



## TABLE OF CONTENTS

I. Introduction .....	p. 7
II. Assignments of Error .....	p. 8
III. Issues .....	p. 8
IV. Statement of the Case.....	p. 9
V. Argument .....	p. 11
a. Was it abuse of discretion and error for the Trial Court to set child support without considering support monies actually paid by Appellant and received by Respondent?.....	p. 11
b. Was it error for the Trial Court to award the State of Washington a judgment against Appellant of \$509.00 for back child support/TANF expended during the period from April 1, 2007 through May 31, 2007 when the child support start date is February 28, 2009 and Respondent was not eligible to receive TANF from April 1, 2007 through May 31, 2007? .....	p. 17
c. Was it error for the Trial Court to award Respondent a judgment against Appellant of \$77,725.00 for back child support for the period from October 1, 2004 through January 31, 2009 when the child support start date is February 28, 2009 and Appellant did not accrue any support debt under any other support obligation? .	p. 21
d. Is the impartiality of the Presiding Judge reasonably questioned where: 1. A lawyer with whom the	

presiding judge previously practiced law was a material witness in the proceeding; 2. Appellant can show evidence that the Presiding Judge was a board member for Grays Harbor Community Hospital (GHCH) and Appellant has been in litigation with GHCH during the pendency of the proceeding? . .p. 27

VI. Attorney’s Fees on Appeal . . . . .p. 31  
VII. Conclusion . . . . .p. 32

**TABLE OF AUTHORITIES**

**CASES**

1. *Anderson v. City of Issaquah*, 70 Wn. App. 64, 77-78, 851 P.2d 744 (1993) . . . . . p. 20  
2. *Antoine D. Johnson, MD v. GHCH et. al.*, United States Court of Appeals, Ninth Circuit, No : 08-35529 . . . . .p. 29  
3. *Antoine D. Johnson, MD v. GHCH et. al.*, US District Court, Western Region of Washington, Dkt. #71, p.4, lns. 2-6 (5/3/2007). . . . . p. 29  
4. *Beers v. Beers*, 74 Wn. 458, 133 P. 605 (1913) . . . . .p. 26  
5. *Bonn v. Bonn*, 12 Wn. App. 312, 529 P.2d 851 (1974). . . . . p. 32  
6. *In re Marriage of Capetillo*, 85 Wn. App. at 316 . . . . .p. 22

7. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926) . . . . p. 20
  
8. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998). . . . .p. 17
  
9. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991) . . . . .p. 20
  
10. *Hartman v. Smith*, 100 Wn.2d 766, 768, 674 P. 2d 176 (1984) . . . . .p. 22
  
11. *In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). . . . .p. 13
  
12. *In re Marriage of Hunter*, 52 Wn. App at 269. p.25
  
13. *In re Marriage of Muhammad*, 153 Wn.2d 795, 807, 108 P.3d 779 (2005) . . . . .p. 31
  
14. *In re Marriage of Ortiz*, 108 Wn.2d 643, 648-49, 740 P.2d 843 (1987). . . . .p. 24
  
15. *In re Marriage of Peterson*, 80 Wn. App. 148, 152, P.2d 1009 (1995). . . . .p. 22
  
16. *In re Marriage of Stern*, 57 Wn. App. 707, 717, 789 P.2d 807 (1990). . . . .p. 14
  
17. *In re Marriage of Stoltzfus*, 69 Wn. App. 558, 561-62, 849 P.2d 685 (1993) . . . . .p. 22

18. *In re Timmons*, 94 Wn.2d 594, 597-99, 617 P.2d 1032 (1980). . . . . p.25
  
19. *In Re Shoemaker*, 128 Wn.2d 116 (1995) 904 P.2d 1150 . . . . .p. 25
  
20. *In the Matter of the Marriage of Kelly B. Marzetta, Appellant, and Allan L. Marzetta, Respondent*, 129 Wn. App. 607-III (2005) . . . . .p. 13
  
21. *Kay Corp. v. Anderson*, 72 Wn.2d 879, 885, 436 P.2d 459 (1967) . . . . .p. 27
  
22. *Kinne v. Kinne*, 137 Wn. 284, 242 P. 388 (1926) . . . . .p. 26
  
23. *Koon v. Koon*, 50 Wn.2d 577, 579, 313 P.2d 369 (1957). . . . .p. 26
  
24. *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) . . . .p. 17
  
25. *Lejeune v. Clallam County*, 64 Wn. App. 257, 269, 823 P.2d 1144, *review denied*, 119, Wn.2d 1005 (1992). . . . .p. 24
  
26. *Marino Property Co. v. Port Comm'rs*, 97n.2d 307, 312, 644 P.2d 1181 (1982) . . . . .p. 24
  
27. *McGrath v. Davis*, 39 Wn.2d 487, 489, 236 P.2d 765 (1951). . . . .p. 26
  
28. *Mut. of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 650, 757 P.2d 499 (1988) . . . . .p. 18

29. *Sanges v. Sanges*, 44 Wn.2d 35, 38-39, 265 P.2d 278 (1953)..... p. 26
30. *Schafer v. Schafer*, 95 Wn.2d 78, 80, 621 P.2d 721 (1980)..... p. 22
31. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)..... p. 13
32. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P2d 674, review denied, 127 Wn.2d 1013 (1995)..... p. 28
33. *State v. Carter*, 77 Wn. App. 8, 12, 888 P.2d 1230 ..... p. 27
34. *State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141(1996) ..... p. 27
35. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007)..... p. 14
36. *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 denied, 126 Wn.2d 1026 (1995). .p. 27
37. *State v. Yates*, 161 Wn.2d 714 (2007) 168 P.3d 359..... p. 17
38. *Wilburn v. Wilburn*, 59 Wn.2d 799, 801-02, 370 P.2d 968 (1962)..... p. 26
39. *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78,

	81, 530 P.2d 298 (1975) . . . . .	p. 17
40.	<i>Wolfkill Feed &amp; Fertilizer Corp. v. Martin</i> , 103 App. 836, 840, 14 P.3d 877 (2000). . .	p. 27, 30

**STATUTES**

1.	RCW 26.09.170 . . . . .	p. 21
2.	RCW 26.09.170(1)(a) . . . . .	p. 22
3.	RCW 26.19.035(1)(c) . . . . .	p. 12
4.	RCW 26.19.035(3) . . . . .	p. 13
5.	RCW 26.19.071(1) . . . . .	p. 13
6.	RCW 26.19.071(3). . . . .	p. 14
7.	RCW 29.19.071(5) . . . . .	p. 15
8.	RCW 74.20A.020(9) . . . . .	p. 14

**REGULATIONS**

1.	WAC 388-400-0005 . . . . .	p. 20
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**FEDERAL LAW**

1.	Child Support Enforcement Amendments of 1984, Pub.L. No. 98-378, 98 Stat. 1305 (1984). . . . .	p. 12
2.	The Family Support Act of 1988 . . . . .	p. 12
3.	42 U.S.C. § 667 (b)(2). . . . .	p. 12

**STATE CONSTITUTIONAL PROVISIONS**

1.	Washington State Constitution, Article I, §23. . . . .	p. 26
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**TREATISES**

1.	31 C.J.S. <i>Estoppel</i> § 75, at 745-54 (1964) . . . . .	p. 18
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**CODE OF JUDICIAL CONDUCT**

1. Canon 3D(1)(b) . . . . .p. 27

**I. INTRODUCTION**

This is an appeal of the Findings of Fact, Conclusions of Law and Order of the Grays Harbor County Superior Court dated February 17<sup>th</sup>, 2009. This is also a prayer for a change in judge. This case presents several unique legal issues and a set of clear facts that show the lower Court committed error and was not a disinterested party to the matter at bar.

**II. ASSIGNMENTS OF ERROR**

1. The lower Court erred by entering the following findings of fact and conclusions of law in its Temporary Support Order of February 17<sup>th</sup>, 2009 (*see* Appellant’s Clerk Papers (ACP); pp. 389 – 394): 2.2, 3.2, 3.3, 3.5, 3.6, 3.7, and 3.20.

**III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Was it abuse of discretion and error for the Trial Court to set child support without considering support monies actually paid by Appellant and received by Respondent?

2. Was it error for the Trial Court to award the State of Washington a judgment against Appellant of \$509.00 for back child support /TANF expended during the period from April 1, 2007 through May 31, 2007 when the child support start date is February 28, 2009 and Respondent was not eligible to receive TANF from April 1, 2007 through May 31, 2007?
  
3. Was it error for the Trial Court to award Respondent a judgment against Appellant of \$77,725.00 for back child support for the period from October 1, 2004 through January 31, 2009 when the child support start date is February 28, 2009 and Appellant did not accrue any support debt under any other support obligation?
  
4. Is the impartiality of the Presiding Judge reasonably questioned where: 1. A lawyer with whom the presiding judge previously practiced law was a material witness in the proceeding; 2. The Presiding Judge was a board member for Grays Harbor Community Hospital (GHCH) and Appellant has been in litigation with GHCH during the pendency of the proceeding?

#### **IV. STATEMENT OF THE CASE**

Respondent filed for dissolution on 12/11/03. During the pendency of the judicial proceeding, Respondent requested assistance from the Division of Child Support (DCS) of the Department of Social and Health Services.” (See ACP; p. 402, lns. 17 - 20).

DCS through the Grays Harbor County Prosecutors Office entered the judicial proceedings to establish temporary child support. (See ACP; p. 380). Following a hearing, the lower Court issued a Temporary Child Support Order setting child support at \$1,534.00. (See ACP; p. 391, lns. 9 - 27). The temporary child support start date was February 28<sup>th</sup>, 2009. (*Id.*).

The same Order also assessed Appellant a support debt of \$509.00 “for back child support/TANF expended during the period from April 1, 2007 through May 31, 2007” and a support debt of \$77,725.00 “for back chi[ld] support for the period from October 1, 2004 through January 31, 2009”. (See ACP; p. 401, lns. 15 – 19).

The lower Court issued a Superior Court Order on 12/29/03. (See ACP; p. 68). This established a determinable support obligation for Appellant. Prior to February 17, 2009, Antoine D. Johnson timely paid

his support obligation. (*See* ACP; p. 23, lns. 1-5; p. 51, lns. 16-26; p. 52, ln. 6; p. 84, lns. 22-25; p. 86, lns. 4-13; p. 98, lns. 5-10; p. 115, 'Part II'; p. 118, ln. 27; p. 126, 'Part II'; p. 129, ln. 27; p. 210, lns. 23-25; p. 213; p. 342, lns. 18-19; p. 345, lns. 11-14; p. 346, lns. 6-7; p. 352, ¶ 2; p. 357; p. 360, lns. 6-26; p. 382, lns. 6-22). Hence, he accrued no support debt under the superior court order of 12/29/03.

Respondent was not eligible to receive TANF from April 1, 2007 through May 31, 2007. (*See* ACP; p. 352, ¶ 3).

In calculating the child support, the lower Court reviewed and signed work sheets developed and adopted by the administrative offices of the Courts. (*See* ACP; pp. 384-388). Said work sheets do not disclose maintenance actually received by Respondent, nor maintenance actually paid by Appellant.

The lower Court issued a 60 day stay of its Temporary Child Support Order allowing for a hearing on a Motion for Reconsideration regarding said Order. In advance of any such hearing, Dr. Johnson was required by the Court to be current on his child support payments. (*See* ACP; p. 393, ln. 28).

## **V. ARGUMENT**

### **a. Was it abuse of discretion and error for the Trial Court to set child support without considering support monies actually paid by Appellant and received by Respondent?**

In 1984, Congress required every state seeking federal funding for its welfare program to have laws establishing advisory child support guidelines. (*See* Child Support Enforcement Amendments of 1984, Pub.L. No. 98-378, 98 Stat. 1305 (1984)). The Family Support Act of 1988 requires states, as a condition of participating in the federal public welfare program, to establish child support guidelines that operate as rebuttable presumptions of the correct support amount.

#### **(b) Availability of guidelines; rebuttable presumption**

**(2)** There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded.

**A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.** (*Bold and underline added. See 42 U.S.C. § 667 (b)(2).*)

Criteria established by the State of Washington can be found in RCW 26.19. This statute establishes standards for application of the child support schedule.

“The child support schedule shall be applied: (c) in all proceedings in which child support is determined or modified.” (RCW 26.19.035(1)(c)).

“Worksheets in the form developed by the administrative office of the courts shall be completed under penalty of perjury and filed in every proceeding in which child support is determined. The court shall not accept incomplete worksheets . . . .” (RCW 26.19.035(3)).

“All income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent.” (RCW 26.19.071(1)).

Case law guides us thusly:

“Ms. Marzetta is correct in her assertion that child support worksheets are mandatory, but RCW 26.19.071(1) does not require that the court make a precise determination of income. Instead, the court is required to consider all income and resources of each parent's household.” (*In the Matter of the Marriage of Kelly B. Marzetta, Appellant, and Allan L. Marzetta, Respondent*, 129 Wn. App. 607-III (2005)).

The Court of Appeals reviews child support orders for a manifest abuse of discretion. (*In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791

P.2d 519 (1990)). To succeed on appeal, the appellant must show that the trial court's decision was manifestly unreasonable, or based on untenable grounds or reasons. (*State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

A manifestly unreasonable decision or a decision exercised on untenable grounds is a decision where the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

Because the amount of child support rests in the sound discretion of the trial court, the Court of Appeals will not substitute its judgment for the trial court's where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances. (*See In re Marriage of Stern*, 57 Wn. App. 707, 717, 789 P.2d 807 (1990)).

The record contains substantial evidence that Appellant disclosed to the lower Court, the monthly amount of support monies,<sup>1</sup> (maintenance) actually received by Respondent. (*See* ACP; p.360, ln. 12

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<sup>1</sup> "Support moneys" means any moneys or in-kind providings paid to satisfy a support obligation whether denominated as child support, spouse support, alimony, maintenance, or any other such moneys intended to satisfy an obligation for support of any person or satisfaction in whole or in part of arrears or delinquency on such an obligation. (RCW 74.20A.020(9)).

and *supra* @ p. 7, Section IV, ¶ 4). The record also contains substantial evidence quantifying the amount of support monies actually paid by Appellant. (*Id.*).

RCW 26.19.071(3) states: “. . . monthly gross income shall include income from any source, including: (q) Maintenance actually received.” Support monies actually received by Respondent are not included in the Washington State Child Support Schedule Worksheets approved by the lower Court. As such, said worksheets are not only incomplete, but also the lower Court did not consider all the income received by the Respondent.

Conversely, the record contains substantial evidence that Appellant disclosed the monthly amount of support monies he actually paid to Respondent to the lower Court. (*Id.*). The record also contains substantial evidence quantifying the amount of support monies he actually paid to Respondent. (*Ibid.*).

RCW 29.19.071(5) states: “The following expenses shall be disclosed and deducted from gross monthly income to calculate net monthly income: (f) Court-ordered maintenance to the extent actually paid.” Court-ordered support monies (maintenance) actually paid by Antoine D. Johnson pursuant to the 12/29/03 Superior Court Order, are not included in the Washington State Child Support Schedule Worksheets

approved by the lower Court. As such, said worksheets are not only incomplete, but also the lower Court did not consider deductions that would determine Appellant's income.

Appellant has presented specific findings on the record that clearly show that the application of state child support guidelines would be unjust or inappropriate as determined by statutory criterion<sup>2</sup> established by the State of Washington. This is because though said criterion mandates the consideration of all income and resources of each parental household, the Washington State Child Support Schedule Worksheets approved by the lower Court do not include support monies disclosed to the lower Court by Appellant. As such, Appellant has met his burden, and has successfully rebutted the presumption that the amount of the award which resulted from the application of state child support guidelines is the correct amount of child support to be awarded.

The lower Court has applied the wrong legal standard, and/or based its temporary child support order on an erroneous view of the law. Both statute and precedent require courts to consider all income and resources of each parent's household. Therefore, the decision to approve Washington State Child Support Schedule Worksheets that fail to include

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<sup>2</sup> RCW 29.19.035, RCW 29.19.071.

all disclosed parental income<sup>3</sup> and resources is improper, manifestly unreasonable, exercised on untenable grounds, and represents reversible error as it is a manifest abuse of discretion.

**b. Was it error for the Trial Court to award the State of Washington a judgment against Appellant of \$509.00 for back child support/TANF expended during the period from April 1, 2007 through May 31, 2007 when the child support start date is February 28, 2009 and Respondent was not eligible to receive TANF from April 1, 2007 through May 31, 2007?**

The Washington State Supreme Court found in *State v. Yates*, 161 Wn.2d 714 (2007) 168 P.3d 359 that “The doctrine of equitable estoppel is grounded in the principle ‘that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.’ *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975).

A party seeking the protection of the doctrine must establish three elements: ‘(1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; (3) injury to such other party resulting from permitting the first party to contradict or repudiate such admission, statement, or act.’ (*Id.*).

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<sup>3</sup> Specifically, the monthly maintenance actually received by the Respondent and the monthly maintenance actually paid by Appellant pursuant to the Superior Court Order of 12/29/03. (See APC; p. 68).

Application of equitable estoppel against the government is disfavored. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998) (citing *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993)). A party asserting equitable estoppel against the government must establish, in addition to the three elements set forth above, that equitable estoppel (1) is 'necessary to prevent a manifest injustice' and (2) would not 'impair' 'the exercise of governmental functions.' *Kramarevcky*, 122 Wn.2d at 743. A party must prove all required elements by clear, cogent, and convincing evidence. *Id.* at 744.”

Finally, in addition to satisfying each of the above elements, the party asserting this defense must have proceeded in good faith and have “clean hands,” or be free from fault in the matter. *Mut. of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 650, 757 P.2d 499 (1988). Importantly, a party may not base a claim of estoppel on conduct, omissions, or concealment, or representations, especially when fraudulent. (*Id.* at 651 (quoting 31 C.J.S. *Estoppel* § 75, at 745-54 (1964))).

DCS should be equitably estopped. DCS took the position that Respondent **was not** eligible to receive TANF benefits from April 1, 2007 to May 31, 2007.<sup>4</sup> (See ACP; p. 352, ¶ 3). DCS then took the position

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<sup>4</sup> Appellant, through counsel, made inquiry into Respondent Jennifer Johnson’s DCS case; specifically, was she eligible to receive TANF. DCS representative Rebecca Bernard provided documents showing Jennifer’s TANF was closed after one month and stated

that Respondent was eligible to receive TANF benefits from April 1, 2007 to May 31, 2007. (See ACP; p. 393, lns. 15-17). As a result, APPELLANT was found to be liable for TANF benefits from April 1, 2007 to May 31, 2007 by the lower Court, and an award against him of \$509.00 for back child support/TANF was made. (*Id.*).

There can be no doubt Respondent erroneously received \$509.00 from DCS. Equally, there can be no doubt Respondent did not receive back child support/TANF from DCS as she was not eligible to receive such benefits. By reversing its position, DCS has made it possible for the lower Court to label the errant \$509.00 “back child support/TANF” when it is clearly not, and thereby make Appellant responsible for DCS’s error. This is an inequitable consequence of DCS’s actions.<sup>5</sup>

The record amply demonstrates APPELLANT relied and acted on the DCS statement that Respondent was not eligible to receive TANF benefits. Indeed, Appellant filed pleadings and declarations averring DCS’s position that Respondent was not eligible to receive TANF benefits. (See ACP; p. 345, lns. 9-11; p. 346, lns. 4-5; p. 358, lns. 19-20).

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DCS would be seeking reimbursement of TANF benefits expended during that one month while continuing medical benefits for the children even though the father was providing medical benefits for the children.

<sup>5</sup> From April 1, 2007 to May 31, 2007, Appellant paid and was current on all support monies pursuant to the support obligation established by the Superior Court Order of 12/29/03. (See ACP; p. 68 and p. 7, Section IV, ¶ 4 *supra*). During said time period, Appellant was not even aware Respondent was seeking TANF benefits.

It is clear APPELLANT has been placed in a detrimental position based upon DCS's changing representations, and a manifest injustice is involved.

Respecting TANF benefits, it is self-evidently unfair for DCS to conform to interpretive policies and procedures that conclude Respondent is not eligible to receive TANF benefits, and later deny the same interpretive policies and procedures in a judicial hearing. DCS service recipients must be able to rely on the plain meaning of regulations and DCS interpretations, without fear that DCS will later penalize them by adopting a different interpretation.

Further, allowing DCS to adopt new and changing interpretations would also result in finding chapter 388-400-0005 WAC unconstitutionally vague. Regulations are unconstitutionally vague if they allow an administrative agency to make arbitrary discretionary decisions. (*See Anderson v. City of Issaquah*, 70 Wn. App. 64, 77-78, 851 P.2d 744 (1993)).

A statute or regulation that forbids or requires the doing of an act in terms so vague that people of common sense must guess as to its meaning and differ as to its application violates the first essential of due process. (*Id.* at 75 quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385,

391, 46 S. Ct. 126, 70 L. Ed. 322 (1926); see also *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991).

If DCS service recipients cannot rely on the consistency of clear DCS interpretations in effect at the time they receive DCS services, they are left to guess at the meaning of regulations. In this regard, DCS's actions are not only manifestly unjust, but also unconstitutional.

APPELLANT has 'clean hands' regarding DCS's actions. In other words, APPELLANT is free from fault in this matter. At no time did APPELLANT influence DCS's labile interpretations of TANF benefit eligibility, nor did APPELLANT influence DCS's remittance of \$509.00 to Respondent. Further, governmental function is not impaired by estoppel. Here, estoppel protects DCS from creating unconstitutionally vague regulations.

The Doctrine of Equitable estoppel is applicable; therefore, the lower Court's decision to award the State of Washington (DCS) \$509.00 for back child support/TANF is reversible error.

**c. Was it error for the Trial Court to award Respondent a judgment against Appellant of \$77,725.00 for back child support for the period from October 1, 2004 through January 31, 2009 when the child support start date is February 28, 2009 and Appellant did not accrue any support debt under any other support obligation?**

Under RCW 26.09.170, a retroactive child support modification is highly disfavored except in certain unusual instances, none of which apply here.

The provisions of any child support decree may be modified only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment. RCW 26.09.170(1)(a).

Case law guides us thusly:

"Generally, child support payments become vested judgments as the installments become due." *Capetillo*, 85 Wn. App. at 316 (citing *Hartman v. Smith*, 100 Wn.2d 766, 768, 674 P.2d 176(1984); *Schafer v. Schafer*, 95 Wn.2d 78, 80, 621 P.2d 721(1980)). "The accumulated child support judgments generally may not be retrospectively modified." *Capetillo*, 85 Wn. App. at 316 (citing *Hartman*, 100 Wn.2d at 768; *In re Marriage of Stoltzfus*, 69 Wn. App. 558, 561-62, 849 P.2d 685 (1993)). See RCW 26.09.170(1) (providing support modification applies solely to obligations subsequent to modification petition).

The Court of Appeals reviews a modification of child support for abuse of discretion where the challenging party must demonstrate that the trial court's decision is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons. *In re Marriage of Peterson*, 80

Wn. App. 148, 152, 906 P.2d 1009 (1995). Additionally, substantial evidence must support the trial court's findings of fact. *Peterson*, 80 Wn. App. at 153.

A manifestly unreasonable decision or a decision exercised on untenable grounds is a decision where the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. (*Id.*).

The lower Court entered a Superior Court Order establishing a support obligation for Appellant on 12/29/03. (*See* ACP; p. 68). The record contains substantial evidence that Appellant satisfied all support obligations pursuant to said Order prior to the lower Courts February 17<sup>th</sup>, 2009 Temporary Child Support Order. (*See* ACP; p. 7, Section IV, ¶ 4 *supra*).

Two more Superior Court Orders were entered subsequent to the lower Court's 12/29/03 Superior Court Order. The first was a temporary Superior Court Order requiring Appellant to pay Guardian ad Litum and Respondent's attorney fees. (*See* ACP; p. 83). The second was a temporary Superior Court Order requiring Appellant to pay Respondent's 2005 IRS debt and her attorney's fees. (*See* ACP; p. 102-104). Appellant satisfied both temporary Superior Court Orders. (*See* ACP; p. 17; p. 83; p.

106, Ins. 1-2). As such, no support debt accrued pursuant to any written and/or entered Superior Court Order from the lower Court, prior to February 17<sup>th</sup>, 2009.

On February 17<sup>th</sup>, 2009, the lower Court assigned Appellant a support debt of \$77,725.00 even though Appellant had clearly satisfied all support obligations pursuant to all written and/or entered Superior Court Orders. “The law prohibits retroactive modification of child support because it opens the door to uncertainties, costs and hardship.” (*Cf. In re Marriage of Ortiz*, 108 Wn.2d 643, 648-49, 740 P.2d 843 (1987) (retroactive application of escalation clauses creates substantial uncertainties)). Here, the lower Court has retroactively escalated the amount of support established by previous Superior Court Orders, and in so doing, has created a support debt for Appellant that would not have existed absent the lower Court’s impermissible action.

There exists no evidence on the record of an accrued support debt for the Appellant prior to the wrongful February 17<sup>th</sup>, 2009 temporary Child Support Order. “Substantial evidence must support the trial court’s findings of fact.” (*Id.*). The lower Court’s action of retroactively escalating previously established Superior Court Orders applies the wrong legal standard, and/or is based on an erroneous view of the law.

The doctrine of res judicata or claim

preclusion ensures finality of judgments. *Marino Property Co. v. Port Comm'rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982). Once a judgment is final, a court may reopen it only when specifically authorized by statute or court rule. *See Lejeune v. Clallam County*, 64 Wn. App. 257,269, 823 P.2d 1144, review denied, 119 Wn.2d 1005 (1992). CR 60 sets forth the general conditions under which a party may seek relief from judgment. RCW 26.09, which governs dissolution actions, sets forth additional grounds applying solely to such actions. *See In re Timmons*, 94 Wn.2d 594, 597, 617 P.2d 1032 (1980).

Furthermore,

“None of these cases, however, hold a trial court has unfettered discretion in the exercise of its equitable powers. We agree with the court of appeals in *Hunter* that the trial court's power can only be exercised within the "framework of established `equitable principles'." *Hunter*, 52 Wn. App. at 269 (quoting *Hartman*, 100 Wn.2d at 769).” *In Re Shoemaker*, 128 Wn.2d 116 (1995) 904 P.2d 1150.

It is inequitable for the lower Court to retroactively escalate Appellant’s support obligation and thereby create a support debt where none existed. This is because by performing such action, the lower Court changes the legal consequences of Appellant’s past acts that existed prior to the entry of the lower Court’s wrongful February 17<sup>th</sup>, 2009 order. Indeed, Appellant’s legal act of satisfying support obligations prior to said

order has been transformed into an illegal act of non-satisfaction of support obligations.

Such lower Court action is based on untenable grounds and/or granted for untenable reasons because it has an *ex post facto* effect, and *ex post facto* laws are seen as a violation of the rule of law in our great state of Washington: “No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.” (Washington State Constitution, Article I, §23).

As previously stated, RCW 26.09.170 sets forth the conditions for modifying a child support order. Turning to said statute there is no authority for the lower Court’s action of retroactively escalating previously established Superior Court Orders. Indeed, RCW 26.09.170(1) was enacted in 1973 and reflects settled law in this state that a modification of child support may not operate retroactively. *See Wilburn v. Wilburn*, 59 Wn.2d 799, 801-02, 370 P.2d 968 (1962); *Koon v. Koon*, 50 Wn.2d 577, 579, 313 P.2d 369 (1957); *Sanges v. Sanges*, 44 Wn.2d 35, 38-39, 265 P.2d 278 (1953); *McGrath v. Davis*, 39 Wn.2d 487, 489, 236 P.2d 765 (1951); *Kinne v. Kinne*, 137 Wn. 284, 242 P. 388 (1926); *Beers v. Beers*, 74 Wn. 458, 133 P. 605 (1913).

The lower Court’s decision to retroactively escalate Appellant’s support obligation though Appellant had timely paid and satisfied his

previously established support obligation is manifestly unreasonable, based on untenable grounds, and/or granted for untenable reasons and is reversible error. This is because said action violates the child support statute and cannot be justified by equitable principles.

**d. Is the impartiality of the Presiding Judge reasonably questioned where: 1. A lawyer with whom the presiding judge previously practiced law was a material witness in the proceeding; 2. The Presiding Judge was a board member for Grays Harbor Community Hospital (GHCH) and Appellant has been in litigation with GHCH during the pendency of this proceeding?**

Due process, the appearance of fairness, and canon 3(D)(1) of the Code of Judicial Conduct (CJC) require that a judge disqualify from hearing a case if his or her impartiality may be reasonably questioned. *Wolfkill*, 103 Wn. App. at 841 (citing *State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141(1996)).

A trial court is presumed to perform its functions regularly and properly without bias or prejudice. *Wolfkill*, 103 Wn. App. at 841 (citing *Kay Corp. v. Anderson*, 72 Wn.2d 879, 885, 436 P.2d 459 (1967)). The appearance of fairness doctrine seeks to insure public confidence by preventing a biased or potentially interested judge from ruling on a case. *See State v. Carter*, 77 Wn. App. 8, 12, 888 P.2d 1230 (quoting *State v.*

*Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992)), *review denied*, 126 Wn.2d 1026 (1995).

Evidence of a judge's actual or potential bias is required. *Post*, 118 Wn.2d at 619. Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674, *review denied*, 127 Wn.2d 1013 (1995).

Appellant is required to present evidence that the judge presiding over the dissolution proceedings is actually or potentially disinterested. Appellant will meet his burden by first presenting evidence from the record that shows John Farra was appointed as Guardian Ad Litum in the dissolution proceedings, and also he previously practiced law with the Presiding Judge. Appellant will then present evidence that shows that the judge presiding over the dissolution proceedings was a GHCH Board Member, and that the Appellant has been litigating GHCH during the pendency of the dissolution proceedings.

John Farra was appointed as Guardian Ad Litum to the dissolution proceedings on 12/29/03. (*See* ACP; p. 68). He filed an

“Affidavit of the Guardian Ad Litum” on 2/24/04.<sup>6</sup> The judge presiding over the dissolution proceedings is the Hon. Gordon L. Godfrey. (See ACP; p. 402, Ins. 3-4). John Farra previously practiced law with the Hon. Gordon L. Godfrey<sup>7</sup>. (See Trial Court Appearance Docket ‘SUB #’ 150; dated 10/27/2006 and titled Motion and Affidavit/Declaration, pending supplementation of ACP).

The Hon. Gordon L. Godfrey was a previous GHCH Board Member: “With respect to the Hon. Gordon L. Godfrey, Opposing counsel failed to acknowledge his relationship to this action. He is a former member of the Grays Harbor Community Hospital Board of Directors. Because of this relationship as well as a perception of judicial bias, Plaintiff requested the Hon. Gordon L. Godfrey rescues himself in Grays Harbor Cause No.03-3-00481-2. He refused.” (*Antoine D. Johnson, MD v. GHCH et. al.*, Dkt. #71, p.4, Ins. 2-6 (5/3/2007)). Appellant declared to the lower Court that he was informed by various sources that the Hon. Gordon L. Godfrey would “get him” because of his lawsuit with GHCH.<sup>8</sup>

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<sup>6</sup> Appellant will supplement his Clerk’s Papers by adding Trial Court Appearance Docket ‘SUB #’ 62; Dated 02/24/2004 and titled Affidavit Of Guardian Ad Litum which was inadvertently not designated in his *Amended* Designation of Clerk’s Papers.

<sup>7</sup> Appellant will supplement his Clerk’s Papers by adding Trial Court Appearance Docket ‘SUB #’ 150; Dated 10/27/2006 and titled Motion and Affidavit/Declaration which was inadvertently not designated in his *Amended* Designation of Clerk’s Papers.

<sup>8</sup> *Antoine D. Johnson, MD v. GHCH et. al.*, is currently in The United States Court of Appeals for the Ninth Circuit: cause number **08-35529**.

Appellant has met his burden by presenting specific evidence of violations of the Code for Judicial Conduct:

CANON 3--JUDGES SHALL PERFORM THE DUTIES OF THEIR OFFICE IMPARTIALLY AND DILIGENTLY

D) Disqualification.

**(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned,** including but not limited to instances in which:

(b) the judge previously served as a lawyer or was a material witness in the matter in controversy, or a **lawyer with whom the judge previously practiced law** served during such association as a lawyer concerning the matter, or such lawyer **has been a material witness concerning it;** (*emphasis added*).

The impartiality of the Hon. Gordon L. Godfrey might reasonably be questioned because he was on the Board of Directors for GHCH and Appellant has been in litigation with GHCH during the pendency of the dissolution proceedings he presides over. Further, the impartiality of the Hon. Gordon L. Godfrey might reasonably be questioned because John Farra, a lawyer with whom the judge previously practiced law, has been a material witness concerning the dissolution proceedings.

“We review a trial court's denial of a motion that it recues for an abuse of discretion.” *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn.

App. 836, 840, 14 P.3d 877 (2000). Appellant moved the Hon. Gordon L. Godfrey to recue himself from the dissolution proceedings. (See ACP; p. 100). He refused. (*Id.*).

Here, the record presents a clear and nondiscretionary duty to recue or disqualify. This is because Canon 3(D)(1)(b) expressly directs judges to disqualify themselves in instances in which “. . . a lawyer with whom the judge previously practiced law. . . has been a material witness concerning” the dissolution proceedings. Hence, the lower Court’s decision to deny Appellant’s request that the Presiding Judge recue himself was an abuse of discretion and additional evidence of judicial bias and impartiality.

Appellant prays that the Court of Appeals return these proceedings to an alternate judge in view of the bias, impartiality and abuse of discretion displayed by the Hon. Gordon L. Godfrey.

#### **VI. ATTORNEY FEES ON APPEAL**

Appellant requests attorney fees on appeal. “Under RCW 26.09.140, we may, in our discretion, order one party to pay the other party’s attorney fees on appeal. In exercising our discretion in making such an award, we consider the parties’ relative ability to pay and the arguable merit of the issues raised on appeal.” *In re Marriage of Muhammad*, 153 Wn.2d 795, 807, 108 P.3d 779 (2005).

Appellant's issues have merit. Moreover, in support of his request for attorney fees on appeal, Appellant can produce evidence revealing his lack of income. (See ACP; p. 381-383). This evidence is credible information that was ignored by the trial court below. Furthermore, Appellant had no choice but to seek appeal as other remedies were foreclosed to him. Indeed, the lower Court required Appellant to be current on all child support payments prior to receiving a hearing on a Motion for Reconsideration of the lower Court's February 17<sup>th</sup>, 2009 Temporary Child Support Order. (See ACP; p. 401, bottom of page). Precedent shows that such action is improper.

In *Bonn v. Bonn*, 12 Wn. App. 312, 529 P.2d 851 (1974), the ex-husband was repeatedly found in contempt for failure to pay support and filed five petitions to modify the decree. The court entered an order staying further proceedings until the defendant had complied with all previous court orders, including payment of support arrearage and attorney fees. The Court of Appeals reversed for a hearing on the petition, holding that it was not in the best interests of the children to withhold a hearing to penalize the father's disobedience of prior support orders.

## **VII.      CONCLUSION**

For all the foregoing reasons, Appellant prays that the Court of Appeals reverse and/or vacate the trial Court's Order of February 17<sup>th</sup>, 2009. To insure litigation proceeds in good faith and complies with court rules, Appellant prays that the Court of Appeals move these proceedings to an alternate judge.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of July, 2009.



J. PATRICK QUINN

WSBA #17440

Attorney for Appellant

COURT OF APPEALS  
DIVISION II  
09 JUL 17 PM 12:37  
STATE OF WASHINGTON  
BY Ksc  
DEPUTY

**DECLARATION OF SERVICE**

I hereby declare that I sent a copy of the document on which this declaration appears on via (fax) mail/messenger service and delivery to: REBECCA BERNARD

I declare under penalty of perjury of the laws of the State of Washington, that the foregoing is true & correct.

Dated: JULY 17, 2009 at: OLYMPIA, WA

By: Heather Young

**DECLARATION OF SERVICE**

I hereby declare that I sent a copy of the document on which this declaration appears on via (fax) mail/messenger service and delivery to: STEVEN MCNETT

I declare under penalty of perjury of the laws of the State of Washington, that the foregoing is true & correct.

Dated: JULY 17, 2009 at: OLYMPIA, WA

By: Heather Young