75105-1

Court of Appeals No. 75105-1-I

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

MICHAEL ROHTER,

Appellant-Respondent,

v.

MICHELLE ROHTER,

Appellee-Petitioner.

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Division I
State of Washington

Appeal from the Superior Court of Washington for Snohomish County
Case No. 14-3-02517-5
Honorable Millie Judge

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case relates to the trial court's ruling in a family law divorce action between Appellant MICHAEL ROHTER ("Mr. Rohter") and Appellee MICHELLE ROHTER ("Ms. Rohter"). Mr. Rohter disputes the amount awarded by the trial court to his former spouse, Ms. Rohter, in spousal support and child support.

On March 21, 2016, the trial court entered an order making Mr. Rohter the obligor parent to pay $656.11 per month as child support for both minor children. Ms. Rohter was made the oblige parent. On the same day, an order was also entered that ordered Mr. Rohter pay $1,000 per month to Ms. Rohter as maintenance.

II. ASSIGNMENTS OF ERROR

1. The court erred when it did not adequately take into account the evidence presented by Appellant that proved that the Appellee ex-wife could work more.

2. The trial court erred to take into account the evidence presented by Appellant while it calculated and awarded maintenance amount to Appellee ex-wife.

A. Issues Pertaining to Assignments of Error.

i. Was the evidence presented by Appellant regarding the Appellee ex-wife's ability to work, valid and admissible?

III. STATEMENT OF THE CASE

A. Background.

Mr. and Ms. Rohter were married for 13 years and have two sons aged 9 and 10 years. Both Mr. and Ms. Rohter worked as professional pilots. Prior to the separation, the parties had agreed that Ms. Rohter should leave her full-time job as a pilot for Kenmore Air and train to be a Montessori teacher. This was done so that she could spend more time with the children, especially during the summer. The decision was also made after Ms. Rohter tore her rotator cuff while working as a seaplane pilot. Ms. Rohter had started her Montessori training and has been pursuing her teaching certificate, but at the time of trial had not yet completed the required internship. During trial Ms. Rohter was employed as a teaching assistant making $14 an hour, but as a teacher would not be working during the summer months. (RP 56:9-12). Ms. Rohter claimed that she could not return to her job at Kenmore Air on a full-time capacity during the summer because of her injured shoulder and has worked part-time as a contract pilot for Kenmore Air since.

Mr. Rohter worked for Grousemont, a private airplane that provided service for a private family, during the marriage, earning about $60,000 during the majority of his employment. (Id. at 310:20-23). He is currently working at Clay Lancey Aviation, a company

providing aviation services for corporate aircraft. (Id. at 307:7-9). Mr. Rohter is working as a Management Aircraft Director and was also appointed as Chief Pilot for the operation. He currently earns $50,000 annually. (Id. at 308:15-17; 310:17-18). Mr. Rohter accepted the job at Clay Lancey Aviation with the expectation of substantial growth in the future and to accommodate the well-being and care of his children by having a set, predictable schedule, weekends and holidays off and vacation time. (Id. at 317:6-11). He wanted to spend more time with the kids and with his old job it was difficult to spend quality time with them because he was on-call 24 hours a day. Although he is making less money, he is now able to spend more time with his children and has a better opportunity for future growth in his new position. Additionally, Ms. Rohter claimed to not be able to fly more in the summer months, because of Mr. Rohter's job at Grousemont and him having to be on-call 24 hours a day. (Id. at 204:1-6). But Mr. Rohter is no longer working for Grousemont and is not on-call 24 hours a day at his new job.

B. Procedural History.

Mr. Rohter and Ms. Rohter separated on October 1, 2014. On November 17, 2015, a contempt order was entered which included unpaid child support, maintenance, father's portion of uninsured health care expenses and extracurricular activities of $1,071.60, as well as ordered BECU Visa payments of $500. The trial was held on January

28-29, 2016. The court signed a Parenting Plan on January 28, 2016. On March 22, 2016, the trial court entered a child support order allowing a principal judgment amount of $6,870.12 as child support/other obligations from March 1, 2015 through October 31, 2015, against Mr. Rohter. On March 22, 2016, Mr. Rohter was also ordered to pay $656.11 per month for child support and $1,000 monthly maintenance to Ms. Rohter for five years. The court also ordered Mr. Rohter to pay attorney fees of $10,000 to Ms. Rohter, the BECU Visa credit card liability of $10,000, and other IRS taxes, penalties and interests of about $3,000 after he had already paid the majority of his 401k toward his own legal fees in this matter. The single family residence was awarded to Ms. Rohter with a net equity of $53,026 after payment of $43,026 to Mr. Rohter. The royalty income from the oil gas lease which valued $160 annually was also awarded to Ms. Rohter. A notice of appeal was filed on April 19, 2016.

IV. SUMMARY OF ARGUMENT

In the present case, the trial court abused its discretionary power and awarded maintenance and child support unreasonably. The court in the instant case failed to consider the evidence presented by Mr. Rohter in support of his claim that Ms. Rohter could do more work than she claimed. Ms. Rohter had exaggerated her shoulder injury and

has stated unreasonable restrictions to her work without any proper basis for the same.

In the instant case, Mr. Rohter has produced sufficient evidence to demonstrate that the claims of Ms. Rohter are not valid and there is no reasonable basis for the support that was granted. The trial court failed to account for the evidence that Ms. Rohter could work more than she claimed; therefore, the maintenance and child support awarded in favor of Ms. Rohter is above and beyond what it should be and is an unreasonable hardship on Mr. Rohter.

V. ARGUMENT

A. Standard of Review.

"A trial judge is given broad discretion in determining the reasonableness of an award, and in order to reverse that award, it must be shown that the trial court manifestly abused its discretion." Ethridge v. Hwang, 105 Wn. App. 447, 460, 20 P.3d 958, 966 (2001). An award by the trial court is unreasonable, "if it is outside the range of acceptable choices . . . it is based on untenable grounds . . . 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." In re Marriage of Bowen, 168 Wn. App. 581, 586–87, 279 P.3d 885, 888 (2012).

"Appellate courts apply the substantial evidence standard of review to findings of fact made by the trial judge." In re Marriage of Rockwell, 141 Wn. App. 235, 242, 170 P.3d 572, 576 (2007). "'Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.'" Id. (quoting In re Marriage of Griswold, 112 Wash.App. 333, 339, 48 P.3d 1018 (2002)).

B. The trial court erred to take into account the evidence presented by Appellant that proved that Appellee ex-wife could work more.

"When calculating child support, the trial court must first determine the standard child support calculation from the economic table set out in RCW 26.19.020." Siddiqi v. Siddiqi, 144 Wn. App. 1027 (2008). "This statutory economic table provides the basic support obligation, based on the parents' combined net monthly income." Id. "The trial court then determines each parent's individual support obligation by multiplying the basic support obligation times each parent's proportionate share of their combined monthly income." Id.

"The appellate court will overturn an award of child support only when the party challenging the award demonstrates that the trial court's decision is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons." In re Marriage of Peterson, 80 Wash. App. 148, 152, 906 P.2d 1009, 1011 (1995). Failure to

consider all sources of income is reversible error. In re Marriage of Bucklin, 70 Wn. App. 837, 855 P.2d 1197 (1993); In re Marriage of LaDouceur, 58 Wn. App. 12, 791 P.2d 253 (1990).

Voluntary unemployment has been defined as "unemployment that is brought about by one's own free choice and is intentional rather than accidental...." In re Marriage of Brockopp, 78 Wn. App. 441, 446 n. 5, 898 P.2d 849 (1995). Imputing income to a voluntarily unemployed or underemployed parent is mandatory. RCW 26.19.071(6), See also In re Marriage of Goodell, 130 Wn. App. 381, 390, 122 P.3d 929 (2005). "[V]oluntary under-employment by either parent will not shield that parent from a child support obligation." In re Marriage of Jonas, 57 Wash.App. 339, 788 P.2d 12 (1990). This principle applies with equal force to men and women, regardless of the merit of the reason for the under-employment. In re Marriage of Wright, 78 Wash. App. 230, 234, 896 P.2d 735, 737 (1995).

In In re Marriage of Wright, the court imputed $300 of income to the wife because she was working part-time at a hospital and in the National Guard. In re Marriage of Wright, at 234. The court found that "she had 'choices' of employment 'available to her'". Id.

In the present case, Ms. Rohter has other choices of employment, such as flying more often. The trial court failed to consider the evidence submitted by Mr. Rohter in support of his argument that Ms. Rohter had exaggerated her shoulder injury and

could not work more. Ms. Rohter had testified that after the injury her doctor had not issued any instructions, or limitations. (Id. at 219:4-8). Ms. Rohter also stated that the flight surgeon had not offered any written advice or a written statement as to minimize or mitigate the risk of exaggerating or re-aggravating the rotator cuff (Id. at 17-25), specifically she was not required to not fly anymore.

Most importantly, Ms. Rohter's boss at Kenmore Air, Charles Perry ("Mr. Perry"), had testified that he had not seen any restriction on Ms. Rohter's physical condition in her certificates. (RP 114:3-5). When Mr. Perry testified, he said that "in July and August, I would fly somebody as much --probably as much as they would be available." (Id. at 94:11-12). And that he didn't know exactly what Ms. Rohter was paid an hour, but that it was more than $50, maybe $63, a flight hour. (Id. at 107-08:23-20).

Ms. Rohter is capable of making more money by flying more, especially during the summer months. The court abused its discretion when it took into consideration her past rotator cuff injury, which it found to limit her frequency of flying. The evidence presented to the court clearly showed that Ms. Rohter had no limitations on her ability to fly for her employer, Kenmore Air. It is Ms. Rohter's choice to be under-employed, because she has no medical limitations on her ability to fly. Though Ms. Rohter may not want to work as much during the summer to be able to spend time with her sons, this is not reason

enough to merit under-employment, as Mr. Rohter is now able to help more with the boys in the summer because of his new job not requiring him to be on-call 24 hours a day. The court based its ruling of child support on untenable grounds, because there was no evidence to show that Ms. Rohter was unable to fly more, to the contrary, the only evidence presented showed that Ms. Rohter had no restrictions on flying more; therefore, the child support award should be overturned.

C. The trial court erred to take into account the evidence presented by Appellant while it calculated and awarded maintenance amount to Appellee.

"The award of maintenance is within the discretion of the trial court." In re Marriage of Luckey, 73 Wn. App. 201, 209, 868 P.2d 189, 195 (1994). "The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just." Id. The relevant factors considered by the court before calculating and awarding maintenance are "the financial resources of each party; the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; the standard of living during the marriage; the duration of the marriage; and the time needed by the spouse seeking maintenance to acquire education necessary to obtain employment." Id.

In the present case, the trial court ordered that Mr. Rohter has to pay Ms. Rohter $1,000 per month for maintenance. The award of

maintenance by the court is unreasonable and unjust, because the court failed to properly consider the relevant factors before calculating and awarding the maintenance to the Ms. Rohter.

In the instant case, the majority of Ms. Rohter's employment was in the field of aviation. (RP 212:20-22). She was also undergoing Montessori training and after her internship, her salary rage will be about $30,000 - $45,000. (Id. at 332:14-18). Further, she has testified that she received income from oil leases, but did not fully disclose the amount received from that. (Id. at 275:8-20).

However, the situation of Mr. Rohter is different. He is not in a satisfactory position to pay the maintenance. Mr. Rohter's wages were garnished and the control of his bank account was seized by DCS. (Id. at 22-25; 286:1-5). Mr. Rohter used to work at Grousemont and for majority of the time Mr. Rohter's salary with Grousemont was $60,000. Mr. Rohter left that job to work at Clay Lancey Aviation earning only $50,000. (Id. at 307:5-9; 310:17-18). He changed his job to Clay Lancey Aviation with an expectation of substantial growth in the future and to accommodate the well-being and care of his children. (Id. at 317:6-11). However, presently he has not yet received any raise in salary at Clay Lancey Aviation. (Id. at 316:17-20). While Ms. Rohter has a predictable and set work schedule, Mr. Rohter is on-call and his income is unpredictable. Therefore, currently Mr. Rohter is not in a position to pay the ordered maintenance and child support and

plenty of evidence was presented in trial to support that argument. (Id. at 334:5-8).

During the 13 years of marriage, both spouses flew planes making a good living. But prior to the separation Ms. Rohter decided to change careers to become a Montessori teacher. The change in career decreased what she was earning, but with some time she will be able to earn $35,000 to $40,000. Evidence presented at trial showed that there is ample opportunity for her to earn significantly more money flying and she will not be impaired by injury. The main reason for this career change was to spend more time with the kids. Mr. Rohter has also made a change in jobs to be able to spend more time with his kids, but the court unreasonably is making him pay maintenance although he is making significantly less with his new job, than the job he held during the marriage.

Further, the court ordered Mr. Rohter to pay the maintenance to Ms. Rohter for five years, but the court unreasonably set that timeframe. Ms. Rohter only needs to finish her internship before she can become a Montesorri teacher, which she could accomplish within a year; therefore, it is unreasonable to make him pay for five years of maintenance.

The trial court failed to consider the relevant factors under RCW 26.09.090; therefore, the award of maintenance by the trial court is unreasonable and unjust.

VI. CONCLUSION

For the reasons stated in this appellate brief, and the evidence submitted, the trial court order awarding child support and maintenance must be overturned.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Corey Evan Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on November 1, 2016, I caused to be served the document to which this is attached to the party listed below in the manner shown next to their name:

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