

69108-2

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COURT OF APPEALS
DIVISION ONE

FEB 14 2013

NO. 69108-2
IN THE COURT OF APPEALS STATE OF WASHINGTON
DIVISION ONE

Robert Gustaveson, Petitioner,

Vs.

Amina Babayev, Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Timothy A. Bradshaw, Judge

REPLY BRIEF OF APPELLANT

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STATE OF WASHINGTON
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TABLE OF AUTHORITIES (In Addition To Previous Listed)

RULES, STATUTES, AND OTHER AUTHORITIES

The laws below have been referenced when cited:

RULE CR 52 DECISIONS, FINDINGS AND CONCLUSIONS

(1) Generally. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law. Judgment shall be entered pursuant to rule 58 and may be entered at the same time as the entry of the findings of fact and the conclusions of law.

(2) Specifically Required. Without in any way limiting the requirements of subsection (1), findings and conclusions are required:

(C) Other. In connection with any other decision where findings and conclusions are specifically required by statute, by another rule, or by a local rule of the superior court.

**RULE CR 59 NEW TRIAL, RECONSIDERATION, AND
AMENDMENT OF JUDGMENTS**

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(9) That substantial justice has not been done.

(f) Statement of Reasons. In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof.

If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(g) Reopening Judgment. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Washington Court of Appeals Administration, Amendment 50, Section 30, to Article IV of the Washington State Constitution.

(1) Authorization. In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute.

(2) Jurisdiction. The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute.

(3) Review of Superior Court. Superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute.

Does statute law override common law? Statutory law supersedes common law as long as court finds it constitutional. Case law should be used as a means of interpreting statutory law. Statutory law is held higher than case law. Case law can be overturned in the process of interpreting and applying statutory law, but statutory law cannot be overturned, only amended. If analyzing law, see statutes first, and apply case law second as a means of defining the statute.

RCW 26.19.035(2) Standards for application of the child support:

(2) Written findings of fact supported by the evidence. An order for child support shall be supported by written findings of fact upon which the support determination is based and shall include reasons for any deviation from the standard calculation and reasons for denial

of a party's request for deviation from the standard calculation. The court shall enter written findings of fact in all cases whether or not the court: (a) Sets the support at the presumptive amount, for combined monthly net incomes below five thousand dollars; (b) sets the support at an advisory amount, for combined monthly net incomes between five thousand and seven thousand dollars; or (c) deviates from the presumptive or advisory amounts.

**SOCIAL SECURITY LAWS--- TITLE IV—GRANTS TO STATES
FOR AID AND SERVICES TO NEEDY FAMILIES WITH
CHILDREN AND FOR CHILD-WELFARE SERVICES**
Part D—Child Support and Establishment of Paternity

Sec. 458. Incentive payments to States

INCENTIVE PAYMENTS TO STATES

Sec. 458. [42 U.S.C. 658a] (a) In General.—In addition to any other payment under this part, the Secretary shall, subject to subsection (f), make an incentive payment to each State for each fiscal year in an amount determined under subsection (b).

(b) Amount of Incentive Payment.—

(1) In general.—The incentive payment for a State for a fiscal year is equal to the incentive payment pool for the fiscal year, multiplied by the State incentive payment share for the fiscal year.

(2) Incentive payment pool.—

(A) In general.—In paragraph (1), the term “incentive payment pool” means—

(i) \$422,000,000 for fiscal year 2000;

(ii) \$429,000,000 for fiscal year 2001;

(iii) \$450,000,000 for fiscal year 2002;

(iv) \$461,000,000 for fiscal year 2003;

(v) \$454,000,000 for fiscal year 2004;

(vi) \$446,000,000 for fiscal year 2005;

(vii) \$458,000,000 for fiscal year 2006;

(viii) \$471,000,000 for fiscal year 2007;

(ix) \$483,000,000 for fiscal year 2008; and

(x) for any succeeding fiscal year, the amount of the incentive payment pool for the fiscal year that precedes such succeeding fiscal year, multiplied by the percentage (if any) by which the CPI for such preceding fiscal year exceeds the CPI for the second preceding fiscal year.

(B) CPI.—For purposes of subparagraph (A), the CPI for a fiscal year is the average of the Consumer Price Index for the 12-month period ending on September 30 of the fiscal year. As used in the preceding sentence, the term “Consumer Price Index” means the last Consumer Price Index for all-urban consumers published by the Department of Labor.

(3) State incentive payment share.—In paragraph (1), the term “State incentive payment share” means, with respect to a fiscal year—

(A) the incentive base amount for the State for the fiscal year; divided by

(B) the sum of the incentive base amounts for all of the States for the fiscal year.

(4) Incentive base amount.—In paragraph (3), the term “incentive base amount” means, with respect to a State and a fiscal year, the sum of the applicable percentages (determined in accordance with paragraph (6)) multiplied by the corresponding maximum incentive base amounts for the State for the fiscal year, with respect to each of the following measures of State performance for the fiscal year:

(A) The paternity establishment performance level.

(B) The support order performance level.

(C) The current payment performance level.

(D) The arrearage payment performance level.

(E) The cost–effectiveness performance level.

(5) Maximum incentive base amount.—

(A) In general.—For purposes of paragraph (4), the maximum incentive base amount for a State for a fiscal year is—

(i) with respect to the performance measures described in subparagraphs (A), (B), and (C) of paragraph (4), the State collections base for the fiscal year; and

A. INTRODUCTION

I had fought to be an equal time parent. The King County Superior Court denied that. To this day, it seems their goal all along is and was to keep the father's child support obligation as high as they can get it, under suspect rulings. Perhaps influenced with federal matching dollars at stake.

It seems that there is financial motive to the county (King) to maximize the payment amount. It seems as this really has nothing to do with the best interests of the child and that the payment amount has not been set to Washington State Child Support Guidelines per our laws as laid out by the legislature.

The State, as represented by the county prosecutor (KCPA), has drawn up a lengthy reply primarily now arguing that the order should still not be back dated retroactively because the mother is a TANF recipient.

They are concerned that all unpaid support be preserved for collection as indicated in their response to the appellant's petition for modification of child support, and their response to motion for revision, but in the latter, requesting to be excused from appearing.

I agree with keeping any amount, whether it be determined that retroactivity would have been allowed by law if it is determined that the trial court abused their discretion and had misapplied the law, as in contest here now, or not, resulting in either arrearage due or actual overcharging all along.

As I have argued this issue of retroactivity before the trial court (commissioner first, and then by judge), in both cases their findings of fact, or lack thereof, when acknowledged, and contradictory to one another, were not supported by the evidence, to justify their conclusions and rulings of law. (See Appellant's Brief)

The KCPA on their response to the original petition for modification of child support, and on their response to motion for revision had requested that all unpaid support continue to be preserved for collection, and in the latter requesting to be excused from the hearing.

In father's reply to the respondent mother, my issues and concerns have been addressed in the appellant's brief.

B. ASSIGNMENTS OF ERROR

The KCPA has presented several new arguments in their attempt to show there was no abuse of discretion by the trial court's contested ruling in their determination of not permitting child support to be backdated beyond the date of filing. The decision(s) of the trial court have already been made. Outlined in the brief of appellant, and elaborated here in counterclaim to KCPA issue with retroactivity of child support beyond filing date, and their defense for standard of review with respect to abuse of discretion. There are other standards for review on appeal here too as well, which can be under scrutiny.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

As brought forth in brief of appellant, the claims of error of the court remain:

1. Sufficiency of the Evidence?

The evidence on record was, and is, clearly outlined with regard to presentation of a motion, or proper understandable

wordage to that extent, and that which was implemented into the petition to modify child support, and all proposed orders inclusive, to compel the court to backdate with supporting argument, and that a showing of significant change in circumstances was in place at that time also, to warrant the action requested.

2. Manifest Weight of the Evidence?

Did the trial court's finding that there was no provision to compel the court to backdate child support prior to the date of filing a real and true factual finding? Or was it an [intentional?] oversight and not seen?

3. Abuse of Discretion?

Was the trial court's decision arbitrary and unreasonable?

D. STATEMENT OF THE CASE

As outlined in brief of appellant.

E. ARGUMENT

The KCPA does not allege any assignments of error (RB2). Yet, the KCPA claims that RCW 26.09.070(7) is not applicable so that RCW 26.09.170(1) only refers to separation contracts (RB8-9). But that was not the finding/conclusion the trial court made. The trial court at revision/reconsideration concludes “under RCW 26.09.170(1) a court may not backdate child support prior to the petition absent a motion to compel a court ordered automatic adjustment; here, there is/was no such provision”. The trial court never made the finding that provisions in RCW 26.09.070(7) would render RCW 26.09.170(1)(a)(b) non applicable. Now, this would be a new argument. The KCPA never presented this argument before.

Even in consideration of applicability and criteria needing to be established first by RCW 26.09.070(7) before RCW 26.09.170(1) could be applied, it is obvious there is no wording in that law to forbid that “the provisions of any decree respecting maintenance or support may be modified” cannot be modified.

Also of note, the word “automatic” used in citation of the statute RCW 26.09.170(1) by the trial court in their ruling, changes the

terms, and meaning. “Automatic” was not written into the statute as verbatim per the legislature. That add-on was done by the court.

The KCPA now is presenting new arguments, using case law examples, to justify the trial court’s ruling(s) of denying retroactive child support beyond the date of filing. Not one of these case laws, if now allowed to be heard before the court of appeals, cited by the KCPA are directly applicable in this case . They cannot now change the trial court’s finding that “there was no provision written into the child support modification petition to compel an order to permit a back dating of the effective start date”. They do however reinforce the notion that there was indeed valid provision to cause them to argue the case further.

RCW 26.09.170(1)(a)(b) criteria has been met, as shown by the evidence.

From my understanding, statute law shall supersede common law when directly applicable, and in this case it is.

The evidence to support this is on record; right in the petition itself; and argued in open court. The trial court’s written findings of fact don’t jibe with the evidence.

By RCW 26.19.035(2) Standards for application of the child support:

(2) Written findings of fact supported by the evidence. An order for child support shall be supported by written findings of fact upon which the support determination is based and shall include reasons for any deviation from the standard calculation and reasons for denial of a party's request for deviation from the standard calculation. The court shall enter written findings of fact in all cases whether or not the court: (a) Sets the support at the presumptive amount, for combined monthly net incomes below five thousand dollars; (b) sets the support at an advisory amount, for combined monthly net incomes between five thousand and seven thousand dollars; or (c) deviates from the presumptive or advisory amounts.

The finding by the trial court that there was no provision is not supported by the evidence, because the provision was/is there on record.

AND:

By Court Rule CR 59 (1, 6, 7, 9(f)(g)) New Trial, Reconsideration, and Amendment of Judgments

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

With regard to retroactivity, the commissioner concluded one thing, the judge another, with the judge contradictory to what the commissioner concluded, and in both instances, neither were backed by written findings supported by the evidence.

With regard to setting of the child support amount, the commissioner concluded one amount and gave fair relief to the father (and indirectly to his daughter) citing evidence, findings of fact, and conclusions of law. At revision/reconsideration, the trial judge, on his own accord, with this being a non-issue before him, never cited findings of facts supported by the evidence to conclude voluntary unemployment/underemployment (in fact, he never even made that conclusion- he just made his order), and then he imputed the child support (at his discretion and contrary to the legislative intent of RCW 26.19.071(6)) amount to a non-sustainable amount (short of drastic measures because there are no jobs available to the dad in residential carpentry or comparable jobs as shown on record).

With regard to a deviation request, the commissioner did not address the matter and the trial judge acknowledged the issue (4RP4, 16-17), but without finding of fact wrote into his final order that a deviation was not requested. It was asked before the court, at its discretion, to consider a deviation based on disparity of living costs [the dad's home mortgage, water, sewer, garbage at \$1350/month vs. the mother's rent (section 8), water, sewer, garbage of \$72/month]

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

See argument with regard to base child support amount set by the trial judge.

(9) That substantial justice has not been done.

(f) Statement of Reasons. In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

This was not done by the trial court.

(g) Reopening Judgment. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

The facts before the commissioner were the [same exact] facts before the judge. They did not change. The judge never noted any amended findings of fact or made any new extraordinary findings that would seem to justify his conclusions and order.

**And in response to the KCPA claim of filing dates being askew-
Although not indicated in the clerk's papers, the initial child support
modification petition was requested before the Washington State
Division of Child Support in May 2011, who referred the matter over
to this same KCPA working now in this case. At that time this KCPA
denied the request to move forward absent my own filing of the action
before the court, citing by letter:**

**“Dear Mr. Gustaveson: We have spoken on the phone several times
about your request for a modification of your child support. As we
discussed on the phone, and in a letter dated July 29, 2011, our office
does not believe there is a legal basis to file for a modification of your
child support at this time, based on the prior dismissal with prejudice
of your prior petition for modification, and lack of any significant
change in income. As we discussed, you are free to file for
modification on your own. You may request a review of your case,
through the Division of Child Support, in August 2012, when two
years have passed since the court's dismissal, with prejudice, of your
modification petition. At that time we will review the case for
modification based on your income and any other relevant factors.
Please note that if you continue to leave messages for me, I will be**

unable to return your calls” Signed Margaret Campbell, KCPA

8/11/2011.

It seems like a cat and mouse game almost here.

In that particular case, the commissioner gave me two choices at final oral order: 1) Pay about \$200 more per month in child support or 2)

To dismiss the case. I chose neither. The commissioner said she would mail the final order out. The final written order came to me in the mail 8 days later and indicated a dismissal with prejudice. That left me two days to file a revision motion, which I did. That was denied because “there was no legal basis for revision because I ‘elected’ to dismiss my case” per the order of the Honorable Deborah Fleck.

There was absolutely no way on earth that could have been proven; that judge testified on my behalf and drew her conclusion based on her testimony that I said or noted something that only she said.

Justice served?

Also noteworthy here in my argument reply is that the KCPA (State) had submitted a proposed child support order to that previous dismissal with prejudice recommending a \$160/month reduction in the child support amount (EX4).

As far as my reply to the respondent's brief, I want to reiterate that I swear, again, on the Holy Bible, that I did serve to the clerk at the Judge's chambers KRJC, Judge Bradshaw a notice for reconsideration with corresponding petition on 5/1/2012 at 10:50 AM (now filed as a RTS), and on the very same day I served a duplicate notice for reconsideration, and a working copy of that petition to the receptionist for the KCPA, in their building a few blocks away. And identical notice and petition for motion reconsideration paper's to the respondent mother to which she replied to on 5/9/2012.

The trial court decided on the matter nevertheless which is now under this appeal.

The KCPA had requested that they, as the state, be excused from the revision motion on their response dated 1/6/2012, and to the best of my recollection, stated the same to me after a telephone confirmation to inquire about my reconsideration motion and obligation to inform them.

The state has stated that they represent neither the appellant nor the respondent, but because the child has received TANF that they have an interest to preserve back child support owing to the State of

State and county. The KCPA further states “the State does not have any direct financial interest in the amount of current child support ordered except for when the child received TANF” and that “the State is only addressing the appellant’s second claim of error regarding retroactive modification of child support”. (State (KCPA) Brief 1).

My argument for retroactive modification is the same as before in “brief of appellant”. Now, as a rebuttal to the KCPA, I myself have an interest to preserve back child support owing from the State. This would have been, and frankly should have been, a non-issue now if the trial court had adhered to their oral conclusion of 10/2008 to “not disturb the administrative child support already in effect” (and then current at that time) (2RP5). Then the amount could have and would have been set current, based on Washington State Child Support Guidelines at annual review before an administrative judge and conveniently held over telephone conference. Rather, the King County Superior Court’s new, non-argued, and “disturbed” child support order then superseded the older administrative order and essentially became a 3 year order.

At that the time the mother was an eligible TANF recipient and she was awarded primary custody of our child. There was financial incentive for the trial court to invoke the child support order to a now (King) county order. Here now comes into effects of the Social Security Act Title IV Section D.

In looking at the Federal Social Security Act, Title IV, Part D, Section 458, you will see language that allows the US Federal Government to give back “Incentive Payments” to US states for performance based child support collection, paternity establishment, and administrative costs. Typically, these incentive payments go back to social services programs because the thinking is after a divorce or custody battle many women will end up using programs like TANF and Welfare for which US States have little money in their budgets for. While the exact amount of money is hard to define because of performance, and the fact that different states get back different amounts, many studies show that the average is that for every one dollar collected in child support, one dollar is released from Social Security coffers that can then be given back to US States. (studies performed by Lary Holland and Michael Sherron)

As far as the appellant can determine, TANF is not an application standard by RCW 26.19 Washington State Child Support Schedule. The obligation amount had been set prior without argument, without consideration of then current economic factors, employment history, recession, and contrary to the oral order determined by the trial court, and subsequently, no written findings of fact supported by the evidence was provided, as required by RCW.19.035. (Appellant's Brief)

I question that in the determination of child support obligations, under higher state and county levels of authority where the utilization of wide ranges of discretion and application standards are, or might be influenced in their decision(s) because of Federal Government matching money to the state and county levels through TANF qualifications of the Federal Social Security Act, Title IV, Part D, Section 458, that a conflict of interest is too present to ignore by financial motive as well as a lack of separation of powers between executive (division of child support) and judicial (superior court) branches.

F. CONCLUSION

The Court Of Appeals, Division One, should use their authority to review and amend the outcome of this Petition to Modify Child Support set to the Laws of Washington State.

DATED 2/14/13

Respectfully Submitted,



Robert Gustaveson

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Vs.

COA NO. 69108-2

Amina Babayev, Respondent.

DECLARATION OF SERVICE

I, ROBERT GUSTAVESON, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

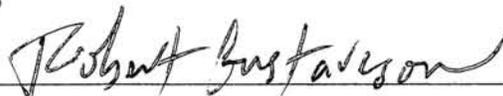
THAT ON THE 14TH DAY OF FEBRUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL

AMINA BABAYEV
436 102ND AVE. SE #B-303
BELLEVUE, WA 98004

AND TO

MARGARET CAMPBELL
KING COUNTY PROSECUTING
ATTORNEYFAMILY SUPPORT DIVISION
724 WEST SMITH STREET, SUITE 101
KENT, WA 98032

SIGNED IN RENTON, WASHINGTON THIS 14TH DAY OF FEBRUARY
2013

X  _____