

69108-2

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

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**Robert Gustaveson,                      Petitioner,**

**Vs.**

**Amina Babayev,                      Respondent.**

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

**The Honorable Timothy A. Bradshaw, Judge**

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**BRIEF OF APPELLANT**

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**Robert Gustaveson, Pro Se  
412 Wells Ave. N.  
Renton, WA 98057  
(425) 687-0407**

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**TABLE OF AUTHORITIES**  
**RULES, STATUTES, AND OTHER AUTHORITIES**

**The laws below have been referenced when cited:**

**RCW 26.19.071(6) Standards for determination of income.**

**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. 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 purposely underemployed to reduce the parent's child support obligation. Income shall not be imputed for an unemployable parent. Income shall not be imputed to a parent to the extent the parent is unemployed or significantly underemployed due to the parent's efforts to comply with court-ordered reunification efforts under chapter 13.34 RCW or under a voluntary placement agreement with an agency supervising the child. In the absence of records of a**

**parent's actual earnings, the 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 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.**
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**RCW 26.09.170 Modification of decree for maintenance or support, property disposition — Termination of maintenance obligation and child support — Grounds.**

**(1) Except as otherwise provided in RCW 26.09.070(7), the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment; and, (b) except as otherwise provided in this section, only upon a showing of a substantial change of circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.**

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**RCW 26.19.075(1)(c)(ii)**

**Standards for deviation from the standard calculation.**

**(1) Reasons for deviation from the standard calculation include but are not limited to the following: (c) Debt and high expenses. The**

**court may deviate from the standard calculation after consideration of the following expenses: (ii) A significant disparity in the living costs of the parents due to conditions beyond their control;**

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**RCW 26.19.001 Legislative intent and finding.**

**The legislature intends, in establishing a child support schedule, to insure that child support orders are adequate to meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living. The legislature also intends that the child support obligation should be equitably apportioned between the parents.**

**The legislature finds that these goals will be best achieved by the adoption and use of a statewide child support schedule. Use of a statewide schedule will benefit children and their parents by:**

- (1) Increasing the adequacy of child support orders through the use of economic data as the basis for establishing the child support schedule;**
- (2) Increasing the equity of child support orders by providing for comparable orders in cases with similar circumstances; and**
- (3) Reducing the adversarial nature of the proceedings by increasing**

**voluntary settlements as a result of the greater predictability achieved by a uniform statewide child support schedule.**

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**CANON 2, RULE 2.7- A judge should perform the duties of a judicial officer impartially, competently, and diligently- Responsibility to Decide-A judge shall hear and decide matters assigned to the judge, except when disqualification or recusal is required by RULE 2.11 or other law.**

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**CANON 2, RULE 2.2 - Impartiality and Fairness**

**A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.**

**[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.**

**[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.**

**RECORD OF PROCEEDINGS INDEX**

**Before Honorable Theresa Doyle 10/6/08.....1RP**  
**Before Honorable Theresa Doyle 10/7/08.....2RP**  
**Before Honorable Bonnie Canada-Thurston 12/8/11..... 3RP**  
**Before Honorable Timothy Bradshaw 1/27/12..... 4RP**

**A. ASSIGNMENTS OF ERROR**

**1. At trial on a revision motion of a commissioner's order, a King County Superior Court Judge erred in setting the base child support amount using an imputed historical rate of pay to a carpenter to the father without factual finding of voluntary unemployment or voluntary underemployment which by law is necessary before that application could be put into effect.**

**2. At trial on a revision motion of a commissioner's order, a King County Superior Court Judge erred in not permitting retroactivity to the child support order beyond the date of filing after he made no complete finding(s) that all criteria was not met to satisfy state statute that would otherwise allow the order to be further backdated.**

**3. At trial on a revision motion of a commissioner's order, a King County Superior Court Judge erred in not addressing a request for a deviation allowance in the determination of the final child support amount.**

**Issues Pertaining to Assignments of Error**

**1. Did Judge Bradshaw incorrectly apply the Washington State Child Support Schedule Standards RCW 26.19.071(6)(b) in his setting of the final child support amount? Specifically, RCW 26.071(6) states “The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed”. Neither the commissioner nor the judge made a finding of voluntary unemployment or voluntary underemployment. However, the commissioner indicated in her findings/conclusions that the father cannot find work and granted the father’s request to set the child support amount based at minimum wage. The judge made no finding of voluntary unemployment or voluntary underemployment – a prerequisite to imputing income as the standard. Should the appellate court revert the base amount of child support order back to the amount the commissioner had set?**

**2. Did Judge Bradshaw incorrectly apply Washington State Law in his setting of the child support order to be non-retroactive beyond the date of filing? Specifically, RCW 26.09.170(1) would seem to justify retroactivity to the date specified in the child support order after it**

**was shown all criteria necessary was established to satisfy the requirements of that law. Judge Bradshaw made the finding that certain provisions (namely, a motion itself) were not established to compel the court to backdate beyond the date of filing. This particular matter was argued before the commissioner and the judge, and was incorporated into the child support modification petition itself. Should the appellate court permit the child support order to be back dated beyond the date of filing?**

**3. Did Judge Bradshaw fail to address the issue of a deviation request on the final child support order? This issue was brought before the commissioner and the judge. The commissioner crossed out the written argument portion devoted to a proposed deviation requested under RCW 26.19.075(c)(ii) and checked the “does not apply” box but made no finding or reason or conclusion to indicate why. The judge did not address the issue at all. In his final child support order he just inserted “was not requested” into the box. Yet in trial he made reference to argument for deviation request. Should the appellate court address and decide this issue?**

**B. STATEMENT OF THE CASE**

**Child support order for the father, who has now a 5 ½ year old daughter, was in place since birth. Originally, an administrative child support order was established, prior to a parenting plan being put into place. The administrative child support order decided in 4/08 (CP25-41) was amended to a King County Superior Court order (dated 11/08)(CP48-59)(EX3) at a parenting plan trial in 10/08 without argument and contrary to what was decided orally by the judge (1RP3-5). That locked the father in for a minimum 2 years more (actually 2 ½ +) and only reviewable before the Superior Court now with what was an outdated order based on 2005, 2006, 2007 earnings. The recession was pretty well felt in early 2008, especially in the father's line of work as a residential non-union pick up carpenter. The next time a Petition to Modify Child Support was heard was in 8/10 and was dismissed with prejudice. Then in 12/11 a child support modification was granted (CP160-180) in the sense that the commissioner made a ruling to lower the child support amount owed by the father, this time concluding he couldn't find work as a carpenter and his criminal background checks were hindering him from finding work in other areas of employment (CP190). But the**

**commissioner did not address 1) a deviation requested, and 2) left a question mark on the father's request to backdate the child support order (CP172-173,189) to the date the amount was last genuinely determined, or in that sense would have been allowed for review under the then administrative rules- which assumedly was to not be disturbed by order of the superior court (1RP3),(2RP5). So the father then motioned for revision in 1/12 (CP199-200) and presented these issues/arguments before the court judge. In 4/12 (signed on 4/25/12) the trial judge made his decision to revise and raise the child support up another \$260 per month (imputing to a historical rate of pay to a carpenter, even though he made no finding of fact that the father was voluntarily unemployed or voluntarily underemployed); that back dating the commissioner's order to 4/09 need not apply; and did not rule on a deviation request (CP214-228). A reconsideration motion (CP229-233) was filed in a timely manner (5/1/12) with the clerk, and copies given to the judge (at the judge's chambers), the respondent and the county prosecuting attorney family support division. The judge said he was not given the working copy ("in violation of CR 59(9)(b)") but became aware of the matter only due to the father's "uninvited ex parte voice mail messages"(CP246). So he ruled anyhow which denied the reconsideration (CP245-247). I would like to point**

**out that I swear on the Holy Bible I did serve the judge a copy, I filed a return of service (CP300), and that his bailiff acknowledged receipt of the working copy (reconsideration motion) via telephone but that he had not gotten to the matter yet. I say that for the record. The judge ruled on the reconsideration motion but in the case caption box he changed it to: ORDER RE REVISION OF COMMISSIONER'S RULING (CP245). I say this to hopefully alleviate getting the revision and reconsideration orders mixed up. For the record- the motion was filed per court rules, on time, and served to all parties involved as well as with the clerk of the court.**

**b), e) The issue for a deviation allowance, based on RCW 26.19.075(c)(ii): Standards for deviation from the standard calculations-debt and high expenses-a significant disparity in the living costs of the parents, was presented to both the commissioner (CP21,165-166) and the judge (CP199, 229-233)(4RP4,7-9). Neither one addressed or decided this issue.**

**Canon 2- A judge should perform the duties of a judicial officer impartially, competently, and diligently- Rule 2.7: Responsibility to Decide-A judge shall hear and decide matters assigned to the judge, except when disqualification or recusal is required by RULE 2.11 or other law.**

**c), f) At revision motion before Judge Bradshaw on trial date 1/27/12 (CP199-200), (4RP4-19) one of the two issues brought forth pertained to dispute of backdating the child support order to the last date that would have otherwise been allowed (4/09) per administrative court rules had the King County Superior Court not “forged” (1RP3-4)(2RP3-5)(CP25-47)(CP48-59)(EX3) a non-argued, almost duplicated, written KCSC child support order contradicting the concluded oral KCSC child support order to “leave the administrative**

**child support undisturbed” . This issue, supported by backing arguments (recession, lack of work in construction at that time, unemployment, then current “outdated” child support order soon to be up for review, and other significant changes in circumstances as presented, and successive tax returns back to 2005) was brought before the commissioner on 12/8/11. Her final order, with respect to the effective start date of the child support order set at that time - which was to the date of filing only (6/11) and not backdated further on this child support modification motion, was now under contest before Judge Bradshaw at revision motion. Initially on revision he merely concluded that the child support order “need not be applied beyond the date of filing” (CP215). He gave no citations of findings of fact or conclusions of law to validate that decision. On a reconsideration motion (CP229-233), Judge Bradshaw found this time that there was no provision to compel the court for a retroactive adjustment (CP246). However, at trial before the commissioner on 12/8/11 she made mention that the reason she could not retroactively backdate the child support amount was because “I (she has) have no authority to grant a retroactive modification beyond the date of filing. And that is set by case law, decided by the Court of Appeals Division 1” (3RP32). Neither of the two different conclusions of law was**

**substantively backed by findings of fact to justify them. The commissioner's decision, where she did not specifically state that case law (nor did respondent) and how it is directly applicable to this unique case would seem to indicate that at the least there was some awareness of the court to compel them to consider retroactivity beyond the date of filing, if the actual writing in the petition (CP1-4) and proposed orders (CP160-180,187-190) itself did not do that.**

**d) The judge at the first revision (CP214-215), without any new argument regarding this issue, and on his own accord, imputed income to the father to the historical rate of pay of a carpenter (CP215). Yet made no finding of the father being voluntarily unemployed or voluntarily underemployed which by law -RCW 26.19.071(6) must be determined prior to imputing income on a parent. The judge wrongfully applied "his" law as he concludes "Since the father is currently unemployed there is no current rate of pay. Therefore, the court must go to the next statutorily prioritized factor which is 'full-time earnings at the historical rate of pay based on available information, such as employment security data.' RCW26.19.071(6)(b). Here, the record shows the Petitioner's historical rate of pay was \$39,529.51 annually, or \$3294.13 monthly.**

**The applicable Order of Child Support and Washington State Child Support Schedule Worksheets are attached". (CP216-301 ).**

**The judge at reconsideration (re-labeled revision) decided this time, or rather re-stated his opinion, that since the father is healthy and employable and has been unemployed for a limited time that he could impute using RCW 26.19.071(6)(b)(CP235). However again, he did not validate this order with findings of fact that the father was voluntarily unemployed or voluntarily underemployed . The judge has misapplied the statute RCW 26.19.071(6) which requires the court to determine that a parent is voluntarily unemployed before that income standard may be applied.**

**CANON 2, RULE 2.2 - Impartiality and Fairness**

**A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.**

**[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.**

**[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.**

**As well as not considering RCW 26.19.001- Legislative intent and finding- The legislature intends, in establishing a child support schedule, to insure that child support orders are adequate to meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living. The legislature also intends that the child support obligation should be equitably apportioned between the parents.**

**The legislature finds that these goals will be best achieved by the adoption and use of a statewide child support schedule. Use of a statewide schedule will benefit children and their parents by:**

- (1) Increasing the adequacy of child support orders through the use of economic data as the basis for establishing the child support schedule;**
- (2) Increasing the equity of child support orders by providing for comparable orders in cases with similar circumstances; and**
- (3) Reducing the adversarial nature of the proceedings by increasing voluntary settlements as a result of the greater predictability achieved by a uniform statewide child support schedule.**

**The commissioner I believe decided on a preponderance of the evidence and the totality of the circumstances whereas the judge did not seem to consider all facets of this case nor apply the law(s) as it is**

**written. To that effect the commissioner was correct in her setting of the base child support amount to the father.**

**D. 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 \_\_\_\_\_**

**Respectfully Submitted,**

A handwritten signature in black ink, reading "Robert Gustaveson", is written over a horizontal line.

**Robert Gustaveson**

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

Robert Gustaveson,    Petitioner,  Vs.  Amina Babayev,         Respondent.	COA NO. 69108-2
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**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 14<sup>TH</sup> DAY OF DECEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL

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

AND TO

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

SIGNED IN RENTON, WASHINGTON THIS 14<sup>TH</sup> DAY OF DECEMBER 2012

X Robert Gustaveson