

65194-3

65194-3

NO. 65194-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of

JAIMIE VETTER, NKA STEELE
Petitioner.

and.

NATHAN VETTER
Respondent,

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STATE OF WASHINGTON
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BRIEF OF APPELLANT NATHAN VETTER.

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ASSIGNMENT OF ERRORS

1. The trial court abused its discretion and erred as a matter of law in finding that the father, Nathan Vetter, has income of \$10,500 per months.
 - a. The court failed to make any findings on the record to support imputing income to the father.
 - b. The court failed to correctly apply the facts of record per the applicable statute regarding computation of and imputation of income.
 - c. The court determined income of the father arbitrarily, without any competent evidence of record to support the court's finding.
 - d. The court exhibited actual prejudice against the father, violating his 14th Amendment to a full and fair hearing by an impartial decision maker and his right to a proceeding with the appearance of fairness.
2. The court erred in denying the father attorneys fees when he had need and the mother has the ability to pay.

STATEMENT OF CASE

This matter was filed on April 15, 2008, by the mother Jaimie Steele, as a petition for modification of the parenting plan and child support. CP14-23. The petition articulated numerous reasons that the Mother wanted to change the parenting plan from one of equally shared residential time to herself as the primary residential custodian. The parents ultimately settled the parenting plan issues with an agreed order, which retains the 50/50 arrangement. CP 169.

The remainder of the case was set on the Trial by Affidavit calendar, and an agreed trial date of December 11, 2009 was set. CP 27—29. On December 11, on motion of the father, the court continued the trial date to March 5, 2010. CP 213-214. The court order entered on December 11, 2009 provided some guidance for the parties as follows:

Parties to update financial information and comply w/ LFLR 10 & 14. Respondent shall provide proof of job searches commensurate w/ her past employment to avoid imputation if she chooses to open her own business. Petitioner is on notice that his income for purposes of support orders shall be based on full-time employment.

CP 213.

The transcript of the hearing on December 11, 2009, before Commissioner Ponomarchuk was also provided to Commissioner John Curry for the trial on March 5, 2010. CP 440. On December 11, 2009,

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Commissioner Ponomarchuck had verbally instructed Mr. Vetter that he would not impute his income at \$60.00 per hour, but that to prevent some imputation based upon the evidence to full-time, the father must provide proof of fulltime income. The colloquy at the December hearing was as follows:

THE COURT: Now, I 'm going to need to see the job searches or imputations on the table. So you need to understand that I'm not saying that I'm going to imp—I'm not going to impute 60 hours and hour—60 dollars an hour for this; he's a music teacher. All right?

On the other side of the coin, the law is very clear that I have to impute to full-time.

MR. VETTER: I understand, Your Honor.

THE COURT: So you may have, historically, worked 20 hours a week; that's not going to be acceptable, because the law's changed. All right?

MR. VETTER: I understand.

THE COURT: So you need to be prepared to explain to the Court what your income—a reasonable income should be; because it's the—has to be based upon full-time.

CP 440.

The parties' prior child support order entered in 1994 required the mother to pay a transfer payment of \$442 per month to the father. CP 3.

The mother, Jaimie Steele, requested the court to order a transfer payment to her in the amount of \$203.18, after granting a residential credit

for the 50/50 custody, by claiming that Mr. Vetter's income should be imputed at \$10,392 per month, at \$60 per hour, fulltime; The mother claimed that the father had disclosed this income in his interrogatory responses. CP 219. Further, she analyzed his bank records from July 2007 through April 2009 and documented an average of \$5201.92 per month deposits in his accounts. Thus, she reasoned that his tax returns that reported gross income of only (approx.) \$20,000 for 2008 should not be relied upon. CP 219. Reasoning that he works only part time, or that he actually works more hours but does not report cash income, the mother alternatively argued that the court should double the bank cash flow to impute the father's income. CP 219

Mr. Vetter, who was prose, filed detailed explanations of his sources of income and responded to the mother's allegations with evidence to the contrary. He explained how his interrogatory answers had been misrepresented. CP 344. He attached copies of his interrogatory responses to demonstrate that the mother had misrepresented his answers. In response to interrogatory number 35, he had disclosed his rate of pay at \$60 per hour. In response to interrogatory 36, he had disclosed the time he left for work until the time he got home—a total of 19.75 hours per week. CP 387-388. However, he explained that he could not earn \$60 for each hour he worked because much of the time was spent commuting to different

cities for 1-hour music lessons. CP 344. He showed that he actually provided 9 hours per week of music lessons, including 3 of his classes on Sunday. CP 455. Thus, his total part-time music lesson income was \$540 per week, and his actual hourly earnings (averaging the hours for which he was paid vs. the hours traveling, waiting between classes, etc.,) was about \$30 per hour, before deducting business expenses. Since his students attended school before the afternoon, he could not earn any more per week in music lessons. CP 345-346. He also disclosed that on Friday afternoons he works for 4.25 hours at \$35 per hour with Music Northwest. This adds \$148.75 to his weekly income. Twice a month he makes \$100 for additional work for Music Northwest; and twice a month he earns \$75 for a regular performance at a nightclub. CP 346. His paystubs, from Music Northwest verified his income from that source. CP 1000-1003.

After the December 11 hearing, to fill out his employment, he took a part time job with a car lot at \$10 per hour that is flexible so that he can also keep his higher paying part-time teaching jobs. CP 346. His employer verified his rate of pay and schedule. CP 458-9.

Mr. Vetter pointed out to the court that his gross teaching salary was subject to student no-shows and to business expenses associated with his music teaching. CP 345-6. Thus, in addition to commute time, the \$60 per hour was not profit, and nor was it always reliable.. Finally, he

disclosed that, since the December, 2009 hearing, he had secured a job for \$10 per hour that filled the school time hours and allowed him to leave and go to his teaching duties each day. CP 345-6; 455-6.

Mr. Vetter also provided evidence that he did not have the financial resources that the mother claimed were going through his bank account. He explained that his father had loaned him approximately \$22,325, CP 347, which were verified in many of the bank records provided to the court. Further, he submitted a declaration by his father itemizing the funds given to him. CP 462-3. Roughly \$20,000 of these loans were received in 2008, thus explaining \$20,000 – or about 1/3—of the cashflow upon which the mother relied to claim that he was making over \$5000 per month. This \$1666.66 in parental assistance in 2008 reduced his average cash deposits from \$5201.92 to \$3555.25.

Mr. Vetter's financial declaration disclosed that he did not start work for Music Northwest until February 2008, CP 887, and that would explain why his earned income was lower than in 2009 from that source.

The sealed financial source documents tracked many of the electronic transfers from Mr. Vetter's father to his accounts. i.e., see CP 984, May 2009; CP 1382, October, 2008; CP 1399, September 2008; CP 1406, July and August, 2008.

The parties have a history of the mother earning a much higher income

than the father. At the time of the initial child support order in 1994, the father's net income was \$2677 and the mother's was \$3459. CP 2, 3. The mother's gross income according to tax returns disclosed the following: \$69,402 in 2004, \$92,290 in 2005, \$83,054 in 2006; \$96,874 in 2007. CP 177—194; CP 1246—1248.. Her 2008 income was \$144,325.09. CP 451; CP 1249-50.. She reported that as of May 31, 2009, she was earning \$9400 per month. CP 106. The record shows that after that date, she claims to have been “laid off” from her employer and started a “fledgling” consulting business, but her gross receipts in January, 2010 were \$15,600. CP 349.

The father's income per year was far lower. In 2007, before he secured the Music Northwest position, he netted \$10,571 from his teaching business. (CP 977, Schedule C, shows that although his gross income for tax purposes was lower, part of that was for business use of his home.) for that year, he reported gross receipts of \$20,847. In 2008, he reported gross receipts on his schedule C of \$34,611.00. CP 1317. His profit income before deducting business use of home was \$18,239.00. CP 1315—1329. His total income was \$18,239 (business profit) plus \$3851 (W-2 income) = \$22,090.00; his monthly gross income was \$1840.83.

The cash-flow claimed by the mother in Mr. Vetter's bank accounts during 2008, (approximately \$62,000) was substantially explained by the

W-2 income in 2008 of \$3851, the gross business receipts of \$34,611, and the \$20,000 in assistance from family = \$58,462. The evidence showed that he worked about 20 hours per week, but after business expenses and unpaid hours, actually earned about \$25 per hour.

On March 5, 2010, Commissioner John Curry entered Findings and Conclusions that found “attorney fees and cost were not requested.” CP 595. The father, however, had consistently requested attorneys fees in the entirety of the action, in the amount of \$21,000. CP 124; 347. Commissioner Curry had denied attorneys fees orally. ROP 14.

Commissioner Curry also entered a child support order that imputed the father’s net income to be \$7612.96. CP 598. Zero transfer payment was ordered after a credit for residential time. CP 599. The child support worksheet listed income imputed for the father, without citing any specific evidence supporting the decision to impute or the level of imputation. CP 605. In his oral opinion, Commissioner Curry found that the father’s income is \$60 per hour, imputed to 40 hours per week, with a gross of \$10,400 per month. ROP 13.

Comments of import made by the court at trial on March 5, 2010, included:

THE COURT: Believe it or not, I went through this, this. You guys have way too much time on your hands. This is—you know, I don’t know if this was a contest to see who

could get the most paper, but if it were, I would award the person who gave me the most paper nothing, because this is—this is embarrassing. With that in mind, you may proceed.

ROP 3.

MS FAIRFIELD [counsel for mother] So the first big matter here is how to calculate Mr. Vetter's income. He has. . .

THE COURT: Trust me, I've read the arguments, I've read the ruling of Commissioner Ponomarchuk, so I have a really good idea of how to calculate both their incomes. Again, when you give me this much paper, you expect me to read it, so I read it, so I understand it, and I understand your argument

ROP 6

MR. VETTER: Thank you , your Honor. If it would be okay, I have prepared an opening statement that I'd like to read.

THE COURT: If you must. I don't need to hear it.

ROP 9.

THE COURT: You don't get to go from, all right, I make \$60 an hour for 20 hours a week to \$10 an hour at 40 hours a week. That – first of all, that doesn't even make sense.

MR VETTER: Your Honor, I'm not claiming that. But the fact of my situation is that I can't teach my students while they're in school, so there are all these hours during the day where it's just impossible for me to work as a music teacher, and so I took on this job because it allows me a flexible enough work schedule where I can work during the day while my students are in school and then go off and teach. . .

ROP 10-11.

THE COURT: What is amazing in this case, is each of you want me to do to the other what you don't want to be done to yourself, put her at the highest she can be, put him at the highest he could be, you're telling me put her at the highest you could be but don't do it to me. She's saying put it at the highest he could, but don't do it to me. I did it to both of you.. . .

As to the father's income, Commissioner Ponomarchuk ruled the petitioner is on notice his income for support purposes shall be based on full-time employment. As such, I find that he earns \$60 per hour at 40 hours per week. His gross income is \$10,400 per month.

ROP 11.

The court then denied attorneys fees. ROP 15.

LEGAL ANALYSIS

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN FINDING THAT THE FATHER, NATHAN VETTER, HAS INCOME OF \$10,400 PER MONTH.
STANDARD OF REVIEW.

In *In Re marriage of McCausland* 159 Wn. 607,152 P.3d 1013 (2007), the standard for review of a child support order is described as “abuse of discretion.” More explicitly, this means that a court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds, including an erroneous view of the law. The trial court's entry of general, rather than specific findings does not automatically require vacation of its

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order if evidence in the record supports it.

However, when a support case is determined by trial by affidavit, substantial evidence must support the trial court's findings. *In re Shellenberger* 80 Wn. App 71, 906 P.2d 968 (1995). Specifically, income may not be imputed at a level that the parent is not capable and qualified to earn. The court must make findings based upon evidence in the record, and *Shellenberger* was reversed for a new trial for failure to do so.

a. The court failed to make any findings on the record to support imputing income to the father.

RCW 26.19.071 (6) governs imputation of income. The relevant portions of that statute for the purpose of analyzing the trial court's lack of findings include the first 3 sentences of the statute:

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 unemployed or voluntarily underemployed based upon that parent's work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposefully underemployed to reduce the parent's child support obligation.

In this case, the court did not make a finding whether or not Mr. Vetter was voluntarily underemployed based upon his work history, education, health and age, and the court did not make a finding that he was

voluntarily underemployed to purposefully avoid child support.

There is no allegation in the record that Mr. Vetter is purposefully underemployed to avoid child support. The mother's arguments alleged that he earns more than he admits, and that he should be imputed to full-time employment. Those arguments are addressed in the next analysis below, relating to the amount of income imputed. However, before income may be imputed, the court has a mandatory task to make a finding that a parent who is working full time is underemployed in order to evade child support obligations.

There are no facts of record that indicate that Mr. Vetter depressed his income to avoid child support. First, his earnings history has always been similar, and his earnings have increased from 2007 to the present, during the pendency of this case. CP 975—980; 1315—1329; 1000-1003; 458-9. Secondly, Mr. Vetter provided the reasonable explanation that he cannot work additional hours teaching music because his students are in school most of the day. He also explained that he needs a flexible job, like his car lot job, so he can leave in mid-day to teach his students and to go to music Northwest. CP 440. He showed the willingness to work evenings and week ends in his teaching business by demonstrating his weekly schedule to the court. CP 455. None of these representations were factually challenged by the mother and no contrary evidence was provided by the

mother.

The father estimated that he would net about \$800 per month more than he had previously, with this new part-time job; CP 344-346. at \$10 per hour, 20 hours per week, he would earn \$200 per week and the expressed net, after taxes are taken out, is probably slightly high. Since his actual gross income exclusive of the new job is \$1840 per month, his new gross income would be no more than \$2800.00 per month.

This is the gross income that the trial court should have determined for Mr. Vetter. It is full-time income and Mr. Vetter is employed full-time and he is not purposely under-employed to avoid child support. Unless the appeals court determines that substantial evidence in the record supports the court's decision to impute income for Mr. Vetter, the case must be reversed and remanded to determine child support based upon his current full-time earnings.

b. The court failed to correctly apply the facts of record per the applicable statute.

Assuming for purposes of argument that the court correctly or permissibly imputed Mr. Vetter's part time income to full-time income, the criteria for this computation provided in the statute was mandatory. A trial court's application of the law to the facts of the case in a child support modification is a question of law that is determined de novo by the appeals

court. *State ex rel M.M.G. v. Graham* 159 Wn. 2d 623, 152 P.3d 105 (2007). A child support statute is applied according to its plain meaning when it is unambiguous and presumed to mean exactly what it says. *Marriage of Scanlon* 109 Wn. App 167, 34 P.3d 877 (2001).

RCW 26.19.071 is the statute that governs calculation of income for purposes of determination of child support. In the case of self-employed parents, net income is determined after deduction of business expenses. RCW 26.19.071 (5) (h).

RCW 26.19.071 (6) governs imputation of income, and provides a mandatory order of priority regarding the methodology to use. It provides in relevant part:

- . . . [T]he court shall impute a parent's income 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 the 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, general assistance-unemployable, 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 received from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.

In this case, the court is required by statute to impute earnings based upon the first priority process set by statute, that is, full-time earnings at the current rate of pay. The father's current gross earnings per his 2008 tax returns (and also supported by his 2009 financial disclosures) is \$22,090 at part time. The father's income is not determined, as urged by the mother, based upon the amount of deposits to his bank accounts. The father is entitled to deduct his costs of doing business from his gross receipts per RCW 26.19.071 (5) (h). His costs of doing business were not disputed at trial. He is also not required to include his father's gifts that assisted him in paying his attorneys fees. If his current rate of pay is considered to be his professional rate of pay, then his gross income at full-time would be twice his gross income at half-time, or \$44,180 per year, or \$3681.67 per month. Under the statute, this is the specific imputation calculation required.

However, the trial court, by performing a calculation presuming that the father works 4 hours straight time each day at \$60 per hour and that he could work 8 hours straight every day for \$60 per hour, presumed facts not in evidence. There was no evidence that the father earned \$60 per hour for 20 hours per week—which would have resulted in \$1200 per week and approximately \$5000 per month. To

come to that conclusion, the trial court had to deny all deductions for the approximately \$1666 per month of family gifts and for business expenses. By doubling that figure to “find’ the father’s income at over \$10,000 per month, the trial court magnified its error to a doubly inflated figure, a figure doubly not supported by evidence.

Because failure to follow the statute is an error of law, this court must review this matter de novo and find (presuming that it finds substantial evidence in the record for the court’s decision to impute income) that the father’s actual monthly gross income is \$3681.67.

b. The court imputed income of the father without any competent evidence of record to support the court’s findings..

The Trial court is required to accurately calculate income for the parties prior to applying percentages of responsibility for support and presumptive credits. In *In re the Marriage of Newell* 117 Wn. App 711, 772 P.3d 1130 (2003), the trial court did not consider overtime of evidence in computing incomes for post secondary support. Further, the court reduced the imputed income for the mother but did not recalculate the percentages of responsibility for support. The court determined that post secondary education is a child support calculation governed by the same rules as all child support; Support must be calculated based upon the past 2 years of income, including overtime, unless the court finds that overtime

was a nonrecurring event. RCW (26.19.075 (1) (b). Although the court may deviate from the standard way to calculate support, *In re: Marriage of Wayt* 63 Wn app 510, 820 P.2d 519 (1991), the court must enter written findings and conclusions setting forth reasons for such deviation. *State ex rel. Stout v. Stout* 89 Wn. App 119, 948 P.2d 851 (1997).

The findings of the court must be supported by substantial evidence; that is, there must be evidence in the record sufficient to persuade a fair-minded person of the truth of the matter. *Robinson v. Safeway Stores* 113 Wn. 2d 154, 776 P.2d 676 (1989)

In this case, the finding of the trial court was that the father earns \$60 per hour for 40 hours per week. There are no evidentiary facts in the record to support this finding. The father presented un-rebutted testimony that he works 20 hours per week and only earns \$60 per hour for 9 or less hours, and that he earns \$37.50 to \$50 per hour for 3 or 4 additional hours at Music Northwest. The father explained how his interrogatory answers were misrepresented, an un-rebutted explanation. He explained that his father loaned him money for attorneys fees, an explanation not contested by the mother. He documented these explanations with declarations, bank records, and paystubs. CP 344-455. There was no evidence of record that disputed his testimony that he could not earn additional hours of income at that profession because he teaches students who are in school until

afternoons. There was no evidence that a person with a Masters degree in music will necessarily earn more than Mr. Vetter at available jobs in his profession. The court simply performed an unreasoned, random numerical calculation, ignoring the facts of record. Nor did the court cite any facts of record that supported its ‘findings’ as to the father’s income—the court’s use of the “\$60 x 40 hours x 52 weeks / 12 months” was an arbitrary calculation and did not consider his self employment deductions as required under RCW 26.19.071 (5) (h), or Mr. Vetter’s actual earnings vs. hourly pay for class-time billable time. Hence, the court abused its discretion and its ruling must be reversed.

d The court exhibited actual prejudice against the father, violating his 14th Amendment to a full and fair hearing by an impartial decision maker and his right to a proceeding with the appearance of fairness.

14TH AMENDMENT DUE PROCESS RIGHTS.

The right to a full and fair hearing by an impartial judge is a constitutional right under the Due Process clause of the 14th Amendment of the U.S. Constitution. *In re Personal Restraint of Davis* 152 Wn. 2d 647, 101 P.3d 1 (2004). For a judge to be “biased” or “prejudiced” against a person’s case is to have a preconceived adverse opinion with reference to it, without just grounds or before sufficient knowledge. *In re*

Borchert 57 Wn. 2d 719, 359 P.2d 879 (1961). Bias or prejudice on the part of an elected judicial officer is never presumed. *Barbee Mill v. State* 43 Wn. 2d 353, 261 P.2d 418 (1953). For a party to demonstrate bias, it must substantiate the claim with evidence. Judicial rulings alone rarely constitute bias, thus, usually something more is required to be shown. *Davis* 152 Wn. 2d at 692.

APPEARANCE OF FAIRNESS

Additionally, the law requires that a judge appear to be impartial. A trial must be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised. *State v. Romano* 34 Wn. App 567, 662 P.2d 406 (1983), citing *State v. Madry* 8 Wn. App 61, 504 P. 2d 1156 (1972). The appearance of fairness doctrine is invoked if a reasonably prudent and disinterested observer would conclude from the evidence that the litigant did not obtain a fair, impartial, and neutral trial. *State v. Dominguez*, 81 Wn. App 325,329, 914 P.2d 141 (1996). In *Dominguez*, the court reviewed the trial transcript and concluded that the trial was conducted in a fair and evenhanded manner and therefore that there was no evidence of actual bias or of a violation of the appearance of fairness.

In this case, the conduct of the court and the proceedings resulted in a violation of Mr. Vetter's Due Process rights to a full and fair hearing, and

his right to a procedure that maintained the appearance of fairness. A review of the record does not demonstrate a fair and evenhanded trial. The court opened by expressing anger and frustration with the large submittals of the parties. ROP 3. The court made much of the fact that it had “read” the voluminous materials and therefore did not need to hear arguments. ROP 6. The court went on to tell Mr. Vetter, who was pro se, that it did not “need” to hear any of his presentation. ROP 9. The court erroneously accused Mr. Vetter of earning \$60 per hour for 20 hours a week and trying to get the court to accept his income at the rate of \$10 per hour. When Mr. Vetter tried to correct the court’s misguided reading of his allegations, including referring to the transcript by Commissioner Ponomarchuk which stated that income would not be imputed at \$60 per hour, the court simply denied that the prior order had stated that fact. ROP 10-11. (While the prior order had not stated that fact, CP 213, Mr. Vetter had provided the full transcript for the court and indeed it reflected that imputation should not be at \$60 per hour. CP 440)

Finally, the court expressed disdain for what it perceived to be inappropriate attacks on each party by the other, with each party asking the court to maximize the other’s income, and announced, “I did it to both of you.” ROP 13. The court in essence admitted that its decision constituted a knee jerk reaction to the disdain it felt for the disputes of the

parties. It justified its findings, not on the statutory criteria, but on its sense of equity in “doing it to both of you”—regardless of the individual economic positions of the parties, [in which the mother has historically earned multiples of what the father earns], regardless of how the statutes require each party to be evaluated, and regardless of evidence to the contrary in the file or to the lack of evidence to support its findings.

When Mr. Vetter tried to express his disappointment in the court’s ruling because “it’s just impossible for me to make that kind of money,” ROP 15, the court again completely mis-stated Mr. Vetter’s argument by claiming that he wanted to impute the mother’s income and just sit back and work 20 hours per week. ROP 15. The transcript and the video tape show an impatient fact-finder, who interrupts and lectures Mr. Vetter.

Finally, the trial court stated that the result (with no transfer payment by either party) by imputing Mr. Vetter at the inflated level is the same if he were to find income by both parties at their current level. ROP 15. However, the record does not reflect any findings regarding what Commissioner Curry believed the current income of the parties is, nor does it cite to any financial records that the court found authoritative.

When one reads this transcript and views this hearing, there is a concern that the fact finder is not impartial. First, he is hostile and impatient. Secondly, he persistently misstates Mr. Vetter’s position and

the ruling by Commissioner Ponomarchuk. Thirdly, he expresses more than once that he does not need any presentation by the parties. The trial was not conducted in a fair and evenhanded way, and Mr. Vetter did not have a full and fair opportunity to be heard.

A disinterested party, upon viewing this trial, is left with the distinct impression that the reason for the ruling is the Commissioner's anger at the parties because of their disputes and the volume of their paperwork. Also, there is the strong impression that the Commissioner has a preconceived adverse opinion of Mr. Vetter at the outset, because he repeatedly accuses him of working only part time and trying to get the court to assign him a \$10 per hour income, accusations that characterize Mr. Vetter as a deadbeat Dad. More of concern, these accusations have no basis in fact. Mr. Vetter's careful discussion of these facts is thorough and is supported by declarations and financial documents in evidence. CP 335—463.

The proceedings below do not leave the disinterested viewer with the impression that Mr. Vetter received a full, fair, and neutral trial. Mr. Vetter's right to a trial by an impartial tribunal was violated and he has the right to a correct calculation of his income for purposes of child support. Further, Mr. Vetter's right to a trial in which there is an appearance of fairness was violated and he has a right to have his full-time gross income

\$ 2800.00 per month (actual) or \$3681.67 per month (imputed) based upon his fulltime work or , alternatively, based upon his actual earnings in his profession at part-time.

THE COURT ERRED IN DENYING THE FATHER ATTORNEYS FEES WHEN HE HAD NEED AND THE MOTHER HAS THE ABILITY TO PAY..

At both the trial and appellate levels, in a dissolution or post dissolution proceeding, a court asked to apportion attorneys fees must consider the parties' relative need and ability to pay. *Shellenberger*, at 80 Wn. App 87, citing *In re Griffin* 114 Wn 2d 772 , 791 P.2d 519 (1990).

In this case, the father demonstrated receipt of over \$22,000 in loans from his father for the instant hotly contested modification of residential schedule and child support modification matter brought by the mother. He requested \$21,000 in attorneys fees, and disclosed that despite the assistance from his family, he still owed \$14,159.72. CP 347. This amount was not disputed.

However, the findings and conclusions set forth in this matter, drafted by the mother's attorney, stated incorrectly that attorneys fees and costs were not requested. CP 596. Further, without discussion, the trial court's only comment upon that request was "No attorneys' fees." ROP 14.

Given the need of the father and the ability to pay of the mother, the court should have considered and awarded attorneys fees to the father.

On the same basis, and per RAP 18.1, the father requests reasonable fees and costs on appeal.

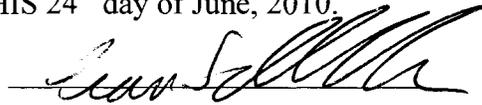
CONCLUSION

The trial court failed to comply with RCW 26.19.071 in allowing Mr. Vetter his business deductions, correctly determining his current income, and imputing under the statutory priorities to a full-time finding of income. The court abused its discretion by instead adopting an arbitrary calculation that is not supported by the facts of record. Further, the court failed to provide any written or oral findings citing to evidence that justified its findings, and instead, treated Mr. Vetter rudely, falsely accused him of taking positions he did not take in his materials, and challenging him and lecturing him. In the end, the court made a ruling for the purpose, according to Commissioner Curry, of treating the parties the way he perceived they treated each other—Mr. Vetter was deprived of a ruling based upon factual findings reflected by evidence in the record, as required by the applicable statutes or by notions of Due Process or the Appearance of Fairness Doctrine.

The Court of Appeals should reverse and correct Mr. Vetter's gross monthly full-time income to \$2800, or if it finds a basis in the record for imputation, imputed income to \$3681.67. The Court of Appeals should order that the child support for the parties, and their respective

percentages, be recalculated with the same credits for 50/50 residential time as previously (which are the same in 1994 and in the current order) and that the special expenses for the child be shared at each party's proportionate share of income. Further, the court of Appeals should award attorneys fees at trial and on appeal.

RESPECTFULLY SUBMITTED THIS 24th day of June, 2010.



Jean Schiedler-Brown, WSBA # 7753

Attorney for Appellant Nathan Vetter