

NO. 65194-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of

JAIMIE VETTER, NKA STEELE
Petitioner.

and.

NATHAN VETTER
Respondent,

2010 OCT 27 PM 5:35
COURT OF APPEALS
DIVISION I
CLERK

REPLY BRIEF OF APPELLANT NATHAN VETTER.

Jean Schiedler-Brown, WSBA # 7753
Law Offices of Jean Schiedler-Brown &
Associates
Attorneys for Respondent Nathan C. Vetter
606 Post Avenue, Suite 101
Seattle, WA 98104
Telephone (206) 223-1888
Facsimile (206) 622-4911

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Re-STATEMENT OF CASE: FACTS OF NOTE FOR REPLY

The December 11 Continuance

These parties were before the court on a trial by affidavit on December 11, 2009, when Mr. Vetter moved for a continuance because Ms. Steele had failed to produce current financial records and claimed to be unemployed. CP 335-470. Ms. Steele claimed to be ready for trial, but Mr. Vetter insisted that he had the right to know Ms. Steele's financial circumstances after she was "laid off" by an employer who had paid her over \$100,000 the prior year. CP 431. Ms. Steele claimed to be receiving unemployment benefits at \$611 per week and to have started a business which had generated no profit to date. CP 30-33. This claim was reiterated by her lawyer in oral argument. CP 439.

The motion for continuance was granted, and the court ruled that Ms. Steele had not responded to interrogatories, and in addition had failed to follow the court rules by submitting mandatory financial records. CP 438. Further, Commissioner Ponomarchuk ruled:

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

CP 213.

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

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

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

MR. VETTER: I understand, Your Honor.

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

MR. VETTER: I understand.

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

CP 440.

The Mother's subsequent financial disclosures:

Prior to March, 2010, Ms. Steele supplemented her financial disclosures, showing business receipts for her consulting business of \$9700 in October, \$10,400 in November, \$5200 in December (2009) and \$15,600 in January 2010. CP 1059. By averaging the months of August

and September, prior to the time her business had any clients, she argued that she had a present income of just over \$6000 per month. However, averaging the months in which she had income, one computes \$10,250 per month. Ms. Steele also disclosed ownership of \$6360 restricted shares of stock with the Schwab company. CP 1310—11; CP 331.

Mr. Vetter's updated Financial records:

Mr. Vetter also updated his financial records after the December 2009 motion. He included all his bank records through December, 2009. CP 761—884. His gross deposits were consistent with the history reported on his tax returns, and there has not been any argument otherwise in this case. He included his 2008 tax returns, including his business schedules that contained his itemized business deductions. CP 1328-1329. He provided this paystubs from Music Northwest to the end of December, 2009, CP 845-852, which verified that the rate of income varied from 2-week pay period to pay period between \$65 and \$465.00. He also provided his first 3 paystubs from Music Northwest for 2010. CP 1004.

The Father's "rate of pay":

The mother claimed that the father earned \$60 per hour, based upon his answer to interrogatories that was his fee for an hour of music lessons, and based upon his bank account records which showed deposits of approximately \$62,000 in 2008. (If the father's family loans of

Approximately \$20,000 in 2008 are subtracted from this amount, his gross deposits are consistent in 2009, at approximately \$40,000+. CP 761-884) These arguments artfully ignored the volume of 2009 financial records produced

Mr. Vetter, explained how his interrogatory answers had been misrepresented. CP 344. He set forth his travel schedule—which was unpaid; he showed the times and days of his lessons; CP 344;387-88. He provided a chart of his schedule of music lessons which showed consistent times week-days after school time, and that he even worked on Sundays, because his students were going to school during the week. CP 455. The mother never contested these facts, and never provided other evidence to the contrary. The father also made a regular weekly income from Music Northwest and provided paystubs, CP 845-852;1000-1003.

After the December 11 hearing, the father took a part time job with a car lot at \$10 per hour that is flexible so that he can also keep his higher paying part-time teaching jobs. CP 346. His employer verified his rate of pay and schedule. CP 458-9. The arguments in the responsive brief that the father had not verified his income by admissible evidence are not correct, and the arguments that he withheld his current financial information are also false.

The responding brief does not address that Mr. Vetter also provided

evidence that he did not have the financial resources that the mother claimed were going through his bank account because his father had loaned him approximately \$22,325, CP 347, which were verified in many of the bank records provided to the court. He submitted a declaration by his father itemizing the funds loaned to him. CP 462-3. Roughly \$20,000 of these loans were received in 2008, thus explaining the cash flow upon which the mother relied to claim that he was making over \$5000 per month. The bank statements submitted by the father showed electronic transfers from Mr. Vetter's father to his accounts. i.e., see CP 984, May 2009; CP 1382, October, 2008; CP 1399, September 2008; CP 1406, July and August, 2008. Statements that Mr. Vetter's explanation of the source of the \$20,000 was lacking in evidentiary quality are untrue. (The responsive brief criticizes the opening brief for characterizing these funds to the father as "gifts", and correctly asserts that they are loans— however the nature of the funds is irrelevant to the argument about whether or not the funds and their source are documented. Counsel for Appellant erred in using the term "gift" and apologizes for any confusion, since Mr. Vetter and his father have always stated that the funds are loans and that he has financial need to repay the loans.)

The mother had a strong and sustained earning record: she earned \$69,402 in 2004, \$92,290 in 2005, \$83, 054 in 2006; \$ 96, 874 in 2007.

CP 177—194; CP 1246—1248.. Her 2008 income was \$144,325.09. CP 451; CP 1249-50.. She reported that as of May 31, 2009, she was earning \$9400 per month. CP 106.

The father's income was based upon self employment and as such, subject to business expense deductions. The mother did not contest that he had business deductions. She ignored that he reported higher gross receipts than net income on his tax returns, and that some of the money flowing through his accounts represented the business deductions. Thus, In 2008, he reported gross receipts on his schedule C of \$34,611.00. CP 1317. His profit income before deducting business use of home was \$18,239.00. CP 1315—1329. His total income was \$18,239 (business profit) plus \$3851 (W-2 income) = \$22,090.00; his monthly gross income was \$1840.83, for what the mother alleges was "part time" work.

The cash-flow claimed by the mother in Mr. Vetter's bank accounts during 2008, (approximately \$62,000) was explained by the W-2 income in 2008 of \$3851, the gross business receipts of \$34,611, and the \$22,000 in loans from his father = \$60,462. Thus, all of the father's source documents were consistent with the income that he reported.

On March 5, 2010, Commissioner John Curry entered Findings and Conclusions CP 595—599, that failed to make any findings regarding whether Mr. Vetter purposefully suppressed his income to avoid child

support, or any other legal basis for imputing income at a rate that he proved is not in fact an hourly rate that is possible for a 40 hour week. No evidence was cited as a basis for the court's decision CP 605.

The Court factually mis-stated Mr. Vetter's arguments, and his evidence as presented to the court:

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

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

ROP 10-11.

The responsive brief labels the decision by the trial court as fair because the court imputed both parties at a high level, making the following comments:

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

As to the father's income, Commissioner Ponomarchuk ruled the petitioner is on notice his income for support

purposes shall be based on full-time employment. As such, I find that he earns \$60 per hour at 40 hours per week. His gross income is \$10,400 per month.

ROP 11.

However, the responsive brief does not respond to the father's arguments, that "tit for tat" cannot be the basis for a ruling; each party has the right to have income computed based upon his or her financial circumstances.

LEGAL ANALYSIS: RESPONSE TO APPELLEE JAMIE STEELE'S POINTS IN THE RESPONDING BRIEF.

THE RESPONDENT STATES THE TRIAL COURT SHOULD BEAFFIRMED BECAUSE THE ONLY ASSIGNED ERROR IS THE IMPUTATION OF INCOME.

Ms. Steele reasons that there is no adequate preservation of objections because Mr. Vetter did not also object to the findings of net income, combined income, the standard calculation, the residential credit, the transfer payment of zero and the equal allocation of health insurance cost.

This argument is nonsensical, since if the gross income is not correctly found or calculated, the net income, combined income, and calculation will necessarily change.

Mr. Vetter did not challenge the residential credit, as that credit has been a part of the parties' child support orders since the original divorce decree.

Further, in the conclusion of his brief, Mr. Vetter requested that the court order that his child support be recalculated on his corrected income,

preserving the residential credit, but changing the actual transfer payment, and the proportionate share of special expenses. (Opening brief at 24, 25.) Thus, Ms. Steele is simply wrong in her assertions. Rather, the error of the trial court is adequately set forth, including all the consequential changes needed in correcting the error, and that the relief requested is clear.

MS. STEELE ASSERTS THAT THE TRIAL COURT MADE FINDINGS THAT MR. VETTER WAS VOLUNTARILY UNDEREMPLOYED, AND CORRECTLY DETERMINED \$60 PER HOUR RATE OF PAY

However, Ms. Steele cites to no finding of voluntary unemployment (indeed, there is none either in the oral decision or the written court orders.) Ms. Steele seems confused regarding what a legal finding is. It is not an assumption, it is a written and disclosed factual adjudication.

Ms. Steele also provides no citation to facts of record to support her argument that the court reasonably relied upon evidence to find \$60 per hour, 40 hours per week a reasonable wage to impute. There are no such facts. Commissioner Ponomarchuck had recognized that \$60 per hour was not reasonable, and stated that income would not be imputed at that rate. It is not an issue of credibility as Ms. Steele argues—there are no facts of record to suggest that \$60 per hour is an appropriate wage figure.

If the court were to use billable time to compute personal income for a professional, then attorneys who bill \$250 per hour would earn \$10,000

per week, and over \$40,000 per month, or more than \$480,000 per year. It would seem absurd to argue that all attorneys can make half a million dollars per year based upon this type of calculation, but this is exactly the theory arbitrarily applied to Mr. Vetter by the trial court. We are all aware that billable time is not the same as the hours that are actually spent in a business and are subject to overhead.

Mr. Vetter's reasonable arguments and his tax returns and financial records support that he is accurately reporting his income. The court's calculation of \$60 per hour, annualized, (multiplied by 2080 hours) results in \$124,800 per year—almost twice the highest total deposits into Mr. Vetter's accounts in 2008, which were just over \$62,000, and which included \$20,00 in family loans. The court's finding is an arbitrary figure not supported by the evidence and the responding brief does not provide any contrary facts of record with which to support that calculation.

MS. STEELE ARGUES THAT THE TRIAL COURT WAS CORRECT
IN IMPUTING INCOME TO MR. VETTER.

First, Ms. Steele relies upon the false premise that the court made a finding that Ms. Vetter was voluntarily under-employed. It did not.

Then, Ms. Steele correctly cites in her brief to RCW 26.19.071 (6), requiring that in order to impute income to a parent who is employed fulltime, it must make written findings of voluntary underemployment for

the purpose of avoiding child support.

Ms. Steele then argues that the court made the statutorily required findings, but she does not and cannot cite to any in her brief at page 26, top. By agreeing that the standards cited by Mr. Vetter control this case, and being unable to cite to how the court complied with the statute, Ms. Steele is admitting that this appeal is meritorious.

a. Ms. Steele argues that Mr. Vetter was voluntarily underemployed.

She (without citing to the record) claims that Mr. Vetter admits to being underemployed. This is not true. Although he admitted the obvious--that his part time job at the car lot paid less than he would be paid as a musician-- he also provided the reasonable explanation that during the hours he worked at the car lot, he was unable to secure work giving lessons since his students attended school during those hours. This fact was not contested, and there were no other contrary facts of record. The facts do not necessitate a finding of voluntary underemployment, and in fact no such finding was made.

b. Ms. Steele argues that Mr. Vetter was not gainfully employed on a full time basis.

Ms. Steele argues that the car lot employment is not “gainful.” This is just a flip side of the argument that the court should impute Mr. Vetter at

his usual income, and not at another occupation. It is irrelevant unless the court decides that income should be imputed, and the court cannot do that unless it finds that Mr. Vetter is purposefully avoiding child support.

Those findings were not made.

MS. STEELE AVOIDS ANALYZING THE CORRECT IMPUTATION PROCESS PER STATUTE, BY CALLING MR. VETTER'S OPENING BRIEF ANALYSIS A "NEW ARGUMENT"

The subject of this appeal is whether or not the court had before it evidence adequate to impute income, and if so, how it should have been done. That is not a new argument. It is part and parcel of the legal analysis that the court had to, per statute, enter into in order to compute child support.

None of the parties argued that Mr. Vetter's part-time work related to music was not in his field, nor that it was not compensated at a reasonable rate. After business expenses, he netted about \$21 per hour assignable to his profession. (\$18,239 (net business profit) plus \$3850 (W-2 from Music Northwest)=\$22,089 / 52=\$424.79 per week, / 20 hours =\$21.24 dollars per hour) (The opening brief estimated \$25 per hour)

The statute requires imputation at fulltime income. The two options presented in this appeal are that either the court could not impute income because Mr. Vetter was gainfully employed on a fulltime basis (in which event he would earn \$424.79 per week for part of his income and about

\$200 per week for the lower compensated income), or, if the court were to find that he was underemployed in order to avoid child support, then the court must impute at fulltime, that is, doubling the income that he currently makes at his profession. This would result in \$850 per week or \$3570 per month (\$850 x 4.2 weeks per month) [Note: another way to calculate an imputed income would be to add the business profit plus W-2 income, double it to \$44,180 and divide by 12, for \$3681.67 monthly—the method used in the opening brief at page 15.] In either event, this is gross and not net and still subject to mandatory personal tax withholdings.

Thus, even if the appeals court rules that there is an implicit finding that justifies imputation, the trial court was required to follow the statute in deciding how to impute income. The court must follow the statutory provisions in order of priority.

The first priority is that the court must impute full-time earnings at the current rate of pay. RCW 26.9.071 (6) (a). That would be to double the un-disputed earnings in 2008 (and considering the consistent gross receipts from 2009) that reflect the sum of the business income after business deductions and before the tax shelter deduction of business use of the home, plus the Music Northwest W-2 income. Since there is proof of the current rate of pay after business deductions, the court's inquiry should

have ended here, and the fulltime income should have been imputed at \$3570 per month. (or \$3681.67 per the opening brief method, based upon actual 2008 income, doubled, and divided by 12 for a per month figure.)

However, Jaimie Steele argues that the court should have reached RCW 26.9.071 (6) (c), which allows imputation to full-time(if sections (a) or (b) do not apply to the case) based upon a past rate of pay where information is incomplete or sporadic. She argues that because Mr. Vetter has in the past earned \$60 per hour, therefore under this statute the court could find that Mr. Vetter's income is \$60 per hour at fulltime. This analysis is faulty. It is faulty because \$60 is not a past "rate of pay", but a present or past billable time hourly rate that is subject to business deductions. Failing to allow business deductions violates the mandatory standards for finding income. RCW 26.19.071 (5) (h).

It is faulty because the full-time multiplication of \$60 x 4.2 weeks resulting in \$10,080 per month, or \$120,960 per year, an amount that without question Mr. Vetter has never come close to earning. There is no evidence that there is a market for this rate of earning 40 hours per week when Mr. Vetter's students attend school Monday through Friday until 2 or 3 PM. This amount is nonsensical unless every person is to be randomly assigned income at the highest hourly rate his profession can earn.

Attorneys, real estate agents, and others who can yield high incomes in certain cases would be assigned incomes of hundreds of thousands or millions of dollars per year. The extension of this argument would make the child support calculations oppressive because they would not be based upon the real world in which parents must live.

Ms. Steele's argument is also faulty because even if the court does not accept (under RCW 26.19.071 (6) (a)) that Mr. Vetter's current rate of pay is equal to part time income documented for 2008, then the same data must be used in applying subsection (c) for a past rate of pay. The question becomes, what is the correct rate of pay based upon the evidence, whether applied under subsection (a) or (c). Once again, Ms. Steele avoids the important central question—how can she (or the court) justify assigning 40 hours per week at \$60 per hour? The question is just as concerning under subsection (c). The answer is, obviously, \$60 per hour fulltime without allowing for billing vs. administrative/overhead time is unreasonable and not supported by the record. Mr. Vetter's "past rate of pay" is fully documented by the 2008 tax returns and other financial records that account for the approximately \$62,000 in Mr. Vetter's accounts, and result in the same computation as above, that is, a gross income of \$3570 per month. In conclusion, even if the court finds that

Mr. Vetter provided “incomplete and sporadic” data, (although he provided his bank and financial records through 2009 for a March 5, 2010 trial which were consistent with past years’ income) the ‘past rate of pay’ in 2008, would control as the data used under RCW 26.19.071 (6) (c).

Ms. Steele also argues that Mr. Vetter cannot argue a computation of his income from tax returns because at trial the parties focused upon the bank deposit income. Mr. Vetter is not changing his argument from trial. His tax records were in evidence at trial. His argument is that his bank deposits are consistent with the income reported in his tax returns, and thus he argues both based upon his bank accounts and his tax returns, that his reports to the court are honest and consistent. This argument is not a change in theory, but a response to the red herring raised by Ms. Steele—her claim that Mr. Vetter is being dishonest with the court because of the funds in his bank account that supposedly exceed his reports of income on his tax returns, is shown to be false by his demonstration of the facts and records that the income is consistent whether measured by bank records or by tax returns. This is not a case of credibility as claimed by Ms. Steele. It is a case in which all financial records are consistent and there is no competent evidence of record justifying the computation the trial court made. The only credibility issue is regarding Ms. Steele—who represented

to the court in December 2009, that her sole income was unemployment compensation, and then admitted to receiving \$20,000 during those months in her updated financial disclosures in 2010.

In a related argument, Ms. Steele wants to prevent Mr. Vetter from demonstrating how his income disclosures are accurate by referring to tax records and bank records, by claiming that Mr. Vetter is precluded from citing business expenses because he did not list business expenses on his financial declaration. However, Mr. Vetter obviously used the financial declaration to set forth his gross personal income as opposed to gross business income, and did not intend to represent (untruthfully) that he had no business expenses.

Finally, Ms. Steele argues that Mr. Vetter is not allowed to argue to this court how income should be imputed to him, since he opposed imputation at trial. Obviously, Mr. Vetter continues to oppose imputation, but he is also entitled to argue in the alternative, that if it is found that income should be imputed, then it must be imputed per the statutory standards and consistently with the evidence.

The trial court's decision was erroneous, both in determining to impute income and in the manner in which income was imputed, both errors of which were claimed initially in this appeal.

MS. STEELE ATTEMPTS TO DISTINGUISH THE *Shellenberger*

CASES, AND CANNOT CITE ANY OTHER INCONSISTENT CASES

The weight of judicial authority interpreting the imputation statutes supports Mr. Vetter's position, and in fact, other than trying to distinguish the facts of one of the cases cited in Mr. Vetter's brief, , *In re Marriage of Shellenberger* 80 Wn. App 71m, 96 P.2d 968 (1995) and citing one other case, *In re Marriage of Foley* 84 Wn. App 839, 930 p.2d 929 (1997), Jamie Steele obviously agrees with Mr. Vetter's analysis since no contrary cases are cited.

Ms. Steele's discussion of *Shellenberger* misses the relevant holdings of that case. First, that case stands for requiring the court to impose only income that the parent is capable and qualified to make. Here, although Mr. Vetter could make a business hourly rate of \$60 per hour, he could no more earn \$60 per hour for 40 hours per week than every attorney can earn \$250 per hour for 40 hours per week. In short, the court must find a realistic hourly rate a person is actually capable of making, that is, taking into account all of the other hours a professional works, i.e., traveling, practicing, preparing.

Secondly the *Shellenberger* case, perhaps more importantly, stands for the requirement for the court to make findings. The Court of Appeals would not recognize "implicit" findings as Ms. Steele wants the court in this case to do. Ms. Steele cannot make an excuse for the trial court

failing to do its job in making written findings to support its ruling.

The only case cited by Ms. Steele, *Foley*, strongly supports Mr. Vetter's position. The amount of additional income imputed to a parent who did not work fulltime was modest(only \$250 more than the \$1600 he actually earned.) The parent was a self employed contractor, and certainly the court did not impute him at the basic contractor's rate that he commanded for the jobs he did. The amount of income imputed to the parent was obviously significant to the appeals court, as it compared the amount imputed to the standard set in the statute, that is, the census figures that are also contained in the Child Support Guidelines. This figure is to be used by the court, in order of priority, if the court is unable to document a higher rate of pay and if minimum wage is not an appropriate amount for imputation. RCW 26.19.071 (6) (e). In Mr. Vetter's case, he is not arguing that census figures should have been used as they would be significantly less than his documented earnings capability. The *Foley* case supports one of Mr. Vetter's key points, that the amount of imputed income must reflect findings that are reasonable and based upon evidence of record and consistent with other statutory imputation.

JAMIE STEELE'S ARGUMENTS REGARDING THE VIOLATION
OF DUE PROCESS AND THE APPEARANCE OF FAIRNESS
ASSIGNMENT OF ERROR WEAK AND MEANINGLESS

Ms. Steele admits at other places in her brief that there is no need to

preserve issues of manifest Constitutional error at the trial court level. More importantly, how can a litigant preserve an appearance of fairness argument when he does not know until the trial is underway that the court is exhibiting an appearance of fairness or procedural due process issue? As pro se, Mr. Vetter was not equipped to articulate to the court that his position was being mis-apprehended in a caustic and prejudicial way. He attempted to correct the misstatement of his arguments in a respectful way, but was dismissed by Commissioner Curry.

Ms. Steele agrees with the standards for the determination that the appearance of fairness doctrine has been violated, that is, that a reasonable person who is impartial would be left with the impression that a person did not receive a fair and impartial hearing. She argues that Mr. Vetter did not bear his burden of proof that his trial lacked the impartiality to which he was entitled. She bases this on two main arguments:

First, she argues that the case cited by Mr. Vetter, *State v. Dominguez*, 81 Wn. App 325,329, 914 P.2d 141 (1996), articulates too high a standard for demonstrating appearance of fairness for Mr. Vetter to prove on this records. In *Dominguez*, the allegation of appearance of unfairness was related to the parties' prior relationship, and not to the conduct of the trial. In that case, the appeals court reviewed the trial transcript and concluded that the trial was conducted in a fair and evenhanded manner and therefore

that there was no evidence of actual bias or of a violation of the appearance of fairness. Importantly, the court considered it critical to review the trial transcript for evidence of bias. In the case at bar, however, a review of the videotape of the trial shows an emotional, lecturing Commissioner, who admits that he makes his decisions based upon his anger at the cross-allegations of the parties. Although Mr. Vetter had no reason to expect that he would not be provided an impartial forum for his trial, (as there was in the *Dominguez*) the critical part of the analysis is whether or not the bias can be demonstrated of record. Here, it is obvious.

Ms. Steele then argues that the commissioner supposedly treated both parties “the same” by imputing income to both. She does not, however, cite any law that entitles the commissioner to deviate from the statutory requirements in order to impute two parents almost identical income, despite the disparate earning histories, and different professions. The record is clear in depicting the father as consistently lower-earning. The court is not treating the parties “equally” by granting each of them their argument to maximize the other’s income. In the mother’s case, the ruling was appropriate, because of her December, 2009 false statements to the court regarding her unemployment, because of her earnings history and because she was told in December 2009 by Commissioner Ponomarchuk to provide a work search to prevent this imputation. The mother did not

cross appeal the imputation of her income because it was fair and supported by the record. In the father's case, the ruling was not fair, not supported by the record, and he did not receive the statutory considerations for his business expenses and other financial circumstances. The court failed to cite the evidence upon which it imputed at the rate of \$120,000 + annually, failed to make findings based upon evidence of record that he was voluntarily underemployed to avoid child support, and failed to make any findings, as required by statute. It follows that the court's judgment exhibits bias and bears the appearance of unfairness. That the Commissioner openly argued with Mr. Vetter and accused him falsely of wanting to work only part time and wanting the court to assign to him full time income of \$10 per hour, adds to the impression of bias. While the court said it knew how to calculate income, it made no reviewable findings regarding how it came to its conclusions.

Ms. Steele echoes the trial court's attitude by claiming that, in the end, the court's ruling makes no difference, since no transfer payment is ordered. However, Mr. Vetter had previously been entitled to a transfer payment of more than \$400 per month. This new ruling substantially changed his child support burden. It increased his percentage of insurance and daycare and other special expenses. For a parent who cannot afford such expenses, this is a serious hardship. It is indeed a novel argument to

argue that because a father is not ordered to affirmatively pay child support, an inaccurate calculation results in no damage. It seems a bit insensitive. I wonder if that argument would have been made if it was the mother who needed a transfer payment because of the father's consistent, higher earnings history and ability?

Mr. Vetter is a good father who has fought to keep a shared custody arrangement so that he can participate in raising his daughter. He has a right to a correct child support calculation that will result in the appropriate transfer payment based upon correct calculation of net income, percentages, and relative financial burden on each parent.

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

Ms. Steele characteristically attempts to dodge the attorney fee issues by calling it a "new issue" although admitting in her brief that Mr. Vetter requested fees at the trial level. He did so request. CP 347.

Then, while arguing that Mr. Vetter failed to ask for fees on a proper basis, Ms. Steele admits that Mr. Vetter's basis for requesting fees was to repay tens of thousands of dollars that he was unable to afford and was loaned by his family, and to pay additional \$14,000 plus to his attorney whose billing was outstanding. In other words, he had need. As referenced throughout this appeal and the record, Mr. Vetter documented

his need. Ms. Steele's ability to pay was also documented, per her years of financial history of earning in excess of \$100,000 annually.

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

Ms. Steele then argues that Mr. Vetter does not have the inability to pay because he is voluntarily underemployed, and could earn as much as the mother. As set forth in the body of the brief and this reply, even if Mr. Vetter earned double what he has historically earned part time, his total income would still be only roughly 50% of Ms. Steele's income.

In this case, the court signed erroneous Findings of Fact that recite that no fees were requested, and the court erroneously denied fees to the father. Instead, fees should be awarded at trial and on appeal.

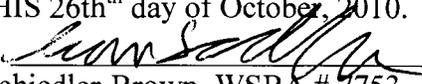
CONCLUSION

The trial court failed to comply with RCW 26.19.071 in allowing Mr. Vetter his business deductions, correctly determining his current income, and imputing under the statutory priorities to a full-time finding of income. The court abused its discretion by instead adopting an arbitrary calculation that is not supported by the facts of record. Further, the court failed to provide any written or oral findings citing to evidence that justified its findings, and instead, treated Mr. Vetter rudely, falsely

accused him of taking positions he did not take in his materials, and challenging him and lecturing him. In the end, the court made a ruling for the purpose, according to Commissioner Curry, of treating the parties the way he perceived they treated each other— a sort of ‘tit for tat.’ Mr. Vetter was deprived of a ruling based upon factual findings reflected by evidence in the record, as required by the applicable statutes or by notions of Due Process or the Appearance of Fairness Doctrine.

The Court of Appeals should reverse and correct Mr. Vetter’s gross monthly full-time income to \$2693.25 CP, 887, or if it finds a basis in the record for imputation, imputed income to \$3681.67. The Court of Appeals should order that the child support for the parties, and their respective percentages, be recalculated with the same credits for 50/50 residential time as previously (which are the same in 1994 and in the current order) and that the special expenses for the child be shared at each party’s proportionate share of income. Further, the court of Appeals should award attorneys fees at trial and on appeal.

RESPECTFULLY SUBMITTED THIS 26th day of October, 2010.


Jean Schiedler-Brown, WSBA # 7753
Attorney for Appellant Nathan Vetter