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DIVISION II

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STATE OF WASHINGTON
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No. 42039-2-II

COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

IN RE THE MARRIAGE OF:

JANE HALE,

Petitioner/Respondent,

and

TIMOTHY HALE,

Respondent/Appellant.

BRIEF OF RESPONDENT JANE HALE

James K. Sells
Anne M. Montgomery
Ryan, Uptegraft & Montgomery, Inc. P.S.
9657 Levin Rd. NW, Suite 240
Silverdale, WA 98383
(360) 307-8860
Attorneys for Respondent Jane Hale

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I. INTRODUCTION

This appeal hopefully represents the resolution of what has been a long, detailed, and at times bitter dissolution action. Mr. and Ms. Hale¹ were married November 4, 2000, in San Diego, and separated early in April 2009. There are two children of the marriage, Theodore, age 9, and Elizabeth, age 7. CP 134. Both parties are professional engineers employed by the Navy, NUWES, in Kitsap County. While living in San Diego, they both held full-time engineering positions, but Ms. Hale left the work force for a time to give birth and care for their young children. The couple made a joint decision for Mr. Hale to take a position at NUWES Keyport, apparently as head of engineering. Ms. Hale left her job in San Diego where her yearly income was approximately \$130,000.00. CP 13. She was able to secure a permanent position at NUWES at a 30-hour work week with a yearly income of \$87,000.00 plus full federal employment benefits. Mr. Hale's income is approximately \$150,000.00 per year.

¹ Although Ms. Hale changed her name by the Decree of Dissolution, for consistency's sake she will be referred to in this brief as either "the mother" or Ms. Hale.

Admirably, the Hales owned a home, now occupied by Ms. Hale and the children, valued at some \$500,000.00, with no mortgage. They also had no debt, although Ms. Hale now carries a \$237,500.00 mortgage to compensate Mr. Hale for his interest in the home. CP 14.

Ms. Hale may be eligible for 40-hour positions in Washington, D.C. and back in San Diego, but obviously does not feel a move for the children would be in their best interests, as it would make “visitation” as agreed by the parties literally impossible. She is more than willing to increase her hours to 40 per week, but there simply is not such a position in her field available at any of the various federal installations in Kitsap County. CP 13-14.

Judge Spearman declined to find Ms. Hale to be “voluntarily underemployed.” RP, 38.

Mr. Hale also sought residential credit on the basis that the children will spend about one-third of the time with him, increasing his expenses, the increase which he meticulously sets forth at CP 19, even including an increase

in “sundry items” from \$7.00 to \$15.00 per month. CP 19.

Judge Spearman also declined to grant a residential credit, and child support was set in accordance with the standard calculation.

Finally, there apparently is an issue regarding correction of a scrivener’s error by Judge Spearman. A little more than a month after the Decree was entered, it was discovered that there was a discrepancy, or at least some confusion, as to when the \$237,500.00 judgment would begin to bear interest. See CP 164-167. At least according to Ms. Montgomery, Ms. Hale’s attorney, the agreed draft of the Decree provided there would be no interest due until 60 days after entry of the Decree. This language was in the Decree drafted by Mr. Hale’s attorney, but a portion of the Decree signed by the Court provided interest to start 60 days after January 11, 2011, the date of a CR2 Agreement. The Decree also still contained the correct language in a different paragraph, wherein interest would not accrue until 60 days after entry of the Decree. CP 166. Ms. Montgomery moved

to correct the error in the incorrect paragraph and Judge Spearman did so. CP 140.

It is Ms. Hale's position that all of the Assignments of Error are without merit; as Judge Spearman simply exercised his discretion on all contested issues, and did so properly.

II. REPLY TO ASSIGNMENTS OF ERROR

Assignment of Error 1: There was no error.

Assignment of Error 2: There was no error.

Assignment of Error 3: There was no error.

III. COUNTERSTATEMENT OF THE CASE

Although Mr. Hale's "Statement of the Case" is generally accurate, there are some portions of same which, at best, may be misleading. For example, Ms. Hale discussed her job situation at CP 13-14. She had a "full time" professional position in San Diego which she left to accompany her husband to Kitsap County for him to receive a promotion. The only position available for her here was a 30-hour week (albeit with full federal benefits). She took it,

and remains in the job today. She freely admits that she may be able to obtain a 40-hour position in Washington, D.C., or San Diego, or even overseas, but has not pursued those options because of concern for the children's situation.²

Secondly, the Court did, in fact, give substantial attention to the issue of a residential credit. Judge Spearman was presented with as detailed information as possible from Mr. Hale, virtually down to the dollar and the hour. The Judge simply found that he viewed somewhere between 1/3 and 38% of residential time not to justify a credit, particularly considering the levels of incomes involved here.

Finally, the issue of the "scrivener's error" is probably much simpler than described by Mr. Hale in his opening

² In view of the length and nature of this action, one can only imagine the problems which would arise if the children lived 3,000 miles away.

brief. The Decree of Dissolution had two different versions of payment of interest, but was signed by the parties and their attorneys. The Court simply found that one of them clearly expressed the intentions of everyone involved, and ruled accordingly.

IV. ARGUMENT

(1) THERE SHOULD NOT BE INCOME IMPUTED TO THE MOTHER

Obviously, a major issue here is the Father's argument that, because the Mother works a 30 rather than a 40-hour week, she should be subject to imputed income, as discussed in RCW 26.19.071(6). That statute is perhaps not as simple as it may appear to be. It states in pertinent part:

The Court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The Court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon the parent's work history, education, health and age, or any other relevant factors. A Court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the Court finds that the parent is voluntarily underemployed and finds the parent is purposely underemployed to reduce the parent's child support obligation. (Emphasis added).

The Mother, Ms. Hale, is a professional engineer employed by the U.S. Government in a professional position of 30 hours per week at NUWES in Kitsap County. CP 13. Mr. and Ms. Hale moved from San Diego in order for Mr. Hale to take a better paying and career enhancing position. CP 13. The Mother's job in San Diego paid approximately \$130,000.00 per year. She left the work force to give birth and care for the couple's two young children. She eventually chose, along with her husband's encouragement, to re-enter the work force, and was able to secure her present position at NUWES. CP 13. This is a permanent position which pays full government benefits and carries a yearly salary of approximately \$87,000.00. CP 14. Mr. Hale's yearly income is approximately \$150,000.00, also along with full government benefits. CP 31.

Ms. Hale acknowledges that she may qualify for a 40-hour per week position in San Diego, or Washington, D.C., but believes it is best for the children to remain here in

Kitsap County with access to and regular interaction with both parents. CP 14.

Thus, there are two issues here: First, is Ms. Hale “voluntarily” underemployed; and, secondly, does her working a 30-hour week provide the answer to the first issue?

Regarding the statute’s discussion of “voluntarily underemployed,” it would seem the most important statutory language is the phrase “. . . any other relevant factors.” Here, it is clear the Court considered this somewhat unusual situation, and could not ignore that:

- Ms. Hale left a 40-hour per week position in San Diego to move to Washington for her husband’s career advancement. CP 13.
- Ms. Hale left the work force to give birth and care for the couple’s two children. CP 13.
- The only permanent professional engineering position with the U.S. Government in Kitsap County for which she is qualified happens to be 30 hours per week. CP 13.

- The 30-hour per week position not only pays a significant salary (\$87,000.00 per year) but provides full federal benefits, which allows her to continue to maintain already accrued benefits, such as retirement and medical insurance. CP 13-14.

- In order to add an extra 10 hours per week, with the corresponding increase in income, Ms. Hale would have to return to San Diego, or move across the country to Washington, D.C. CP 14. It is difficult, if not impossible, to perceive how such a move would be beneficial to the children; or financially advantageous to either party, once the cost of travel is considered.

- Both parties enjoy significant incomes, certainly more than adequate to provide their children with whatever social/educational benefits the parents deem appropriate. Mr. Hale makes nearly double Ms. Hale's income, but their combined annual income is nearly \$240,000.00 per year. There is no apparent reason these two children should want for any educational, social, or any other benefits

common to children of parents with this level of income.

The Court, of course, must address the issue of Ms. Hale's 30-hour work week, as opposed to what we normally think of as a 40-hour week as being "normal." This issue would seem to have been addressed appropriately by Division I in ***In re Marriage of Schumacher v. Watson***, 110 Wn. App. 208, 997 P.2d 399 (2000). There, the Court discussed in some detail what constitutes "voluntary underemployment." Perhaps the most significant finding in ***Schumacher*** was that 40 hours per week is not necessarily an indication, one way or the other, of underemployment. ***Schumacher***, 100 Wn. App. 208 at 213. The determination is for the trial court to exercise its discretion, and there must be an abuse of discretion for this Court to overturn. see ***Marriage of Peterson***, 80 Wn. App. 248, 142, 906 P.2d 1009 (1995).³ An abuse of discretion only occurs when the "trial court's decision is manifestly unreasonable, based on

³ ***Peterson*** was a child support modification action, but the principles of application of the law apply here.

untenable grounds, or granted for untenable reasons.”

Peterson, 80 Wn. App. at 152.

Since the word “untenable” appears at least twice in this definition, it may be instructive to look at its definition. According to Webster’s (New World Dictionary, 2nd College Ed., 170, p. 1558), “untenable” means “that cannot be held, defended or maintained.” It is difficult, if not impossible, to consider someone who makes \$87,000.00 per year with full federal benefits as being “underemployed.” It simply is a theory that “cannot be held or maintained.” One truly has to wonder why this issue is even being argued here; or, for that matter, was advanced at the trial court.

A trial court’s decision regarding child support calculations will be upheld unless this Court finds a “manifest abuse of discretion.” **Marriage of Clark**, 112 Wn. App. 370, 375, 48 P.3d 1032 (2002). A manifest abuse of discretion requires a finding that no reasonable person would have ruled as the Judge did. **Marriage of Nicholson**, 117 Wn. App. 110, 114, 561 P.2d 1116 (1977). It is perhaps

repetitious, but obvious, that a person who gives up her job, travels to a different state in support of her husband's career advancement, gives birth and cares for two children, secures a job within her field of expertise and makes \$87,000.00 per year plus full federal benefits, would not be subject to such a finding by a "reasonable person."

In addition, "voluntary" unemployment or underemployment is brought about by one's free choice. ***Marriage of Brockopp***, 78 Wn. App. 441, 446 fn. 5, 898 P.2d 849 (1995). Ms. Hale hardly had free choice here, unless she wanted to live in San Diego while her husband lived in Kitsap County. Obviously that would have been an unsatisfactory solution for everyone concerned, particularly the children; as would her now taking a position on the East Coast or San Diego. Any increase in income surely would be lost to travel costs for the children to maintain relationships with both their parents.

2) THE FATHER IS NOT ENTITLED TO A RESIDENTIAL CREDIT

Mr. Hale sought a “residential credit” on the apparent basis that his spending slightly more than one-third of the time with the children created additional expense, within the contemplation of RCW 26.19.075(1)(d). The request was denied. CP 127.

The issue of child support calculation is one of discretion, and the trial court’s calculation will be overturned only upon a finding of a “manifest abuse of discretion.” ***Marriage of Clark***, 112 Wn. App. 370, 375, 48 P.3d 1032. Here, Judge Spearman adhered to the standard calculation which is the case far more often than not. It is not difficult to understand why he did so. Hr. Hale makes \$150,000.00 per year, receives full federal benefits (CP 128), has no debt (CP 134), and is the recipient of a cash payment of \$237,500.00. It is difficult, if not impossible, to imagine spending one-third of the time with his two children will place a financial burden upon him. On the other hand, Ms. Hale makes some \$87,000.00, has the children two-thirds of

the time, and now has a \$237,500.00 mortgage, the only debt this couple has.

Any “deviation” from the standard calculation is an “exception to the rule and should be used sparingly and only when lack of doing so would result in inequity.” ***Burch v. Burch***, 81 Wn. App. 756, 760, 916 P.2d 433 (1996). Specific Findings must be made in the case of such deviation, but even if such reasons are not clearly set forth, the Appellate Court may look to the trial court’s oral opinion. ***Crosetto v. Crosetto***, 82 Wn. App. 545, 560, 918 P.2d 954 (1996). There is no such requirement when support adheres to the schedule, as it did here.

Mr. Hale simply failed to make a case for deviation from the standard calculation. Judge Spearman exercised his discretion based upon significant and detailed submissions from the parties. There is absolutely no basis to question that discretionary ruling, particularly when it conforms with the standard calculation, which was reached

after long and hard debate and labor by the Legislature and the Bar.

**3) JUDGE SPEARMAN PROPERLY CORRECTED
A SCRIVENER'S ERROR IN THE DECREE OF
DISSOLUTION**

One, perhaps, would have thought that after some two years of negotiation involving highly intelligent, professional clients, and two very experienced and well-respected family law attorneys, it would all be over at some point. But, that was not destined to happen, and there was one last battle to be fought; that being over conflicting wording in the Decree of Dissolution itself.

Here is what happened. The parties entered into a handwritten "CR2 Agreement" on January 11, 2011. CP 8. That document provided that Ms. Hale would pay Mr. Hale \$237,500.00 for his interest in the family home (which was "free and clear" of debt). It stated that the debt would be interest free if paid "within 60 days." It did not say within 60 days of when. Both parties and attorneys signed the document. The parties were still married and, of course,

were joint owners of the home. The Decree would not be entered until April 8, 2011.

Various drafts of the Decree were exchanged by the attorneys in the meantime while the parties argued over family memorabilia and other issues. Finally, on April 8, 2011, a Decree was approved by the parties and entered by the Court. CP 158, 162. However, there was a discrepancy in the language. Paragraph 1.3 (CP 158) in the Judgment Summary had interest on the \$237,500.00 judgment starting 60 days after January 11, 2011. In the body of the Decree, paragraph 3.2(13) (CP 159) interest on the judgment was to be stayed for 60 days after entry of the Decree.⁴ Again, both parties and attorneys approved entry of the Decree, which was signed by Judge Spearman.

Some two weeks later, Ms. Hale's mortgage broker discovered the discrepancy in the Decree. CP 166. For obvious reasons, this created serious problems for the

⁴ There is no dispute that the judgment was paid within that 60-day period.

lender, and Ms. Hale; and in Ms. Hale's view had the potential of creating an undeserved and unexpected windfall for Mr. Hale and a serious financial setback for her.

Ms. Hale's attorney, Ms. Montgomery, immediately moved for an Order Correcting Scrivener's Error. CP 163-221, filed May 6, 2011. The motion was heard by Judge Spearman on May 13, 2011, and he ruled that there was such an error and the Decree should be reformed to clarify that the 60-day interest free period began with the entry of the Decree. CP 140.

There are several legal, and just plain common sense, reasons for the Court's ruling:

- 1) Ms. Hale could not borrow money (nearly half of the value) on a home she did not own; and she would not own it until the Decree of Dissolution was entered;

- 2) Mr. Hale, by simply "stalling" negotiations, would have earned 12% interest on \$237,500.00 for as long as he was able to find something else to dispute, no matter how trivial. That was certainly never Ms. Hale's intent;

3) The CR2 Agreement does not specify a date for the interest-free period (CP 8), while paragraph 3.2(13) of the Decree is specific, i.e., 60 days from entry. CP 159.

4) If the Court had not corrected the error, the parties (and the lender) would be subject to a Decree with two conflicting provisions, which most certainly would have prolonged this already two-year old litigation.

5) There obviously was no meeting of the minds on this issue within the CR2 Agreement, thus, it was not, and is not, a binding contract which, in effect, is what a CR2 is, or should be.

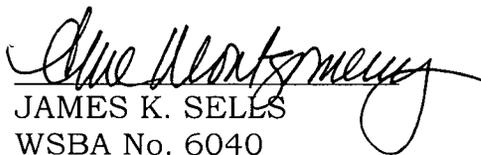
This is a simple matter of what probably were too many computer-generated drafts going back and forth, which resulted in an error; an error which Mr. Hale now seems to want to exploit to his considerable financial advantage. The Court has the inherent authority (and duty) to correct errors in an order, and that is what happened here.

V. CONCLUSION

Each and every assignment of error and argument made by Mr. Hale here boils down to nothing more than an unconvincing theory that virtually every ruling made by Judge Spearman was not just an abuse of discretion, but a manifest abuse of discretion. Without trial courts having the ability to exercise their discretion within the boundaries of the law, there may as well be no such courts. Mr. Hale disagrees with these three discretionary rulings, and that certainly is his right. But, as long as the court exercised its discretion in a proper manner, within the law, this Court must recognize and accept the essential role of the trial judge.

Judge Spearman's rulings should be affirmed and, hopefully, as a consequence, these folks and their children can move on with their lives.

Respectfully submitted,


JAMES K. SELES
WSBA No. 6040
ANNE M. MONTGOMERY
WSBA No. 23579
Attorneys for Jane Hale

CERTIFICATE OF MAILING

I hereby certify that on this day a true copy of the foregoing BRIEF OF RESPONDENT JANE HALE was deposited in the U.S. Mail first class mail, postage prepaid, addressed to:

Mark L. Yelish
Attorney at Law
623 Dwight Street
Port Orchard, WA 98366-4693

I swear under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of October 2011 at Silverdale, Kitsap County, Washington.

A handwritten signature in cursive script, reading "Cheryl L. Sinclair". The signature is written in black ink and is positioned below the dated text.