finally, there was no indication in anything that the judge found that this maintenance award had anything to do with a property award, that was simply argued by Mr. Dorland and counsel without any basis for that conclusion and Ms. Dorland did in fact ask for 6 years' maintenance in this matter, no matter what counsel suggests about her testimony.

D. The Appellant challenges the court's findings of fact and conclusions of law, however, he failed to provide the oral ruling to assist in clarifying what the trial judge meant in her findings; therefore, it must be concluded that the Appellant simply chose to challenge the basic findings of the court that are in writing, since there was no attempt to expand on what was ordered by looking at the oral ruling.

It has long been the law in this state that if a party wishes to challenge the court's findings of fact and conclusions of law, in their case that they should look to the oral or written ruling to clarify the judge's intent. By doing this they can look behind the actual finding, such as the concept of "the best interests of the children" in a custody or parenting plan case, and see why the court made such a finding. Further, to clarify any ambiguity in findings of fact or conclusions of law, the appeals court has always looked to the oral ruling of the trial judge. See *Goodman v. Darden, Doman & Stafford Assocs.*, 100 Wash.2d 476, 481, 670 P.2d 648 (1983); *Miles v. Miles*, 128 Wn.App. 64, 71, 114 P.3d 671 (2005); *In re Meistrell*, 47 Wash.App. 100, 107, 733 P.2d 1004 (1987); *Toyota of Puyallup, Inc. v. Tracy*, 63 Wn.App. 346, 818 P.2d 1122, (1991). If there is no written ruling

then the court must look to the oral ruling to clarify the court's theory behind their decision. *Heikkinen v. Hansen*, 57 Wash.2d 840, 360 P.2d 147 (1961). *Goodman v. Darden, Doman & Stafford Associates*, 100 Wn.2d 476, 670 P.2d 648, (1983). The Appellant may not impeach Judge McKay's simple written findings without referring to the oral ruling which he did not reference or provide.²

When there is no transcript of the ruling to reference and clarify the findings of fact, the court must look to the evidence presented to see if there is substantial evidence to support the findings and decree. See *Miles*, supra. In this case, the transcript of testimony is the only evidence available to this court provided by the Appellant to compare and see if the facts justify the findings of the court regarding the incomes of the parties, the child support determination and the maintenance order.³ *Id.* And, where the trial court's finding is supported by substantial evidence, the appellate court will not substitute its judgment for that of the trial court. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash.2d 570, 343 P.2d 183 (1959). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *In re*

² It should be noted that the Appellant failed to provide the trial transcript to the Respondent's counsel pursuant to the RAP rules and was forced to provide the transcript by clerk's mandate, however, when that transcript was provided to the Respondent's counsel the two stacks of papers provided did not contain the oral ruling. It is presumed that the Appellant did not use that ruling to clarify or show the theory of the judge's decision in this case.

³ Interestingly, the actual Findings of Fact at section 13 state that the "court's oral findings regarding spousal maintenance are incorporated herein as if fully set forth", yet the Appellant did not provide that transcript.

Snyder, 85 Wash.2d 182, 532 P.2d 278 (1975). See also *In re Meistrell*, 47 Wn.App. 100, 733 P.2d 1004, (Div. 1 1987).

In this case, the findings of fact state the following at CP 60-63.:
“Spousal support should be ordered because the respondent has a need for spousal maintenance and the petitioner has the ability to pay. Other statutory factors considered in weighing requests for spousal maintenance also support an award of spousal maintenance from the petitioner to the respondent. The courts oral findings regarding spousal maintenance are incorporated herein by reference as if fully set forth.” (Emphasis added).

When looking at the facts of this case as outlined in the transcript, and exhibits, the following seems clear:

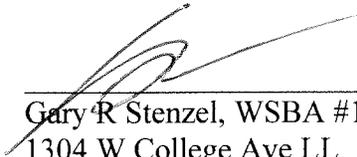
1. Ms. Dorland was employed part time in a seasonal position at the time of trial, and had the parties two daughters living with her (one of course was emancipated but was still in need of help);
2. Ms. Dorland’s financial declaration, although including “food” for three people, herself and her two daughters, far exceeded the funds she received from being a part time flagger for a construction company;
3. Mr. Dorland was the primary financial provider in the Dorland home for years and his income exceeded Ms. Dorland’s actual part time income at the time of trial by more than 7 times her income;
4. Ms. Dorland had 100% of the responsibility for their youngest daughter for transportation, clothing, food, medical appointments, medicine, school activities, and general teenage things since Mr. Dorland had no visitation what so ever;
5. The parties had been married, at the time of trial for 24 years, during which Mr. Dorland was the primary financial provider;

6. Ms. Dorland had a spotty work history at the time of separation and beyond;
7. Ms. Dorland had a college degree in Sociology, which was a degree that was all but useless for everyday jobs;
8. Although the parties had little debt at separation, the major item of property was the husband's retirement with his company, which if removed came with IRS penalties reducing its value by a significant number;
9. Ms. Dorland was not young, and was in her late 40's at the time of trial;
10. Ms. Dorland had a very inconsistent work history, with some resignations based on what appeared to be controversial issues, compared to Mr. Dorland who had had the same job for a long time, and not only received a good salary, he received an annual bonus for his work;
11. Throughout the Dorland's marriage they had several moves, all to seemingly accommodate Mr. Dorland's job, but at the same time causing Ms. Dorland to quit her jobs to accommodate his desire to move to a new place;
12. There were indications that if she tried to work in a school district that she receive unfavorable references, making it difficult for her to even try to stay in an area of work she was familiar with, causing her to move from working with schools and children to part-time work flagging traffic for a construction company;
13. Regardless of the "imputation" of income to Ms. Dorland for child support determination purposes, the reality was that imputed funds did not put food on her table, that it was just a number for child support purposes.

When all these facts and circumstances came before the court, including the fact that Ms. Dorland had been receiving income from her husband's employment, there clearly seems to be sufficient evidence to

persuade a fair-minded, rational person that she should receive a fair spousal support award. The Respondent respectfully requests that the Mr. Dorland's appeal be denied.

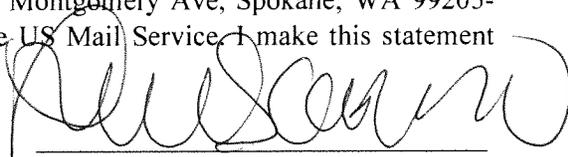
Respectfully submitted this 15th day of May, 2018 by:



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Declaration of Service

I Lori Scarano do hereby state that on this date of May 16, 2018 I mailed a true and correct copy of this RESPONSIVE BRIEF OF RESPONDENT to Jason Nelson at his office address of 925 W Montgomery Ave, Spokane, WA 99205-4552, by depositing that copy with the US Mail Service. I make this statement under penalty of perjury at Spokane.



Lori Scarano, Paralegal