

64427-1

64427-1

FILED
COURT OF APPEALS DIV. I
STA
2010 MAR 15 PM 1:27

NO. 64427-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

APPEAL OF SNOHOMISH COUNTY SUPERIOR COURT No. 05-3-00844-1
(ORDER OF CHILD SUPPORT)

MARY LINARES
Respondent,

v.

DAVID BEACH
Appellant.

RESPONSE TO APPELLANT'S BRIEF

Erica Knauf Santos, WSBA #36234
Attorney for Respondent
Knauf Santos Law, PLLC
3518 Fremont Ave. North #120
Seattle, WA 9810
Tel: 206.782.6200
Fax: 206.774.8579

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMET OF THE CASE..... 1

III. ARGUMENT.....4

 A. THERE WAS NOT A MANIFEST ABUSEOF DISCRETINO BY THE TRIAL COURT..... 4

 B. THE COURT DID NOT ERROR IN SETTING MR. LINARES’ INCOME AT HER CURRENT RATE OF UNEMPLOYMENT. 9

 C. THERE WAS NO IRRELEVANT TESTIMONY DURING TRIAL 10

 D. THE LEGAL FEES AWARD WAS APPROPRIATE AND ACCORDING TO STATUTE.....11

 E. THE COURT HAS DETERMINED THAT MS. LINARES IS IN NEED OF CHILD CARE IN ORDER TO ATTEND SCHOOL AND THAT THE CHILD CARE IS REASONABLE.....13

 F. THE START DATE OF OCTOBER 1, 2009 WAS APPROPRIATE GIVEN THE CIRCUMSTANCES IN THIS CASE.....13

 G. THE JUDGMENT IN THE ORDER OF CHILD SUPPORT DOES NOT DOUBLY IMPACT MR. BEACH.....14

 H. MR. BEACH WAS NOT ORDERED TO FILE A FRAUDULENT TAX RETURN HE WAS ORDERED TO AMEND THE RETURN HE PRESENTED TO THE COURT SO THAT THE \$6,981 TAX REFUND COULD BE RELEASED...14

 I. THERE WAS NO PERJURY ON THE PART OF MS. LINARES OR HER COUNSEL.....16

IV. CONCLUSION.....16

TABLE OF AUTHORITIES

Tables of Cases

In re Marriage of Daubert, 124 Wn.App. 483, 490, 99 p.3d 401, 2004
Wash.App. LEXIS 2409 (October 25, 2004)..... 4, 5

In re Marriage of Griffin, 114 Wn.2d 772, 776, 791 P.2d 519 (1990)..... 4

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971).....4

In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)....4

In re Marriage of Stern, 57 Wn.App. 707, 717, 789 P.2d 807 (1990)...4, 5

Table of Statues

RCW 26.19.071(6).....9

RCW 7.06.060.....11

SCLMAR 7.3.....12

I. INTRODUCTION

Respondent, Mary Linares, respectfully asks this Court to affirm the lower court's decision. The Respondent further requests attorney fees for defending this appeal.

II. STATEMENT OF THE CASE

The parties were divorced in February 2006 after a Snohomish County Trial and an order of child support was entered. CP Exhibit 2. Ms. Linares filed a motion for adjustment of child support in June 2008 with a hearing being held August 4, 2008. The orders at this hearing were temporary orders pending the discovery of additional information. A 90 day review hearing was ordered. CP Exhibit 3. Mr. Beach filed a motion for revision of the August 4, 2008 orders which was denied. CP Exhibit 4. Mr. Beach then became unemployed and filed a Petition for Modification of Child Support. CP Exhibit 5. The review hearing from the August 4, 2008 temporary order was heard December 8, 2008 where Mr. Beach's child support was substantially lowered based on unemployment. CP Exhibit 6 & 7. Mr. Beach started a new job December 15, 2008, just seven days after the review hearing, making \$45 an hour 40 hours a week. CP Exhibit 12.

Arbitration was held on March 3, 2009 and a subsequent arbitration award was sent to the parties. An amended arbitration award was filed with the court after a clerical error was corrected. Mr. Beach filed Trial De Novo from the arbitration award. In April 2009, Ms. Linares filed a motion to adjust the child support pending trial. This motion was denied by the Commissioner for what the Commissioner believed was lack of jurisdiction because the matter had been sent to arbitration. CP Exhibit 8. Ms. Linares filed a Motion for Revision on the grounds that the Superior Court did have jurisdiction as the matter was no longer in arbitration because an award had been filed and Mr. Beach had filed for Trial De Novo. The Motion for Revision was granted by Judge Castleberry and a new order of child support was entered on April 29, 2009. CP Exhibit 9. Judge Castleberry stated in the order "It is not a change of circumstances if the father becomes unemployed again. It is clear given the totality of the circumstances that the father loses a job when child support is raised and gets a job when child support is lowered." The order of child support entered on April 29, 2009 had a clerical error making the order effective April 1, 2008 instead of April 1, 2009. An amended child support order was entered on June 12, 2009. CP Exhibit 10. Mr. Beach again became unemployed at the end of May 2009.

Mr. Beach did not pay the required child support and daycare so Ms. Linares filed a motion for contempt that was heard on June 12, 2009. Mr. Beach was held in contempt for failure to pay child support and daycare. CP Exhibit 11. The Commissioner made findings that it is “clear respondent is consistently avoiding paying for his children. Father is engaging in a war of attrition.” The Commissioner further found “he makes decisions in his own financial disadvantage to avoid support of his own children”. The Commissioner provided purging mechanisms including that Mr. Beach would pay an extra \$500 a month to be used towards daycare and Mr. Beach was to file his 2008 tax return by August 15, 2009 and provide Ms. Linares’ counsel a copy. CP Exhibit 11. Mr. Beach did provide Ms. Linares’ counsel a copy of the 2008 tax return but no proof that it had been filed. CP Exhibit 26. Mr. Beach was to receive a \$6,981 tax return but Mr. Beach directed the IRS to hold this money to pay his anticipated 2009 taxes.

Trial was held September 18, 2009 in Snohomish County with both parties testifying before The Honorable Gerald L. Knight. Judge Knight gave his oral decision on September 18, 2009 and set a presentation hearing for October 7, 2009.

III. ARGUMENT

A. There was not a manifest abuse of discretion by the trial court.

The court of appeal reviews child support orders for a manifest abuse of discretion. *In re Marriage of Daubert*, 124 Wn.App. 483, 490, 99 p.3d 401, 2004 Wash.App. LEXIS 2409 (October 25, 2004) (citing, *In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990)). *Daubert* went on to say that to succeed on appeal, the appellant must show that the trial court's decision was manifestly unreasonable or based on untenable grounds or reasons. *Daubert* at 490 (citing *State ex. Rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). *Daubert* has negative case history regarding the issue of extrapolation which is not at issue here.

“A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.”

Daubert at 490 (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). “The amount of child support rests in the sound discretion of the trial court.” *Daubert* at 490 (citing *In re Marriage of Stern*, 57 Wn.App. 707, 717, 789 P.2d 807 (1990)). *Stern* went on to say “we will not substitute our judgment for the trial courts where the

record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances”. *Id at 490.*

Mr. Beach must prove the above for the trial court’s decision to be overturned. The trial court’s decision was not manifestly unreasonable as it was not outside the range of acceptable choices, given the facts of this case and applicable legal standard at the time. The facts of this case were more than supported by the record and the correct legal standard was applied.

Judge Knight made direct reference to Mr. Beach’s historical earnings in his oral ruling on September 18, 2009:

“In 1999 he made 48,000, and these are rough figures. And by “rough,” I mean that it’s 48,000 plus. In 1999, it was 48,000 plus; in 2000, 75,000 plus; 2001, 58,000 plus; 2002, 60,000 plus; 2003, 62,000 plus; 2004, 65,000 plus; 2005, 72,000 plus; 2006, 79,000 plus; 2007 89,000 plus. In case it’s not clear, I will go back over that again.” RP 123. They were divorced in 2005, in February 2006. The total income, however, that he generated in 2006 was 79,000. The support order that was entered at the time of the decree of dissolution in February 2006 was based on the father grossing \$68,040. Well, I don’t know how they got that figure, but it was off by \$11,000. He made \$11,000 more the year that the marriage was dissolved. The next year, he made \$21,000 more, but yet the support was based upon an annual gross of \$68,000, which would have a monthly gross of \$5,670, resulting in a net monthly income of \$4,198, which ended up in a transfer payment of \$1,552.” RP 123.

Judge Knight went on to address the issue of the father's "game playing" stating:

"Two judicial officers have come to similar conclusions about their concerns about the father doing what he can do to avoid his obligation to support his children". RP at 124. "Judge Castleberry, in his order stated it is – in addition to the attorney's fees that he awarded and the new temporary order of child support, he indicated that it would not be a change of circumstances if the father becomes unemployed again; and this is a quote, 'It is clear given the totality of the circumstances that the father losses a job when child support is raised and gets a job when child support is lowered'. RP 125. "The second judicial officer was Commissioner Waggoner who found the father in contempt of court. The commissioner has stated in her order of contempt, and this is a quote, 'It's clear that the respondent is consistently avoiding paying for his children. Father is engaging a war of attrition. Father has willfully failed to pay the child support, the day care, than temporary attorney's fees'. RP 125 & 126.

"Shortly after his unemployment checks started getting garnished or cashed, he stopped going through with filling out the forms that would be necessary for him to continue getting unemployment. I heard his testimony; and his explanation as to why he did that, the Court finds that not credible. It was gibberish, that explanation about it. I truly don't think that Mr. Beach was concerned that he may be accepting unemployment compensation illegally. If he did, I just don't find that credible. It was consistent with either game playing or this war of attrition. I know it can be argued that it's coincidence. Judge Castleberry, in the order on revision that he entered stated that unemployment would not be a change in circumstances. Within 30 days of that order, Mr. Beach became unemployed. Now it could be a coincidence. Unfortunately, I am, generally, not a believer in coincidence, especially not when they seem to happen more often than not than the statistical odds and chances, if you will, that you are either an awfully unlucky person and

things coincidentally happen to you and it is just that you are one of the statistically odd. I don't think that's the case." RP 127 & 128.

Judge Knight made specific reference as to how he came up with Mr. Beach's gross and net incomes, stating:

"When it is all said and done, the court has a difficult time finding out exactly what your true income is. I do know what it has been in the past, and I see this pattern now that Judge Castleberry saw and that the commissioner saw. That's coming back to where I started out. That's what makes this bad case difficult, determining what is your income." RP 128. "In regards to the father's side of the ledger, I am going to use the year-to-date analysis, and that comes out to \$6,868. The orders in regards to the support transfer, based on these figures, will be effective October 2009." RP 130.

This case did prove challenging to Judge Knight regarding Mr. Beach's income level. However, this difficulty was intentionally exacerbated by Mr. Beach in his war of attrition and game playing with the court. It is clear from the record and Judge Knight's ruling that Mr. Beach continually lost jobs when his child support was raised and found great paying jobs when his child support was lowered. In August 2008 his child support was raised and he "lost" his job within two weeks. In December 2008 his child support was substantially lowered and he started, *not found but started*, a new job seven days later making \$45 an hour with a \$5 per hour bonus. When his child support was raised by Judge Castleberry in April 2009 Mr. Beach lost his job within thirty days of that

order. Judge Knight was faced with a situation of trying to unravel Mr. Beach's games. Ms. Linares was asking that child support be based on Mr. Beach's recent job at \$50 an hour, 40 hours a week which he had from December 15, 2008 until May 30, 2009. This amount would have been \$8,667 gross per month. Judge Knight rejected this and opted for Ms. Linares' second lower proposal which was Mr. Beach's year to date income. Mr. Beach's year to date income consisted of his job from January 1, 2009 through May 30, 2009 and his unemployment from June 1, 2009 through September 2009. Mr. Beach's year to date income came out to \$6,868 gross per month.

Judge Knight's decision was not a manifest abuse of discretion and was not based on untenable grounds or reasons. Judge Knight based his decision on the facts before the trial court and came to the best decision for both parties. Judge Knight could have easily used the higher income figures from Mr. Beach job the first half of 2009, or he could have used Mr. Beach's historical figures before all this game play started which was \$89,000 a year or \$7,417 gross per month. Instead Judge Knight opted for a lower amount based on exactly what Mr. Beach had made so far in 2009.

B. The court did not error in setting Mr. Linares' income at her current rate of unemployment.

Mr. Beach tries to make the argument that Ms. Linares income should be imputed at the standard rate for her age and gender or in the alternative at her historical rate of pay due to her choice to go back to school. Mr. Beach cites RCW 26.19.071(6) for his argument. RCW 26.19.071 (6) states in part:

“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.”

Judge Knight made reference to the mother's schooling and her prior employment, stating:

“The figures that the Court is going to use for the income side of the ledger for the mother is going to be the amount that she has submitted for her extended unemployment benefits. I do know that the job that she had that market has tanked. Of course, the business that she was in was part of the business that led to the destruction of our economy, not complete destruction, but almost, and that's fast and loose money in the real estate market. But that market has tanked. She is now studying to become a nurse. That market is booming. It has been for some time. So, it's not like she is on a lark. She is in a market that pays well. It's in high

demand right now. The demand is exceeding supply. Basic economics is driving up the income or salary for nurses and, plus, it's one of the more flexible jobs. Nurses can move from state to state to state. They don't have to be re-licensed, generally. They are in great demand. So what she is doing is not unreasonable." RP 129 & 130.

The court has determined that Ms. Linares is not voluntarily unemployed. She is unemployed due to the economy and specifically to her prior job's role in the current economy. Ms. Linares returned to school to get a degree in a field that is booming and where she can get a good paying flexible job. Therefore the court is not required to impute Ms. Linares at her age and gender or at her historical rate of pay. The court determined that her income would be her current rate of unemployment.

C. There was no irrelevant testimony during trial.

Mr. Beach is specifically pointing to the line of questioning regarding the paternity testing of one of the children as being irrelevant. Mr. Beach raises this as an assignment of error but does not provide argument on this issue. Mr. Beach was asked a question, his counsel objected to the question and the objection was overruled. RP 37. Mr. Beach was asked if he had the youngest son paternity tested after the August 2008 hearing. Mr. Beach's counsel objected based on relevance. Ms. Linares counsel argued that it was relevant to the father's ongoing attempts to do everything and anything humanly possible to get out of

paying for his children including swabbing his child's mouth for a paternity test. Judge Knight overruled the objection stating:

“Objection overruled. It is relevant in regards to whether or not – I think the underlying question is whether or not this individual is unemployed because of no fault of his, or that it's intentional unemployment to lower his income, to lower his support obligation. And I think the line of inquiry is related to that issue, so that's why I've overruled.” RP 37 & 38.

Mr. Beach tries to argue in his Statement of the Case section A. that “the many rulings of the court's commissioners have been biased by Mary Linares with superfluous and irrelevant information that had nothing to do with the case at hand stating that based on previous history she deserved to be awarded more support”. Mr. Beach had every opportunity to revise any of these commissioner's ruling that he disagreed with and he choose not to do so. The case history is relevant to the courts decision of child support as the court must decide what amount of income Mr. Beach actually makes. This is especially true in a case where there has been substantial game play in an attempt to reduce child support.

D. The legal fees award was appropriate and according to statute.

RCW 7.06.060 addresses Costs and Attorney's Fees for mandatory arbitration of civil actions, stating:

(1) The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo. The court may assess costs and reasonable attorneys' fees against a party who voluntarily withdraws a request for a trial de novo if the withdrawal is not requested in conjunction with the acceptance of an offer of compromise.

(2) For the purposes of this section, "costs and reasonable attorneys' fees" means those provided for by statute or court rule, or both, as well as all expenses related to expert witness testimony, that the court finds were reasonably necessary after the request for trial de novo has been filed.

(3) If the prevailing party in the arbitration also prevails at the trial de novo, even though at the trial de novo the appealing party may have improved his or her position from the arbitration, this section does not preclude the prevailing party from recovering those costs and disbursements otherwise allowed under chapter 4.84 RCW, for both actions.

SCLMAR 7.3 Costs and Attorney Fees states: "MAR 7.3 shall apply only to costs and reasonable attorney's fees incurred after the filing of the request for trial de novo".

Ms. Linares substantially improved her position at Trial and is therefore statutorily entitled to attorney fees. There has been no allegation that the attorney fees were unreasonable, just that if the court had used the correct numbers, whatever those numbers are as Mr. Beach does not state, Ms. Linares would not have improved her position at Trial. Mr. Beach has

not provided this court any documentation that the way the child support was calculated was incorrect. Mr. Beach just claims it is incorrect and leaves it at that. Ms. Linares improved her position and is entitled to the reasonable attorney fees incurred since the date Trial de Novo was filed. The award of attorney fees listed in the Order of Child Support takes into account the temporary attorney fees that were already awarded in the amount of \$4,200.

E. The court has determined that Ms. Linares is in need of child care in order to attend school and that the child care is reasonable.

Mr. Beach has not provided any argument as to why he feels that the child care is unreasonable. This issue was not raised at trial as several judicial officers had previously stated that Ms. Linares need for daycare was necessary and reasonable. Mr. Beach cannot now raise this issue on Appeal. CP Exhibit 3 & 4.

F. The start date of October 1, 2009 was appropriate given the circumstances in this case.

Mr. Beach raises this as an Assignment of Error but does not argue this Assignment of Error in his Brief. The trial court did not abuse its discretion in starting the child support order October 1, 2009. This matter had been ongoing since August 2008 and three separate temporary child support orders were entered between August 2008 and trial. One on

August 4, 2008(CP Exhibit 3), one on December 19, 2008 in accordance with the December 8, 2008 hearing (CP Exhibit 7) and one on April 29, 2009 (CP Exhibit 9) which was amended for a clerical error on June 12, 2009 (CP Exhibit 10). During the times of these orders Mr. Beach was working when the support order was low and not working with the support order was high. Judge Knight held that he was using the year to date for Mr. Beach and that it would start October 1, 2009. RP 130. Given the many temporary orders and nature of this case it would be almost impossible to go back to August 2008 and figure out how much child support there should be each month as Mr. Beach was constantly, intentionally frustrating the process with his game playing.

G. The judgment in the Order of Child Support does not doubly impact Mr. Beach.

The order of child support was incorrectly entered as a temporary order, an amended order was entered March 4, 2010 and has not yet been added to the record. On the order of support entered October 7, 2009 there is a judgment for back child support in the amount of \$5,780,35. CP 79-91. The order specifically states that this judgment is for child support from July 2008 through September 2009 meaning that DCS will not add \$5,780.35 to Mr. Beach's arrears in their system for this time period.

H. Mr. Beach was not ordered to file a fraudulent tax return he was ordered to amend the return he presented to the court so that the \$6,981 tax refund could be released.

Mr. Beach again cites this as an Assignment of Error but does not argue his position. Mr. Beach presented the 2008 tax return as the one he filed in August 2009 as directed in the contempt hearing. RP 33. Mr. Beach stated at trial that he asked the IRS to hold the \$6,981 tax return and apply it to 2009 taxes. Never did Mr. Beach allege that he had not filed this tax return because it was fraudulent. He specifically stated that it had been filed. RP 33. Mr. Beach was ordered to simply amend this tax return by un-checking the box that applied the \$6,981 to his 2009 taxes so that money could be released for back child support. RP 131. Judge Knight specifically stated:

“In regards to the tax return, the father is ordered to amend that return within three days. In so doing, he is directed to switch his decision to have it applied to taxes, and he is directed to have that now be refunded. The money is to be refunded to him. He is further directed that is to go into the wife’s attorney’s trust account and that those funds are to be used to eliminate any back support.” RP 131.

Mr. Beach was not ordered to file a fraudulent tax return. He was simply ordered to amend the tax return he claims to have already filed so that the tax refund of \$6,981 could be released to him and used to pay his back child support and the mother’s attorney fees.

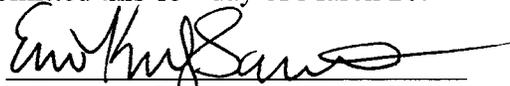
I. There was no perjury on the part of Ms. Linares or her Counsel.

Mr. Beach simply makes a blanket statement that Ms. Linares and her counsel committed perjury but does not point to specific instances and provide any proof that this is the case. Judge Knight heard a full day of testimony from both parties and specifically found that Mr. Beach was not credible stating: "I do not find the father really to be that credible. I don't sir." RP 129. While Mr. Beach may feel that Ms. Linares and her counsel committed perjury that does not make it so.

IV. CONCLUSION

For the reasons stated above and the record before the Court, Ms. Linares asks the Court to affirm the trial court decision and award her attorney fees for defending this appeal.

RESPECTFULLY submitted this 15th day of March 20.


Erica Knauf Santos, WSBA #36234
Attorney for Respondent

I hereby declare under penalty of perjury under the laws of the State of Washington that I served a true and correct copy of this pleading upon David Beach, Appellant and the Clerk of the Court of Appeals Division I, on 15 March 2010 by personal service on the Court of Appeals, and email to Mr. Beach's public defender and a copy via USPS.

Dated at Seattle, Washington, this 15th day of March 2010.


Erica Knauf Santos, WSBA #36234