

FILED
SUPREME COURT
STATE OF WASHINGTON
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BY SUSAN L. CARLSON
CLERK

S. Ct. No. 96967-1
COA No. 32650-1-III

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Marriage of:

KERT A. CARLSON,

Petitioner,

and

REBECCA M. CARLSON, (now EISMANN),

Respondent.

PETITION FOR REVIEW

Kenneth H. Kato, WSBA # 6400
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER.....	1
B. COURT OF APPEALS DECISION.....	1
C. ISSUES PRESENTED FOR REVIEW.....	1
1. Did the court err in entering its order of child support in case 32650-1-III because (1) substantial evidence did not support its over-calculation of Kert Carlson's income and under-calculation of Rebecca Eismann's income and (2) the court made an error in law by so calculating their incomes?.....	1
2. Did the court err in entering judgment against Mr. Carlson for back child support and maintenance as well as attorney and expert fees when the evidence did not support the judgment in case 32650-1-III?.....	1
3. Did the court abuse its discretion by awarding Ms. Eismann \$20,000 attorney fees for Mr. Carlson's intransigence in case 32650-1-III?.....	1
4. Did the court err in entering its order of child support in case 32566-8-III because (1) substantial evidence did not support its over-calculation of Mr. Carlson's income and (2) the court made an error in law by so calculating his income?.....	2
D. STATEMENT OF THE CASE.....	2
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....	2
F. CONCLUSION.....	6

TABLE OF AUTHORITIES

Table of Cases

<i>Dept. of Ecology v. Tiger Oil Corp.</i> , 166 Wn. App. 720, 271 P.3d 331 (2012).....	3
<i>Fox v. Sunmaster Prods., Inc.</i> , 115 Wn.2d 498, 798 P.2d 808 (1990).....	3
<i>In re Marriage of Bobbit</i> , 135 Wn. App. 8, 144 P.3d 306 (2006).....	6
<i>In re Marriage of Crosetto</i> , 82 Wn. App. 545, 918 P.2d 954 (1996).....	6
<i>In re Marriage of Greenlee</i> , 65 Wn. App. 703, 829 P.2d 1120, <i>review denied</i> , 120 Wn.2d 1002 (1992).....	5, 6
<i>In re Marriage of Griffin</i> , 114 Wn.2d 772, 791 P.2d 519 (1990).....	5
<i>In re Marriage of Krieger</i> , 147 Wn. App. 952, 199 P.3d 450 (2008).....	4

Statute

RCW 26.09.170(1)(b).....	4
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Rules

RAP 13.4(b)(1).....	3, 6, 6
RAP 13.4(b)(2).....	3, 4, 6

A. IDENTITY OF PETITIONER

Kert A. Carlson asks this Court to accept review of the Court of Appeals opinion designated in Part B.

B. COURT OF APPEALS DECISION

The unpublished Court of Appeals opinion which Mr. Carlson wants reviewed was filed January 10, 2019, and the order denying reconsideration was filed February 26, 2019. A copy of the opinion and order are in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the court err in entering its order of child support in case 32650-1-III because (1) substantial evidence did not support its over-calculation of Kert Carlson's income and under-calculation of Rebecca Eismann's income and (2) the court made an error in law by so calculating their incomes?

2. Did the court err in entering judgment against Mr. Carlson for back child support and maintenance as well as attorney and expert fees when the evidence did not support the judgment in case 32650-1-III?

3. Did the court abuse its discretion by awarding Ms. Carlson \$20,000 attorney fees for Mr. Carlson's intransigence in case 32650-1-III?

4. Did the court err in entering its order of child support in case 32566-8-III because (1) substantial evidence did not support its over-calculation of Mr. Carlson's income and (2) the court made an error in law by so calculating his income?

D. STATEMENT OF THE CASE

Mr. Carlson incorporates by reference the statement of facts in his opening brief. Further facts will be referred to as necessary.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. February 14, 2014 temporary order and judgment

On February 14, 2014, the trial court entered a temporary child support order, finding Mr. Carlson's actual monthly net income was \$13,903 and Ms. Eismann's was \$5,471. (CP 1342, 1343). They had three minor children so the standard calculation resulted in a total monthly transfer payment from father to mother of \$2,266.01 and a split on other expenses of 72%/28% respectively. (CP 1343, 1344). The court further ordered a \$43,862.07 judgment against Mr. Carlson for back child support and maintenance and for attorney and expert fees. (CP 1349). Mr. Carlson *pro se* did not appeal the judgment. But he did not have to appeal it because the case was not over. CR 54(b); RAP 2.2(d).

By refusing to consider the challenge to the February 14,

2014 judgment, the Court of Appeals ignored the principle that when a timely notice of appeal is filed, other prior rulings of the trial court, even appealable ones, also come up for review even though not designated in the notice. *Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 504-06, 798 P.2d 808 (1990); *Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 749-50, 271 P.2d 331 (2012).

The February 14, 2014 judgment was clearly prejudicial as the trial court expressly considered it in making its findings and rulings on support, maintenance, and fees following trial. (See 5/23/14 RP 631-32). In its oral ruling, the court stated it had indeed reconsidered at trial the prior February 14, 2014 judgment, decided not to change it, and awarded a monetary judgment on top of that judgment. (*Id.*; CP 1894). The earlier judgment was an issue at trial, was decided, and prejudiced the decision designated in the notice of appeal. It is reviewable without being designated in the notice. *Fox, supra*. The Court of Appeals' decision conflicts with *Fox* and *Tiger Oil Corp.* and review is thus warranted under RAP 13.4(b)(1) and (2).

2. April 2017 ruling on petition to modify child support

This Court affirmed the trial court's determination Mr. Carlson failed to show a substantial change in income. It is true he

contended his income was overstated. But the real issue was whether he made a showing of a substantial change in circumstances, not just income. RCW 26.09.170(1)(b). He did because the two older girls lived with him, not Ms. Eismann, as originally ordered. (CP 2024, 2154-56). Mr. Carlson submitted evidence showing his income had changed as well as Ms. Eismann's. (CP 2093-99, 2305-09, 2312-17, 3269). This evidence was sufficient to show there was a substantial change in income as well as in circumstances. Although the trial court accepted Ms. Eismann's suggestion to use \$8500/month as his net income, the amount was still more than what Mr. Carlson showed his income to be. The trial court's findings are not supported by substantial evidence. *In re Marriage of Krieger*, 147 Wn. App. 952, 199 P.3d 450 (2008). The Court of Appeals' decision conflicts with *Krieger* and review is warranted. RAP 13.4(b)(2).

3. Intransigence

The trial court further awarded fees to Ms. Eismann due to Mr. Carlson's intransigence. (CP 1889). The Court of Appeals mistook the record and stated her need as well as his intransigence justified the award of \$20,000 attorney fees. To the contrary, need was not a factor in the award as found by the trial court:

The court finds the Petitioner/Father was intransigent in this case and caused the Respondent/Mother to incur additional fees and costs. Accordingly, the court finds a \$20,000 attorney fee award from the Petitioner/Father to the Respondent/Mother based on Intransigence is appropriate. (CP 1889).

Mr. Carlson acknowledges that *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, *review denied*, 120 Wn.2d 1002 (1992), did not require specific findings as to intransigence. But the inquiry does not stop there. The record must support the court's conclusion Mr. Carlson was intransigent. The trial court neither articulated specific facts in its oral decision nor its supplemental finding of fact showing he was intransigent. See *In re Marriage of Griffin*, 114 Wn.2d 772, 777, 791 P.2d 519 (1990). The Court of Appeals' decision was improperly based on a misreading of the record and conflicts with *Griffin*.

Mr. Carlson was represented by counsel in the trial proceedings until December 2013. Ms. Eismann made no allegation of intransigence while he had counsel. Trial in case 32650-1-III was in May 2014. During that five-month period when Mr. Carlson was *pro se*, nothing in the record reflects he was foot-dragging or engaged in obstruction, filed frivolous or unnecessary motions, refused to comply with discovery requests, or engaged in

any other conduct making the proceeding unduly difficult or costly.
In re Marriage of Greenlee, 65 Wn. App. at 708.2).

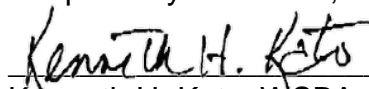
Because no specific facts in the record support a finding of intransigence and the court articulated none, it abused its discretion by so finding. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006); *In re Marriage of Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). The Court of Appeals decision conflicts with other appellate decisions, thus warranting review under RAP 13.4(b)(1) and (2) on this point as well.

F. CONCLUSION

Based on the foregoing, Mr. Carlson respectfully asks this Court to grant his petition for review.

DATED this 20th day of March, 2019.

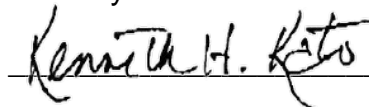
Respectfully submitted,



Kenneth H. Kato, WSBA # 6400
Attorneys for Petitioner
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on March 20, 2019, I served a copy of the petition for review through the eFiling portal on Hailey Landrus at her email address.



APPENDIX

FILED
JANUARY 10, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Marriage of:	)	No. 32650-1-III
	)	(consolidated w/
KERT A. CARLSON,	)	No. 33650-6-III,
	)	No. 35266-8-III)
Appellant,)	
)	
and)	
)	
REBECCA M. CARLSON,	)	UNPUBLISHED OPINION
)	
Respondent.)	

PENNELL, A.C.J. — Kert Carlson appeals multiple trial court orders imposing financial obligations resulting from his marital dissolution. We affirm.

FACTS

Kert Carlson and Rebecca Carlson, now known as Rebecca Eismann, were married in 1999. During the course of their marriage, the parties had three children. Ms. Eismann primarily stayed home to care for the children. Mr. Carlson worked as the sole proprietor of a silk-screening and embroidering business.

Nos. 32650-1-III; 33650-6-III; 35266-8-III
In re Marriage of Carlson

Mr. Carlson and Ms. Eismann separated in 2013. On June 4, 2013, Mr. Carlson petitioned in Spokane County Superior Court for dissolution of the marriage.

Pretrial temporary maintenance and child support orders

Prior to trial, temporary orders were issued requiring Mr. Carlson to pay spousal maintenance and child support. He did not comply. On February 14, 2014, a judgment was entered against Mr. Carlson in the amount of \$43,862.07, requiring him to pay back-child support, back-maintenance, attorney fees, and business valuation fees. Mr. Carlson did not appeal the February 14 judgment.

May 2014 trial proceedings

A dissolution trial was held in May 2014 with Mr. Carlson participating pro se. Mr. Carlson provided very limited information regarding his finances during trial. On cross-examination, Mr. Carlson testified he had a net monthly income of \$8,442 and could afford to pay \$1,250 in child support each month. 1 Report of Proceedings (May 19, 2014) at 165. Mr. Carlson did not detail how he had arrived at these figures.

Ms. Eismann called accountant Todd Carlson¹ to testify at trial. Todd Carlson had reviewed Mr. Carlson's tax returns and profit and loss statements from his business. Based on that information from a three-year period ending in October 2013, Todd Carlson

¹ Todd Carlson is not related to either of the parties.

Nos. 32650-1-III; 33650-6-III; 35266-8-III
In re Marriage of Carlson

estimated Mr. Carlson's gross monthly income at \$17,242. Todd Carlson explained he had discounted depreciation, home office, and automobile expenses of over \$90,000 that had been listed on Mr. Carlson's tax returns. According to Todd Carlson, the aforementioned expenses lacked sufficient justification. Todd Carlson also explained that Mr. Carlson was not paying any federal income taxes because his tax returns indicated he was carrying forward a prior business loss. Mr. Carlson did have income deductions based on social security and Medicare. After these deductions, Todd Carlson estimated Mr. Carlson's net monthly income at \$16,467.

In addition to the evidence presented regarding Mr. Carlson's income, Ms. Eismann provided detailed testimony regarding her own finances. She asked the court to calculate her net monthly income at \$4,452.81. Ms. Eismann testified that Mr. Carlson had yet to make any maintenance or child support payments. Mr. Carlson did not present any evidence contesting Ms. Eismann's income information.

The superior court entered findings of fact and conclusions of law on June 27, 2014. In calculating the parties' respective incomes, the court relied heavily on accountant Todd Carlson's testimony. The court agreed with Todd Carlson that Mr. Carlson's income should not be reduced based on depreciation or home office expenses. However, the court did find Mr. Carlson's monthly business-related automobile expenses

Nos. 32650-1-III; 33650-6-III; 35266-8-III
In re Marriage of Carlson

of \$550 were appropriate. Clerk's Papers at 1889. The court ultimately calculated Mr. Carlson's net monthly income at \$15,592 and Ms. Eismann's at \$4,452. *Id.*

In addition to its findings regarding income, the trial court deemed Mr. Carlson had been intransigent, causing Ms. Eismann to incur additional legal fees. Mr. Carlson was thus ordered to pay Ms. Eismann \$20,000 in attorney fees.

On July 23, 2014, Mr. Carlson appealed the trial court's (1) dissolution decree, (2) findings of fact and conclusions of law, (3) supplemental findings of fact and conclusions of law, (4) final parenting plan, and (5) order of child support, all of which were entered on June 27, 2014. The notice of appeal did not reference any prior court orders, findings or judgments.

Posttrial child support modification proceedings

In 2015, Mr. Carlson petitioned for modification of child support based on several changes in circumstances, including a reduction in income. Trial was held on the proposed modification, as well as issues related to relocation and the parenting plan, in March 2017. The trial court heard testimony regarding the parties' finances with Mr. Carlson continuing to participate pro se.

During the March 2017 trial, Mr. Carlson's primary position was that he had never had a monthly income of \$15,592, as the superior court had found in 2014. He claimed

Nos. 32650-1-III; 33650-6-III; 35266-8-III
In re Marriage of Carlson

his current monthly income was \$2,070. However, Mr. Carlson admitted he used business income to pay for his household expenses, which totaled approximately \$8,500 each month. He also testified that he regularly transferred money between various bank accounts.

The trial court determined Mr. Carlson had not met his burden of showing a substantial change in circumstances. Nevertheless, the court reduced Mr. Carlson's estimated monthly income based on Ms. Eismann's proposal that the court use Mr. Carlson's monthly expenses of \$8,500 as a reasonable assessment of his income. This accommodation by Ms. Eismann was beneficial to Mr. Carlson as it significantly reduced his child support obligation.²

Mr. Carlson filed a separate appeal for the trial court's April 7, 2017, decision on his petition for modification of child support. Mr. Carlson's appeals have been consolidated for review.

ANALYSIS

Judgment for delinquent maintenance and child support

Mr. Carlson has never appealed the judgment entered on February 14, 2014.

² The obligation was also reduced based on changes to Ms. Eismann's income along with primary residence changes for two of the parties' three children.

Nos. 32650-1-III; 33650-6-III; 35266-8-III
In re Marriage of Carlson

This judgment was not extinguished or in any way impacted by the court's entry of the decree of dissolution on June 27, 2014. *See* RCW 26.09.060(11). Nor did the judgment prejudicially affect any of the orders for which Mr. Carlson has filed a timely notice of appeal. *See Anaya Gomez v. Sauerwein*, 172 Wn. App. 370, 376-77, 289 P.3d 755 (2012). Accordingly, Mr. Carlson's challenge to the February 14 judgment is not properly before the court. RAP 5.3(a)(3).

June 2014 decree and child support order

Mr. Carlson claims substantial evidence does not support the trial court's June 2014 findings regarding the parties' incomes. He requests that this court accept his conclusory statements about income instead of the detailed evidence introduced by Ms. Eismann. We decline this invitation.

At trial in May 2014, Mr. Carlson presented almost no evidence regarding his personal income. The only detailed information came from Ms. Eismann's expert, accountant Todd Carlson. Todd Carlson explained his calculations and the reasons why he discounted business expense deductions for depreciation and home office space. Nothing in the record indicates the depreciation and home office expenses had an actual impact on Mr. Carlson's personal income. *See In re Marriage of Stenshoel*, 72 Wn. App. 800, 808, 866 P.2d 635 (1993) (The trial court may exclude business expenses that do not

Nos. 32650-1-III; 33650-6-III; 35266-8-III
In re Marriage of Carlson

actually impact income.). Thus, Todd Carlson's assessment was at least facially reasonable and provided the trial court a sufficient basis for its findings as to the parties' incomes.

April 2017 ruling on petition to modify child support

Unless otherwise permitted by statute, a child support obligation may be modified only on a showing of a substantial change in circumstances. RCW 26.09.170(1)(b), (5)(a). The burden of proving a substantial change has occurred rests with the movant. *In re Marriage of Bucklin*, 70 Wn. App. 837, 839, 855 P.2d 1197 (1993). An involuntary, unpredicted, significant reduction in a parent's monthly income may constitute a cognizable change prerequisite to a modification. RCW 26.09.170(5)(b). Alleged changes in income must be proved by means of "[t]ax returns for the preceding two years and current paystubs." RCW 26.19.071(2).

The evidence supported the trial court's determination that Mr. Carlson had failed to show a substantial change in income. Mr. Carlson's admission that he used his business income to cover personal expenses undercut his claim that he earned only \$2,070 per month. In addition, Mr. Carlson's irregular bookkeeping practices made it nearly impossible to discern the true nature of his personal income. Ms. Eismann was generous in suggesting the trial court use Mr. Carlson's monthly expenses as an estimate of his

Nos. 32650-1-III; 33650-6-III; 35266-8-III
In re Marriage of Carlson

income. It was reasonable for the trial court to accept this approach and reduce Mr. Carlson's support obligation accordingly. The court's determination is not vulnerable to reversal on appeal on these grounds.

Award of attorney fees and costs

In a dissolution proceeding, the trial court has authority to award attorney fees based either on the needs of the parties or intransigence. RCW 26.09.140; *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). Unlike other contexts,³ no specific findings are necessary to justify a fee award. *See Greenlee*, 65 Wn. App. at 708-09. We review a trial court's fee award for abuse of discretion. *In re Marriage of Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999).

Here, the trial court was justified in awarding attorney fees based on both need and intransigence. As set forth above, the evidence supported the trial court's finding that Mr. Carlson's income was substantially greater than that of Ms. Eismann. The record is also replete with evidence that Mr. Carlson increased Ms. Eismann's attorney fee expenditures by delaying production of documents, refusing to obey court orders, and by

³ For example, RCW 23B.13.310(2), which was discussed in *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 144, 331 P.3d 40 (2014), conditions the availability of attorney fees on specific findings.


Nos. 32650-1-III; 33650-6-III; 35266-8-III
In re Marriage of Carlson

aligning the parties' eldest daughters against Ms. Eismann. Mr. Carlson's challenge to the fee award fails.

CONCLUSION

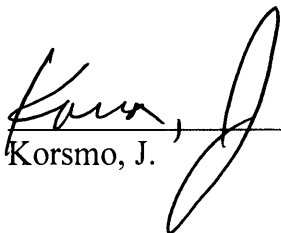
The orders on appeal are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

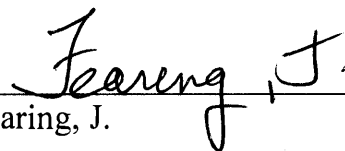


Pennell, A.C.J.

WE CONCUR:



Korsmo, J.



Fearing, J.

FILED
FEBRUARY 26, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE


In the Matter of the Marriage of)	
	)	No. 32650-1-III
KERT A. CARLSON,	)	(consolidated w/
	)	No. 33650-6-III,
Appellant,	)	No. 35266-8-III)
)	
and	)	ORDER DENYING
	)	MOTION FOR
REBECCA M. CARLSON,	)	RECONSIDERATION
)	
Respondent.)	

THE COURT has considered appellant Kert Carlson's motion for reconsideration of this court's January 10, 2019, opinion, and the record and file herein;

IT IS ORDERED the motion for reconsideration is denied.

PANEL: Judges Pennell, Korsmo and Fearing

FOR THE COURT:


ROBERT LAWRENCE-BERREY
Chief Judge

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

*The Court of Appeals
of the
State of Washington
Division III*



500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
<http://www.courts.wa.gov/courts>

February 26, 2019

E-mail

Kenneth H Kato
Attorney at Law
1020 N Washington St
Spokane, WA 99201-2237
khkato@comcast.net

E-mail

Hailey Louise Landrus
Stamper Rubens, P.S.
720 W Boone Ave Ste 200
Spokane, WA 99201-2560
hlandrus@stamperlaw.com

CASE # 326501 (consol. w/ 336506, 352668)
In re the Marriage of: Kert A. Carlson and Rebecca M. Carlson
SPOKANE COUNTY SUPERIOR COURT No. 133013370

Counsel:

Enclosed is a copy of an order denying the appellant's motion for reconsideration of this court's January 10, 2019, opinion.

A party may seek discretionary review by the Washington Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a petition for review in this court within 30 days after the order denying reconsideration is filed. RAP 13.4(a). Please file the petition electronically through the court's e-filing portal or if in paper format, only the original need be filed. The petition for review will then be forwarded to the Supreme Court. The petition must be received (not mailed) on or before the date it is due. RAP 18.5(c).

If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d).

Sincerely,

A handwritten signature in cursive script that reads "Renee S. Townsley".

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

March 20, 2019 - 8:45 AM

Filing Petition for Review

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