

66044-6

66044-6

NO. 66044-6-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL - 7 PM 3:59

KENNETH GREEN,

Appellant,

v.

CHERYL GREEN,

Respondent.

REPLY BRIEF OF APPELLANT

Law Offices of Dan R. Young
Attorney for Appellant
1000 Second Avenue
Suite 3310
Seattle, WA 98104
(206) 292-8181

TABLE OF CONTENTS

| | |
|---|-----------|
| I. REPLY TO RESPONDENT’S ARGUMENT | 1 |
| 1. This Court Should Reject Respondent’s <i>Ad Hominem</i> Attack on the Husband. | 1 |
| 2. Most of the Wife’s Substantive Arguments Are Without Merit. | 4 |
| A. The Husband Has a Support Obligation (RB 8). | 4 |
| B. There Is No Indication That the Husband’s Credibility—or Lack Thereof-- Had Anything to do With the Imputation of Income to Him (RB 8-9). | 5 |
| C. The Trial Court Did Not Properly Consider the Imputation Factors in RCW 26.19.071(6) (RB 9-10). | 8 |
| D. The Trial Court Improperly Considered the Husband’s Pre-Trial Declaration, Not Admitted into Evidence, Concerning His Income (RB 10-11). | 12 |
| E. The Husband Was Not Required to Object to the Court’s Specific Consideration of the Husband’s Pre-Trial Declaration. | 17 |
| F. There Was No Substantial Evidence Supporting the Trial Court’s Determination that the | |

| | |
|--|-----------|
| Husband Was Voluntarily Unemployed (RB 12-13). | 19 |
| G. The Trial Court Was Not Statutorily Required to Impute Income to the Husband Under the Facts of This Case (RB 13). | 21 |
| H. The Husband Withdraws His Extrapolation Argument (RB 13-14). | 22 |
| I. The Trial Court Should Have Used the Husband's Actual Income Instead of Imputing Income. | 22 |
| 3. The Wife Should Not Be Awarded Attorney's Fees (RB 15-16). | 23 |
| I. CONCLUSION | 25 |

TABLE OF AUTHORITIES

TABLE OF CASES

| Case | Page |
|--|--------|
| <i>In re Marriage of McCausland</i> , 159 Wn.2d 607, 152 P.3d 1013 (2007) | 10 |
| <i>Advocates for Responsible Development v. Western Washington Growth Management Hearings Board</i> , 170 Wn.2d 577, 580, 245 P.3d 764 (2010). | 24 |
| <i>Clarke v. Clarke</i> , 112 Wn. App. 370, 375-76, 48 P.3d 1032 (2002) | 10 |
| <i>Dodge v. Stencil</i> , 48 Wn.2d 619, 622, 296 P.2d 312 (1956) | 15 |
| <i>In re Marriage of Brockopp</i> , 78 Wn. App. 441, 446 n. 5, 898 P.2d 849 (1995) | 11 |
| <i>In re Marriage of Goodell</i> , 130 Wn. App. 381, 390, 122 P.3d 929 (2005) | 21, 22 |
| <i>In re Turay</i> , 153 Wn.2d 44, 101 P.3d 854 (2004), <i>cert denied</i> , 544 U.S. 952, 125 S.Ct. 1704, 161 L.Ed.2d 531 (2005) | 17 |
| <i>Matter of Disciplinary Proceedings Against Dann</i> , 136 Wn.2d 67, 87 fn 4, 960 P.2d 416 (1998) | 2 |
| <i>Seidler v. Hansen</i> , 14 Wn. App. 915, 918-20, 547 P.2d 917 (1976) | 19 |
| <i>State v. Superior Court In and For Thurston County</i> , 92 Wash. 16, 30, 159 P. 92 (1916) | 2 |
| <i>Swak v. Dept. of Labor & Industries</i> , 40 Wn.2d 51, 53, 240 P.2d 560 (1952) | 16 |
| <i>Washington State Farm Bureau Federation v. Reed</i> , 154 Wn.2d 668, 677, 115 P.3d 301 (2005) | 16 |

| Statutes | Page |
|------------------------|-------------|
| RCW 26.09.080 | 2 |
| RCW 26.09.100 | 2 |
| RCW 26.09.191(3) | 4 |
| RCW 26.19.071(6) | 8, 10, 21 |
| RCW 50.20.010 | 11 |
| RCW 50.20.040 | 11 |
| RCW 50.20.240 | 11, 12 |

| Civil/Evidentiary Rules | Page |
|--------------------------------|-------------|
| ER 106 | 14 |
| RAP 10.3(a)(5) | 6 |

| Administrative Regulations | Page |
|-----------------------------------|-------------|
| WAC 192-180.060(2) | 12 |
| WAC 192-180-015 | 11 |
| WAC 192-180-020 | 11 |

I. REPLY TO RESPONDENT'S ARGUMENT

1. This Court Should Reject Respondent's *Ad Hominem* Attack on the Husband.

The wife claims that during the marriage the husband committed “multiple acts of abuse and domestic violence” (RB 2);¹ exhibited “bad behavior and abusive conduct” (RB 3); was “controlling, demeaning, bullying and called [his wife] a ‘Whore,’ ‘stupid’ and ‘fat’” (RB 4); was “physically abusive to a family pet, throwing a small poodle into the headboard of their bed . . . , forced sex on [his wife] . . . and was verbally aggressive and abusive to their daughter . . .” (RB 4-5); “had choked [the wife] before, when their daughter was three or four years old (RB 5); choked the wife a second time “when [the husband] put his arm around [the wife’s] neck from behind, cutting off her air so she could not breathe (RB 5); following his “domestic violence arrest, [the husband] had sufficient funds to live in motels, stayed at a friend’s vacant rental, and travelled [sic] to Las Vegas between court dates’ (RB 6); hid money in Washington Mutual Bank accounts in his name only without the knowledge of the wife (RB 6, fn 6); and finally [the husband] was “mean to his wife and child” (RB 16).

The conclusion the wife obviously wishes this Court to draw is that

¹“RB” indicates the respondent’s brief, “AB” the appellant’s brief.

the husband is so mean, abusive and aggressive that he should get no relief in this Court, regardless of the legal merits of his appeal.

There are three responses to this over-arching *ad hominem* attack on the husband.

First, *ad hominem* arguments are not persuasive, as they do not address the merits of the underlying issues. See, *Matter of Disciplinary Proceedings Against Dann*, 136 Wn.2d 67, 87 fn 4, 960 P.2d 416 (1998); *State v. Superior Court In and For Thurston County*, 92 Wash. 16, 30, 159 P. 92 (1916). The issues on this appeal are whether the trial court considered the relevant factors in determining the husband's income, and whether there was substantial evidence supporting the imputation of income to the husband. Clearly, whether or not the husband was mean and abusive to his wife and child during the marriage has no legal connection to whether income should be imputed to him. See RCW 26.09.080 (the court in a dissolution action shall dispose of the property and liabilities of the parties "without regard to misconduct"); RCW 26.09.100 (the court shall order child support to be paid "after considering all relevant factors, but without regard to misconduct . . ."). By repeating and emphasizing the above allegations of misconduct, the wife is essentially asking this Court to blatantly disregard the clear policy of these statutes to enter child support orders "without regard to misconduct."

Second, the wife's allegations are contested. She cites her own

testimony for these allegations, but ignores the husband's testimony. The husband, for example, denied saying that his wife was stupid and fat (RP 267); denied the allegations that he choked his wife (RP 271-72); denied that he forced sex upon his wife (RP 275); and denied that he struck or injured the family poodle (RP 275-76).

The husband stated that his Washington Mutual Bank account statements came to the family home and he made no effort to hide the monies (RP 22). He testified that he withdrew substantial amounts of money from his Washington Mutual savings account "after being wrongfully arrested for domestic violence" and that the monies were "spent, gambled away, used for living expenses, et cetera" (RP 66).² The husband testified that he "was traumatized after being removed from [his] home and arrested and found that [his] wife was using [his] daughter to facilitate [his] removal for purposes of facilitating her extramarital affair" (*Id.*).³ The wife admitted that her husband had no history of physically abusing the daughter (RP 208). The husband explained that the daughter was "quite spoiled, as are most children that grow up as only children, because they don't have to share anything and they

²The trial court allocated to the husband the funds in the Washington Mutual accounts (now Chase accounts) saved by the husband (CP 154). The husband does not appeal the property division of the trial court's decision.

³The husband's mother lives in Las Vegas and he spent substantial time with her there while the criminal action against him was pending.

usually get everything that they want because they are the only child” (RP 92).

Third, the trial court never made any specific findings regarding the wife’s allegations. The allegations were therefore never established at trial. The trial court made no findings on these issues for the obvious reason that they were irrelevant to the trial court’s disposition of the assets and liabilities of the marriage, the entry of a child support order or the entry of a parenting plan.⁴

As an aside, the husband could talk about the wife’s having an affair during the marriage (RP 34-35, 66, 86, 90). The wife never denied having the affair. But again, her having the affair is certainly “misconduct,” but obviously an irrelevant factor in deciding this appeal.

2. Most of the Wife’s Substantive Arguments Are Without Merit.

The husband will address seriatim, in the same order as addressed by the wife, the wife’s substantive arguments, most of which have no merit.

A. The Husband Has a Support Obligation (RB 8).

The husband agrees that he has a legal obligation to financially support his daughter.

⁴The parenting plan provided for no contact between the father and the daughter “unless and until” a reconciliation therapist recommended contact, because of factors set forth in RCW 26.09.191(3) (CP 130). The husband does not raise on appeal any issues relating to the parenting plan.

B. There Is No Indication That the Husband’s Credibility—or Lack Thereof--Had Anything to do With the Imputation of Income to Him (RB 8-9).

The wife argues that the trial court, “after considering [the husband’s] credibility . . . , imputed income to [him] based on the trial and his under-oath income statement to the court” (RB 8). But there is no evidence in the record that the trial court specifically considered the husband’s credibility on the issue of imputation of income, or any other issue, for that matter. The trial court may have considered the husband’s credibility, as well as the wife’s, but the problem with the wife’s argument is that there was no trial court testimony or evidence upon which the trial court could make a credibility determination with respect to imputation of income. There was no disputed testimony on that subject. If the wife had presented contrary evidence, the trial court could have adopted the wife’s evidence. But where the husband’s testimony is reasonable, and not disputed, the trial court cannot simply ignore it without a basis.

The trial court’s factual findings make it clear how the trial court arrived at its conclusion that income should be imputed to the husband:

Father has advanced degrees and a history of progressively more responsible employment. His record of employment inquiries shows a total of only two in-person contacts over the last 18 months. He is voluntarily unemployed.

(FOF 2.20; CP 136). This chain of reasoning is completely wrong: the father has no “advanced degrees”; there is no evidence in the record that the father has “a history of progressively more responsible employment”; and his record of employment inquiries show three times as many in-person contacts as cited by the trial court. If the trial court truly decided to impute income to the husband on the basis of a credibility determination, the wife could surely cite what *testimony or evidence* the trial court disbelieved to arrive at its imputation decision based on credibility. This the wife has not done and cannot do.

The wife argues further that the trial court imputed income to the husband “based on the trial and his under-oath income statement to the court” (RB 8). The words “based on the trial” without a specification in the record of where the admissible evidence can be found is tantamount to a concession that there is no such evidence. The wife’s factual statements on appeal must be supported by a citation to facts contained in the record. RAP 10.3(a)(5).

Thus disregarding the language “based on the trial,” one is left with the “under-oath income statement to the court.” The wife argues that this “representation was [the husband’s] factually based admission about the level of his employment income which *he was historically capable of earning*” (RB 8).

But what the husband was *historically capable of earning* is irrelevant

in the context of the worst recession since the Great Depression. In ordinary times it is plausible to suppose that a person can earn what he or she historically earned. But during times of economic upheaval and uncertainty, with hundreds of thousands of people out of work in the State of Washington alone,⁵ it is neither plausible nor reasonable to suppose that a worker downsized out of a job can readily get another job paying the same amount the person was *historically capable of earning*. Millions of people throughout the country are out of work now, and to say that each one of them involved in a divorce should have income imputed to them at their historical earning level is absurd.

What is significant is what the person is *capable of earning now*. That is either what the person is actually earning, or the unemployment benefit equivalent. Unless, of course, it can be shown that the person turned down a higher-paying job, or refused to apply for a higher-paying job, or ignored a higher-paying opportunity. But there was no such evidence here. The wife never presented any expert or lay witnesses on that subject, although she did use an accountant as an expert witness to provide an opinion

⁵The unemployment rate in Washington peaked at 10% in December, 2009; was 9.6% in May, 2010; and was 9.1% in May, 2011. See, <http://www.deptofnumbers.com/unemployment/washington/> and <http://www.bls.gov/bls/unemployment.htm>.

as to the value of her government pension (RP 129-136).

Moreover, the “factually based admission” the wife refers to was not an admission in court, but was contained in a document that was never admitted in evidence at trial, i.e., the husband’s pre-trial declaration submitted to a court commissioner in opposition to the wife’s pre-trial motion that child support be set based on imputed income. This issue is addressed in paragraph 2 D below.

Finally, the husband does not maintain that he is unemployable so income *cannot* be imputed to him under the statute. What he does maintain is that for income to be imputed to him, there must be substantial evidence in the record to support the imputation. Such substantial evidence is lacking in this case.

C. The Trial Court Did Not Properly Consider the Imputation Factors in RCW 26.19.071(6) (RB 9-10).

RCW 26.19.071(6) requires the court to determine whether a person is voluntarily unemployed or not “based upon that parent’s work history, education, health, and age, or any other relevant factors.” RCW 26.19.171(6).

Under the “education” prong, the level of a parent’s education would clearly be a relevant factor in determining whether a person was voluntarily unemployed. The trial court here determined that the husband had “advanced

degrees” (CP 136). This determination is not ambiguous, as argued by the wife (RB 9), but is simply wrong. “Advanced degrees” in the plural can mean only one thing: a person has more than one degree beyond an undergraduate degree. An “advanced” degree is, by definition, a degree that is advanced, i.e., a graduate degree more “advanced” than the undergraduate degree. So the trial court based its imputation decision in part on its belief that the husband had two or more degrees beyond an undergraduate degree. This is manifestly wrong: the husband has only an undergraduate degree in business administration (RP 24) and no advanced degree at all.

The trial court also mentioned the husband’s “history of progressively more responsible employment” (CP 136). Yet the wife provides no citation in the record that substantiates this conclusion. The reason is that there is no such evidence. The husband and wife both testified at the trial about the *different employers* that the husband had over the years (RP 25), but the husband testified that “all” of this work was auditing work (RP 25). The trial testimony establishes only that the husband worked at these different companies, not that he got promoted, took on more responsibility, managed employees, rose through the corporate ranks, or even had any different responsibility at one company rather than another. Thus, the trial court’s conclusion that the husband had a “history of progressively more responsible employment” (CP 136) is not only not supported by substantial evidence, it

is not supported by *any* evidence admitted at trial.

The wife tries to argue that the trial court's erroneous conclusions about the husband's "advanced degrees" and "history of progressively more responsible employment" are not so significant that the trial court's decision to impute income to the husband "should necessarily fail" (RB 9). But the only other "relevant factor" under RCW 26.19.071(6) to support the trial court's conclusion that income should be imputed to the husband was the trial court's assertion that the husband's "record of employment inquiries shows a total of only two in-person contacts over the last 18 months" (CP 136). This conclusion is manifestly in error (AB 13).⁶

The wife argues that *Clarke v. Clarke*, 112 Wn. App. 370, 375-76, 48 P.3d 1032 (2002), cited by the husband, was "reversed by" *In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007) (RB 10 fn 7). However, *McCausland*, dealing with extrapolation of income, did not reverse, overrule or question the proposition for which the husband cited it, i.e., that voluntary unemployment is unemployment that is brought about by one's own free

⁶There was no evidence before the court that an accountant should reasonably have a minimum of a certain number of in-person contacts within a given time period. There was no evidence that the husband voluntarily sought to reduce or limit the number of in-person contacts, or avoided in-person contacts so he would be less likely to obtain employment. The trial court's manifestly erroneous findings simply cannot support imputation of income, much less constitute substantial evidence of it.

choice and is intentional rather than accidental (AB 10).⁷ No evidence was presented at trial that the husband's unemployment was brought about by his own free choice and was intentional, rather than being an artifact of a corporate merger and generally bad economic times for many people.

Finally, the wife argues that the husband's job-search log (Ex. 12) is "self-serving" and is "the bare minimum required to ensure his continued unemployment benefits" (RB 7-8). This argument is unavailing.

First, the record-keeping requirements are set forth in WAC 192-180-015. The evidence must demonstrate contacts with at least three employers per week. RCW 50.20.040. If such requirement is not satisfied, the evidence must establish "documented in-person job search activities at the local reemployment center at least three times per week." *Id.* An individual is disqualified for benefits if the commissioner of ESD finds that the individual has failed, without good cause, either to apply for available, suitable work when directed, or to accept suitable work when offered the individual. RCW 50.20.010. ESD is required by law to have a job search monitoring program. RCW 50.20.240. An individual's job search activities may be monitored and verified. WAC 192-180-020. An individual who has received five or more weeks of unemployment benefits must provide evidence of seeking work.

⁷The husband also cited *In re Marriage of Brockopp*, 78 Wn. App. 441, 446 n. 5, 898 P.2d 849 (1995) for the same proposition.

RCW 50.20.240. The consequences of not providing proper reporting are spelled out in Chapter 192.140 WAC. The wife does not argue that ESD has failed in its monitoring efforts or has failed to carry out its statutory duties.

Of even greater relevance is the model by which ESD is able to identify individuals who are likely to exhaust their benefits. WAC 192-180.060(2). The model statistically combines information on an industry, occupation and other personal characteristics and labor market characteristics to generate a numerical score indicating the likelihood of exhausting benefits before finding work. *Id.* Scores may range from 0% (not likely to exhaust benefits) to 100% (certain to exhaust benefits). *Id.* This kind of information may well have constituted substantial evidence, if the wife had offered such evidence at trial. But the wife offered no such evidence. In the absence of such evidence, it must be presumed that ESD was doing its job and the husband's compliance with all ESD requirements meant that his unemployment benefits were properly received under the law and administrative regulations.

D. The Trial Court Improperly Considered the Husband's Pre-Trial Declaration, Not Admitted into Evidence, Concerning His Income (RB 10-11).

The trial court based its decision regarding the imputation of income on the husband's "admission of potential earning capacity, as stated in his

Declaration dated November 4, 2009" (Order of Child Support, ¶ 3.2) (CP 139). That declaration (CP 49-58) was neither offered at trial nor admitted into evidence (CP 119-121).

The wife tries to minimize this glaring error by arguing that the husband himself submitted the declaration, asked a court commissioner to consider the declaration months earlier in a pre-trial motion, and "should not now be heard to complain" that the trial court considered what the husband had previously told the commissioner (RB 10). The fallacy in this logic is apparent.

The trial court here had the role of determining adjudicative facts and applying the law to those facts. Apart from matters of common-sense knowledge and generally-known matters "not subject to reasonable dispute" of which the court could take judicial notice under ER 201, the trial court must determine the facts based on testimony and evidence admitted at trial. This is important for a number of reasons. One is that a party has notice of the evidentiary matters the court is considering so that he may offer other relevant evidence to correct, contradict or supplement the evidentiary matters. If a litigant has no notice of what evidentiary facts are being considered, he is deprived of his due process right to reasonably present his case.

The fact that the husband submitted the declaration earlier in response to the wife's pre-trial motion is irrelevant. Perhaps the matters stated in his

earlier declaration were honestly mistaken, or the husband learned something later that would have changed the testimony contained in his earlier declaration. Perhaps the matters in the declaration required an explanation, or at least context, to be properly understood. The husband was not given an opportunity to provide any corrections or context here. There is no indication that the trial court considered the context or other information in the declaration. “When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.” ER 106. The husband was deprived of his right to require the wife to introduce other parts of the declaration which ought in fairness to be considered with the information she is now seeking to use.

The wife argues that the husband in effect “wants the court to unring [the] knowledge bell” (RB 10). But a commissioner’s “knowledge” based on a declaration in connection with a pre-trial ruling is not imputed to the trial court. Pre-trial motions are typically decided on the basis of declarations, without oral testimony. Trials are decided on the basis of oral testimony and exhibits admitted into evidence. The wife cites no authority authorizing the trial court to cull testimony from pre-trial declarations without notice to the participants and use that evidence to decide legal issues before the court.

Thus the wife's metaphor about unringing a bell is simply inapposite: the bell rung in the commissioner's courtroom was never rung in the trial court.

The wife argues that the declaration was actually used at trial to refresh the husband's recollection about parenting, citing RP 45, 48-50 (RB 10). This is irrelevant. The declaration was not offered or admitted into evidence, and the trial court properly took into consideration the oral testimony of the husband based on his refreshed memory. The wife cites no authority for the implied proposition that use of a writing to refresh a witness's memory on one point automatically renders all the other points contained in the document admitted into evidence. ER 604, relating to the use of writings to refresh memory, does not come anywhere close to establishing the broad and novel principle summarily stated by the wife.

The wife tries to distinguish the holding in *Dodge v. Stencil*, 48 Wn.2d 619, 622, 296 P.2d 312 (1956) that a superseded pleading containing an admission against interest "must be offered in evidence before it can be used as proof of the matter contained therein" at trial. The wife claims that somehow a pre-trial declaration signed by a party is different. This is an attempted distinction without a difference. A declaration submitted by a party in connection with a pre-trial motion eight months before trial is no different in kind than a superseded pleading. They are both spent, having accomplished their purpose at the time, and can be used at trial only if

resurrected and properly admitted into evidence.

While a court may take judicial notice of records in a case, as pointed out by the wife, the judicial notice taken is of the *existence of the record*. *Swak v. Dept. of Labor & Industries*, 40 Wn.2d 51, 53, 240 P.2d 560 (1952).⁸ *Swak* does not deal with a situation where the trial court took judicial notice of adjudicative facts contained in pretrial declarations.

Moreover, the court in *Swak* provided a persuasive rationale of why courts do not take judicial notice of records of separate and independent judicial proceedings, even though between the same parties:

The decision of a cause must depend upon the evidence introduced. If a court should take judicial notice of facts adjudicated in a different case, even between the same parties, it would make those facts, unsupported by evidence in the cause at hand, conclusive against the opposing party; while if they had been properly introduced, they might have been controverted and overcome.”

Swak, supra, 40 Wn.2d at 54. That same rationale applies equally here.

The wife cites two cases for the proposition that judicial notice of matters in the record of a case after a trial may be considered by an appellate court. The first, *Washington State Farm Bureau Federation v. Reed*, 154

⁸The examples cited in *Swak* are cases where the court took judicial notice of an order granting an injunction, a judgment in favor of a codefendant, an original judgment in supplemental proceedings, notice of appointment of a guardian ad litem, an order granting leave to sue, etc. *Swak*, 40 Wn.2d at 53.

Wn.2d 668, 677, 115 P.3d 301 (2005), held that the court takes judicial notice of facts in the record establishing that the legislative enactment of an emergency clause prohibiting a referendum on certain legislation was not obviously false and a mere ruse to deprive the voters of their referendum power. The rationale of such a holding clearly does not apply to this case.

In the second case, *In re Turay*, 153 Wn.2d 44, 101 P.3d 854 (2004), *cert. denied*, 544 U.S. 952, 125 S.Ct. 1704, 161 L.Ed.2d 531 (2005), the Supreme Court granted Turay's motion to take judicial notice of the briefing filed in Turay's second personal restraint petition, in order to determine whether his fourth personal restraint petition should be dismissed as an abuse of the writ. Thus, the Supreme Court did not take judicial notice of adjudicative facts in the earlier case, but only of the record to determine what legal issues were raised. *Turay* is clearly distinguishable.

E. The Husband Was Not Required to Object to the Court's Specific Consideration of the Husband's Pre-Trial Declaration.

On June 22, 2010, during the second day of trial, the wife's counsel submitted a proposed child support order as trial exhibit 85 (Ex. 85). The proposed order was offered only as an illustrative exhibit and was admitted on that basis (RP 183). The husband's counsel did not object to it as an illustrative exhibit (*id.*). Paragraph 3.2 of illustrative Exhibit 85 contained proposed language to the effect that the amount of income imputed to the

husband was based on “Petitioner’s admission of potential earning capacity, as stated in his Declaration dated November 4, 2009.”

The trial court adopted the same language when it entered its decree of dissolution, findings of fact and conclusions of law, and child support order on August 26, 2010 (CP 146).

At the time Ex. 85 was offered and admitted as an illustrative exhibit, it was clearly inappropriate for the husband to object to the wording of the individual paragraphs of the exhibit. The wife’s counsel was examining the wife and using the document to clarify the testimony, so the trial court clearly would not have permitted the husband’s counsel to consume time at that point by objecting to the substantive provisions of the exhibit. Moreover, the trial was not over, so the wife had plenty of time to offer the husband’s declaration as an exhibit or cross examine him about the contents of it. The husband could anticipate only that if the wife wanted any information in the declaration to be considered by the trial court, the wife would properly offer the exhibit at trial or offer an extract from it.

There was no notice of presentation of the child support order. The trial court simply signed it on August 26, 2010, following trial. The wife cites no authority that under such circumstances the husband was required to advise the court in writing or some other way that the husband objected to the trial court’s consideration of evidence outside the record. The trial court

would be expected to recognize matters outside the record and not consider them.

The case of *Seidler v. Hansen*, 14 Wn. App. 915, 918-20, 547 P.2d 917 (1976) does not support the wife's position. While a party may waive objections it failed to bring to the trial court's attention, the husband here objected to the imputation of income to him (CP 115-16). That was all the objection he needed to make.⁹ If there was any waiver, it was on the part of the wife, who by not offering as evidence at trial the information she wanted considered by the trial court, waived the ability to have the court consider such information.

F. There Was No Substantial Evidence Supporting the Trial Court's Determination that the Husband Was Voluntarily Unemployed (RB 12-13).

The wife concedes that the husband became unemployed by an involuntary act, i.e., his termination from Safeco following the acquisition by Liberty Mutual (RB 12). The wife frames the issue as the husband's "continued state of unemployment for an unreasonable period of time and the absence of a reasonable effort by him to become employed, after he lost his job with Safeco . . ." (RB 12). However, there was no testimony at trial as to

⁹In *Seidler*, the party failed to make an objection and declined a continued hearing in which it could have presented objections. 14 Wn. App. at 918.

what a reasonable period of time was for a 58-year-old black downsized accountant to find a job in the current recession. The wife offered no expert witnesses or other testimony on this issue, and she had the burden of proof. It cannot be said that superior court judges have expertise in this matter, as the current recession is unprecedented since the 1930's, and judges are likely to have little experience with it. Nor are judges necessarily conversant with job opportunities in the accounting field.

Moreover, the trial court made no specific finding that the husband was unemployed for an unreasonable period of time. The trial court's imputation of income was based on the husband's supposed "advanced degrees," his supposed history of progressively more responsible employment, his having only two (instead of the six he actually had) in-person contacts in the previous eighteen months, and his earning history as set forth in a declaration neither offered or admitted at trial. These factors, as demonstrated herein, are not substantial evidence.

In addition, the husband's current involuntary unemployment was consistent with his traditional work pattern. The wife's testimony was that the husband would work someplace for a year, the employer would let him go, the husband would draw down unemployment for a year, and then repeat the pattern (RP 214). This is substantial evidence that the husband was successively let go by his employers, and he found it difficult to obtain work

again. The current pattern is consistent with that. The husband worked at Safeco, was let go, then was unemployed for a significant period of time. Only this time the current severe recession and the husband's age made it even more difficult for him to obtain employment. There was no evidence presented that the husband's continued unemployment was the result of his own free choice.

Consequently, it is apparent that the wife has failed to meet her burden to prove that the husband was voluntarily unemployed and that income should have been imputed to him. The trial court's decision in that regard is not supported by substantial evidence.

G. The Trial Court Was Not Statutorily Required to Impute Income to the Husband Under the Facts of This Case (RB 13).

The wife argues that the trial court had a mandatory obligation to impute the husband's income for child support purposes, citing RCW 26.19.071(6) and *In re Marriage of Goodell*, 130 Wn. App. 381, 390, 122 P.3d 929 (2005) (RB 13). This argument is without merit.

In *Goodell* the ex-wife voluntarily quit her job and made sporadic efforts to find another job. The father requested an adjustment in child support. The commissioner imputed income to the mother. In a motion for revision, the superior court revised the commissioner's order and did not impute income to her. The court of appeals reversed that finding, holding

that while she presented evidence of attempts to obtain employment, she did not provide any “reasonable explanation” about why she failed to hold a job. 130 Wn. App. at 390. Accordingly, the court of appeals determined that it was an abuse of discretion in failing to find her voluntarily unemployed. *Id.* There was no trial in *Goddell* and so it is difficult to evaluate the sparse facts presented in the opinion as to what attempts the ex-wife made to find employment or what her explanation was as to why she was not employed. The wife in the present case therefore cannot demonstrate any congruence between the *Goodell* case and the present case.

H. The Husband Withdraws His Extrapolation Argument (RB 13-14).

The husband withdraws his argument about an improper extrapolation of the child support economic table. The scheduled child support amount for one child with combined net income of \$9,111.38 per month is \$1,506 per month.

I. The Trial Court Should Have Used the Husband’s Actual Income Instead of Imputing Income.

Since there was no substantial evidence supporting the imputation of income, the trial court should have calculated the father’s net income based on his unemployment compensation. That should have been \$2,200 per

month (RP 27-28)¹⁰ instead of \$4,427.19 imputed to the husband (CP 139). Combining the wife's and husband's net income yields a total combined monthly net income of \$6,627.19. The basic child support obligation under the schedules is \$1,157 per month. Since his proportional share of the income is 33.20%, the husband's basic monthly child support obligation would be \$384.12 per month. This is the amount of the child support payment the trial should have and would have found if it had not imputed income to the husband.

It goes without saying that if and when the husband does get a job paying more than his unemployment compensation, the child support amount should increase based on his new earnings. But it is patently unfair to require a child support payment based on earnings which the parent does not have and could not reasonably have.

3. The Wife Should Not Be Awarded Attorney's Fees (RB 15-16).

While voluntary unemployment may be grounds for a finding of intransigence, the wife has failed to meet her burden to show that the husband was voluntarily unemployed.

In addition, the court is not required to find intransigence where a person is deemed to be voluntarily unemployed. It is important in this regard

¹⁰That is also the amount used by the commissioner in determining the temporary child support amount (CP 91, 100).

that the trial court did not award any attorney's fees to the wife, even though it found (incorrectly) that the husband was voluntarily unemployed.

The wife has also failed to show her need for attorney's fees and the husband's ability to pay.¹¹

Moreover, the husband's appeal is not frivolous. At least one debatable issue precludes a finding that the appeal as a whole is frivolous. *Advocates for Responsible Development v. Western Washington Growth Management Hearings Board*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). Most people might accept a \$731.92 child support payment for a 16-year-old daughter, if they actually received the money with which they could pay it. But the overwhelming majority of people who were involuntarily downsized from a good-paying job and who were surviving on unemployment compensation would adamantly oppose paying child support based on their former earnings when times were better. They might understandably be bitter about that. And the law shouldn't require it, especially if there were no

¹¹According to the wife's declaration, her monthly expenses exceed her net earnings. She either does not truly pay the debt listed in her declaration, or she has additional income she is not reporting. In any event, the wife could avoid a \$220 per month parking fee and other significant transportation expense by taking the bus to work, and could probably reduce the meals eaten out to less than \$240 per month, and could consider reducing her monthly cable expense of \$146 per month. Also, the fact that the wife has voluntarily incurred a lot of debt should not shift the burden of paying attorney's fees to the husband.

substantial basis upon which to base the imputation of income.

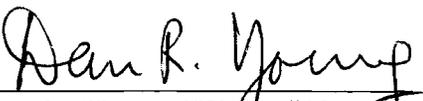
Finally, the husband is not talking about a reduction of \$288 per month. The difference in child support obligation is the difference between the \$731.92 ordered by the trial court and the \$384.12 which should have been ordered based on the husband's actual income. This difference is \$347.80 per month. Over a five-year period that difference is \$20,868. The husband's appeal does not involve a *de minimis* amount, as suggested by the wife.

II. CONCLUSION

The trial court based its imputation of income decision on a mis-evaluation of the evidence presented at trial and on evidence not admitted at trial. There was no evidence presented at trial that the husband voluntarily wanted to be unemployed. This Court should reverse the child support order entered by the trial court, and order that child support be set using the husband's income earned through unemployment.

Respectfully submitted this 7th day of June, 2011.

Law Offices of Dan R. Young

By 
Dan R. Young, WSEA #12020
Attorney for Appellant Kenneth Green

DECLARATION OF SERVICE

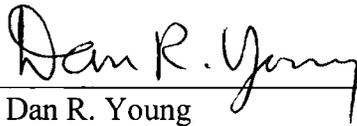
I, Dan R. Young, declare to be true under penalty of perjury under the laws of the State of Washington as follows:

1. I am an attorney representing the appellant Kenneth Green in this action.
2. On July 7, 2011, I sent by the USPS, first class mail with pre-paid postage affixed, a copy of the foregoing Reply Brief of Appellant to the following:

Lori M. Saxion, PLLC
733 First Avenue N.
Kent, WA 98032

Camden Hall, PLLC
1001 Fourth Avenue, Suite 3312-13
Seattle, WA 98154

Dated: July 7, 2011, at Seattle, Washington.


Dan R. Young