

NO. 42645-5-II

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re the Marriage of:

TRISHA ROBIN BRADLEY,

Respondent,

v.

FRANCIS THOMAS BRADLEY,

Appellant.

BRIEF OF APPELLANT
FRANCIS THOMAS BRADLEY

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I. INTRODUCTION

This is a case about child support. This appeal stems from a decision of a superior court judge denying Mr. Bradley's motion for revision of a superior court commissioner's ruling. In 2008, a Final Order of Child Support was entered following a trial in a dissolution action. The order included a provision that child support was to be recalculated in June 2010 using Mr. Bradley's actual income if employed or if unemployed or underemployed, income would be imputed based upon the median net income schedule. In 2010, Mrs. Douay (formerly Bradley)¹ filed a Petition for Modification of Child Support requesting that the court impute income based upon the median net income.

The petition was heard by a superior court commissioner, who ultimately granted Mrs. Douay's request. The commissioner found that Mr. Bradley was underemployed and concluded that the provision from the 2008 Order of Child Support was enforceable in spite of a 2009 amendment to RCW 26.19.071(6), which sets forth priorities of how income is to be imputed. The commissioner also concluded that because Mr. Bradley provided records of his actual earnings, the priorities of RCW 26.19.071(6) did not apply.

¹ The respondent has remarried since the dissolution became final. Her new married name is Trisha Douay, which is how she will be referenced in this brief.

Mr. Bradley filed a motion for revision of the commissioner's ruling, which the superior court judge denied. The revision court determined that the provision in the 2008 Order of Child Support became the law of the case. The revision court also relied upon the commissioner's reading of the statute that because Mr. Bradley had provided records of his actual earnings, the priorities of RCW 26.19.071(6) did not apply.

Mr. Bradley contends on appeal that the revision court erred in denying his motion for revision because the 2008 Order of Child Support did not become the law of the case, and the court erred in its interpretation and application of RCW 26.19.071(6).

II. ASSIGNMENTS OF ERROR

The superior court commissioner entered its Findings/Conclusions on Petition for Modification of Child Support, Order on Modification of Child Support, Final Order of Child Support, Child Support Worksheets, all on July 6, 2011. The revision court entered its Order on Motion to Revise Commissioner's Ruling on September 9, 2011. Mr. Bradley assigns error to the revision court.

Specific Assignments of Error:

1. The revision court erred when it denied Mr. Bradley's motion for revision of the commissioner's ruling. (Order on Motion to Revise Commissioner's Ruling)

Issues Pertaining to Assignments of Error:

A. The revision court inappropriately concluded that the law of the case doctrine applied and that the 2008 Order of Child Support became the law of the case. Whether the revision court erred when it concluded that Paragraph 3.22 of the 2008 Order of Child Support became the law of the case in spite of the 2009 amendment to RCW 26.19.071(6)? (Assignment of Error #1)

B. The revision court incorrectly determined that because Mr. Bradley presented his actual earnings to the court, the priority of income set forth in RCW 26.19.071(6) did not apply. Whether the revision court erred in its interpretation and application of RCW 26.19.071(6) in light of the amended language? (Assignment of Error #1)

III. STATEMENT OF THE CASE

Francis Thomas Bradley and Trisha Robin Bradley were married on September 2, 1995. (Clerk's Papers 9, 93) The parties separated on November 6, 2005. (CP 9, 93) The parties had three children who were 5, 3, and 2 at the time of trial. (CP 9, 94) The trial court granted the

dissolution, approved an agreed parenting plan, and ordered child support for the parties' three children. (CP 92-103)

At the time of trial, Mr. Bradley was thirty-two (32) years of age and had a high school education. (CP 9) He had no training or job skills and very little work experience. (CP 1-3, 9) From 1994 to 2000, Mr. Bradley worked at L&E Bottling as a forklift driver, and his ending pay was approximately \$15.00 per hour. (CP 2, 10) Mr. Bradley was a stay at home father since the first child was born in April of 2002, with the exception of a brief part-time job with Sight and Sound in 2003. (CP 1-2, 10) From 2002 until the parties separated in 2005, Mr. Bradley provided the primary care for the children. (CP 1, 9-10) The only other income Mr. Bradley had generated since separation was from sales of personal property on the Internet, which was approximately \$700.00 to \$800.00 per month. (CP 2, 10)

At the time of trial, Mr. Bradley was attending Centralia Community College as a full time student working towards a degree in social work, as well as working at the college part time for minimum wage earning approximately \$400.00 to \$500.00 per month. (CP 2, 10-11)

The trial court entered findings of fact and conclusions of law wherein it incorporated the Order of Child Support, as well as the child support worksheet, which were both filed on February 29, 2008. (CP 95)

The court imputed income to Mr. Bradley at minimum wage because he was voluntarily underemployed, and he was ordered to pay \$482.00 as his gross child support obligation. (CP 26-27, 104-109) However, the court also concluded at Paragraph 3.22 of its Order of Child Support:

Commencing June 2010, child support shall be recalculated using Respondent's actual income if employed full time (more than 35 hours per week) or if Respondent is unemployed or underemployed income would be imputed to Respondent based upon the median net income schedule. If Respondent should attain full time employment prior to June 2010 he shall notify Petitioner of the same and child support shall be recomputed. In the event Respondent attains full time employment and fails to notify Petitioner of the same, any subsequent change in child support shall be retroactive to the date of Respondent's employment.

(CP, 30) Neither party appealed the trial court's decision.

On December 16, 2010, Mrs. Douay filed a Summons and Petition for Modification of Child Support. (CP 31-33, 110-111) In her Petition, Mrs. Douay argued that the 2008 Order of Child Support should be modified for the following reasons:

The previous order was entered more than two years ago and there has been a change in the income of the parents.

There has been the following substantial change of circumstances since the order was entered:

At the time the order was entered, Respondent's support was based on minimum wage levels. Instead of finding employment he chose to go to college and has

now obtained his degree. Subsidizing the Respondent's career is no longer just or reasonable at the expense of his children. Respondent has now attained the age of 35.

(CP 32)

The Petition also requested that the court "order[] child support payments which are based upon the Washington State child support statutes." (CP 32) In support of her Petition, Mrs. Douay also filed, on December 28, 2010, her 2008 and 2009 income tax returns, as well as her pay stub from October 2010. (CP 112-129)

On February 16, 2011, Mr. Bradley filed his response to the Petition for Modification of Child Support, as well as his financial declaration, his 2008 and 2009 income tax returns, his pay stubs from July 3, 2010 through August 13, 2010; November 20, 2010 through December 31, 2010; and January 1, 2011 through January 14, 2011, and his proposed child support schedule worksheets. (CP 34-35, 130-156)

On April 6, 2011, Mrs. Douay filed a declaration alleging that Mr. Bradley was "taking time off" and that he had "avoided paying a reasonable level of support for the past three years." She requested that the court modify the 2008 Order of Child Support and "set an amount of support based upon imputed income for his age which I believe to be 35." (CP 37) Also on that date, Mrs. Douay filed her financial declaration, as

well as her 2008, 2009, and 2010 tax returns and her pay stub from March 2011. (CP157-202)

Mr. Bradley filed a responding declaration on April 19, 2011, wherein he stated, in relevant part:

3. I did obtain a degree from the University of Washington in Tacoma in social work. I am actively trying to get into graduate school to obtain a masters degree in social work. I am not "taking time off." I am trying to get accepted into a masters program.

4. I am working 34 hours per week at Sticklin Mortuary for \$11.22 per hour. I have imputed 40 hours per week to calculate child support. I am working at Sticklin until I can find a job in social work.

(CP 38) Mr. Bradley also filed his 2010 tax return, as well as his pay stubs from January 15, 2011 through March 11, 2011. (CP 203-214)

On May 11, 2011, a hearing was held on Mrs. Douay's Petition for Modification of Child Support before Court Commissioner Tracy Loiacono Mitchell. (*See generally* Report of Proceedings, Vol. 1²) At the hearing, Mrs. Douay's counsel, Mr. Enbody, argued that the court should impute income to Mr. Bradley according to his age. (RP, Vol. 1, pp.2-5) Mr. Bradley's counsel, Mr. Boehm, argued that before the court could

² A verbatim report of proceedings from five separate hearings has been included in the record on appeal. For ease of reference, Mr. Bradley will refer to the hearings as separate volumes in chronological order, as follows:

RP, Vol. 1 – May 11, 2011 hearing

RP, Vol. 2 – May 25, 2011 hearing

RP, Vol. 3 – June 22, 2011 hearing

RP, Vol. 4 – July 29, 2011 hearing

RP, Vol. 5 – September 9, 2011 hearing

impute income to Mr. Bradley, it was required to make a finding that he was voluntarily underemployed. (RP, Vol. 1, p.6) Mr. Boehm further asserted:

If The Court finds that Mr. Bradley is voluntarily underemployed, then The Court needs to apply the standards set forth in chapter 26.19 and that starts with imputing income at full time earnings at his current rate of pay. And that's what we've done in filing his child support -- proposed child support worksheets.

(RP, Vol. 1, p.6)

The court engaged in a colloquy with counsel for both parties as to the effect of Paragraph 3.22 of the 2008 Order of Child Support. (RP, Vol. 1, pp.9-10) The court found that Mr. Bradley was underemployed and stated: "The question is now do we use his current rate of pay according to the statute or you go with what Judge Lawler ordered [in the 2008 Order of Child Support] and is that a void -- order a voidable order."

(RP, Vol. 1, p.10) The court then stated:

This is what I'm going to do. I'm going to continue this for two weeks but I'm going to set support at the median net income and you can find -- if you find some type of case law or direction, Mr. Boehm, that says I should not be following Judge Lawler's -- I mean this is a clear indication that -- I mean it's like I'm going to set this final order but we're going to be setting a final review and we're going to be doing this. I mean that's the way I'm reading it.

(RP, Vol. 1, p.11)

The court further expressed concern that the parties may have agreed to the language and were now arguing that it should not apply, although there is nothing in the record to support this speculation. (RP, Vol. 1, p.11) The court then continued the matter to May 25, 2011. (RP, Vol. 1, pp.12-13)

On May 20, 2011, Mr. Bradley filed a memorandum, wherein he acknowledged the court's finding as to voluntary underemployment, and outlined two issues for the court:

- I. Upon what basis should the court impute income to the respondent.
- II. Is the escalation clause in the final order of child support enforceable.

(CP 43) With respect to the first issue, Mr. Bradley noted that RCW 26.19.071(6) had been amended since the 2008 Order of Child Support and argued:

Faced with a change in the law, a court now determining what level of income to impute must apply the existing law. To do otherwise would be manifestly unreasonable and an abuse of discretion. Just like in an action to modify a parenting plan or the amount of child support, the court must apply the existing law.

When imputing income, the court has to apply the statutory factors. *In re Shellenberger*, 80 Wn.App. 71 (1995). Under RCW 26.19.071(6), income is based on the median income established by the U.S. Census Bureau only in the absence of records of a parent's actual earnings. In this case, the court has evidence of the respondent's actual rate of pay and earnings.

(CP 43-44) With respect to the second issue, Mr. Bradley argued that Paragraph 3.22 of the 2008 Order of Child Support was an automatic escalation clause and that, pursuant to *In re Marriage of Edwards*, 99 Wash.2d 913, 665 P.2d 883 (1983), the provision was unenforceable. (CP 44-45)

Mrs. Douay filed a reply to Mr. Bradley's memorandum, wherein she again argued that the court should impute income to Mr. Bradley according to the median net income for a person of his age. (CP 50) Mrs. Douay also argued, among other things, that Mr. Bradley had not appealed the 2008 Order of Child Support or filed a petition to modify the terms of the order. (CP 50)

At the hearing held on May 25, 2011, before Commissioner Mitchell, the parties presented further argument. (RP, Vol. 2, pp.2-13) Counsel for Mr. Bradley again argued that Paragraph 3.22 of the 2008 Order of Child Support was an automatic escalation clause, but that even if it were not, the court was required to apply the current law. (RP, Vol. 2, p.12) The court ultimately concluded:

I'm going to find that [Paragraph 3.22] is enforceable and I'm going to follow what Judge Lawler indicated. I have already made a finding that he's underemployed. And The Court will use the median net income as the income imputed to Mr. Bradley. You can put that in the order.

(RP, Vol. 2, p.13)

Another hearing was held on June 22, 2011, to review the parties' proposed orders. (*See generally* RP, Vol. 3) Thereafter, on July 6, 2011, the court issued its written "Findings/Conclusions on Petition for Modification of Child Support," as well as an order granting the petition for modification of child support. (CP 70-73, 215-216) The court also entered the Order of Child Support and accompanying child support worksheet. (CP 74-83, 217-221) In its findings, the court concluded:

Respondent is not working full time and has not worked full time since the entry of the last order. In the meantime, he has gone back to school and received a college degree from the University of Washington in June of 2010. Since obtaining his degree, he has worked only part time. The documentation provided by the Respondent shows that from 01/01/2011 to 01/14/2011 he averaged only a little over 11 hours per week, from 01/15 to 01/28 a little over 6 hours per week, from 02/12 to 02/25 about 6 hours per week, from 02/26/11 to 03/11/11 about 22 hours per week, from 01/28 to 02/12 about 8.5 hours per week, from 11/20 to 12/03 about 5.5 hours per week, from 12/03 to 12/17 about 6 hours per week, from 12/18 to 12/31 about 8 hours per week, from 07/03 to 07/16 a little over 1 hour per week, from 07/17 to 07/30 a little over 17 hours per week, from 07/31 to 08/13 a little over 5 hours per week. Additionally, the Respondent only showed \$4,179.00 of earned income for the year 2010, only \$7,551.00 in 2009, and only \$5,268.00 in 2008.

The Court finds that the Respondent is voluntarily underemployed. **Since the Court has found that the Respondent is voluntarily underemployed, the priorities of RCW 26.19.071(6) do not apply because there is no absence of records**

concerning the Respondent's actual earnings and the first sentence of RCW 26.19.071 states, "The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed."

Paragraph 3.22 of the Support Order entered in 2008 also provided that in the event the Respondent was not employed on a full time basis, then income would be imputed based upon the median net income schedule in June of 2010. The Respondent did not appeal this ruling nor has he filed for a modification of the order.

The Court finds the earnings of the Respondent are known and therefore the priorities contained in RCW 26.19.071(6) do not apply. Standing alone the requirements of RCW 26.19.071 substantiate the conclusion that median net income be utilized and since the earnings of the Respondent are known that the priorities contained in RCW 26.19.071(6) do not apply.

Furthermore, the Court does not consider the ruling of Judge Lawler to be an automatic escalation clause because the order gave the Respondent options to avoid the imposition of median net income which the Respondent has chosen not to utilize.

(CP 71-72) (emphasis added)

Under Paragraph 3.2 of the 2011 Order of Child Support, the court ordered:

For purposes of this Order of Child Support, the support obligation is based upon the following income:

C. The net income of the obligor is imputed at \$3,448.00 because:
the obligor is voluntarily unemployed.³

³ This appears to have been a typo as the court commissioner's oral and written findings were that Mr. Bradley was underemployed.

The amount of imputed income is based on the following information in order of priority. The court has used the first option for which there is information:

Median Net Monthly Income
Table.

(CP 75)

On July 7, 2011, Mr. Bradley filed a motion for revision, pursuant to RCW 2.24.050, of the commissioner's ruling on the Order of Child Support. (CP 84-85) In his motion, Mr. Bradley argued that "[t]he Commissioner applied the incorrect law in imputing income to the respondent under RCW 26.19.071(6)." (CP 84) Mr. Bradley asserted that the commissioner erred in imputing income based upon the median net income and that the imputation of income "should have been respondent's current earnings on a fulltime basis." (CP 84) Mr. Bradley further contended that the commissioner erred in finding that Paragraph 3.22 of the 2008 Order of Child Support was not an automatic escalation clause. (CP 84-85) Mr. Bradley noted that "[t]his motion is based upon RCW 2.24.050, RCW 26.19.071(6) Ch.26.19 Appendix Instructions, Line 1f, and instruction Income Standards (6) and the records and file[s] in this case." (CP 85)

A hearing was held on Mr. Bradley's motion for revision on July 29, 2011, before Superior Court Judge James Lawler.⁴ (*See generally* RP, Vol. 4) Mr. Bradley's counsel, Mr. Boehm, noted that he was not challenging the commissioner's finding of voluntary underemployment. (RP, Vol. 4, p.2) Rather, he again argued that RCW 26.19.071(6), as amended in 2009, required the commissioner to impute income to Mr. Bradley based upon the priorities set forth in the statute, beginning with full time earnings at the current rate of pay. (RP, Vol. 4, pp.2-3) Mr. Boehm also argued that the Instructions for Worksheets indicate that income should be imputed "using the first method possible based on the information you have in the following order: Calculate full time earnings using either, number one, current rate of pay, and then it goes to say historical rate of pay, past rate of pay, minimum wage." (RP, Vol. 4, p.3) Mr. Boehm further noted that the instructions indicate that if one of the aforementioned methods cannot be used, then income may be imputed using the median net income tables. (RP, Vol. 4, p.3) Mr. Boehm asserted that because there was evidence of Mr. Bradley's current earnings, "[t]hat is the level that should be imputed full time to Mr. Bradley." (RP, Vol. 4, pp.3-4) Mr. Boehm again argued that Paragraph

⁴ Judge Lawler was the judge on the original trial who entered the 2008 Order of Child Support.

3.22 of the 2008 Order of Child Support was an “invalid automatic escalation clause.” (RP, Vol. 4, pp.4-5)

Mrs. Douay’s counsel, Mr. Enbody, responded with the argument that the priorities set forth in RCW 26.19.071(6) only apply if there is an absence of a parent’s actual earnings. (RP, Vol. 4, p.6) Essentially, he argued that because the court had evidence of Mr. Bradley’s earnings, the priorities did not apply. (RP, Vol. 4, p.6)

After hearing argument from both parties, the court concluded:

All right. Well, the difference is that if we didn’t have this paragraph 3.22 in the decree, I would agree with you, Mr. Boehm. But that became the law of the case. Everyone was under notice what the parties had to do. He was in control of the situation. If he was working, then there would be -- we wouldn’t be looking at this, we wouldn’t be looking at the median income. We would be using his actual income full time. He didn’t do that. That order predated the change in the statute.

So, again, it’s not -- I agree it was not an automatic escalation clause because it wasn’t automatic. It was dependent on what he did. The median income, using the median income was the law of the case. That was what I ordered. So I guess we might be able to get there a different way whether we’re using the current 26.19.071 to get there or we’re using this one. The bottom line is the median income is what was used. That was the appropriate response. That was the appropriate ruling. So the motion for revision is denied.

(RP, Vol. 4, pp.11-12)

In an effort to clarify the court's ruling, Mr. Boehm stated, "So it's The Court's finding then in this action we do not apply the current law because of that paragraph? Is that what you're basically finding?," to which the court responded, "Yes." (RP, Vol. 4, p.12)

Another hearing was held on September 9, 2011, for presentation of the proposed order. After hearing argument from each of the parties, the court commented:

But I think there needs to be the additional language that says that basically my decision was because of the original -- the language in the original decree that we weren't doing -- we weren't going through those priorities, we were imputing as I said in my original decree.

(RP, Vol. 5, p.5)

The court subsequently entered the written order, wherein it concluded:

1) There was no absence of Mr. Bradley's earnings presented to the Court and Mr. Bradley's actual earnings were supplied to the Court when the matters were originally heard;

2) Mr. Bradley did not appeal the ruling following trial that set his child support by Order of February 28, 2008 which in particular adopted paragraph 3.22 of said Order nor has he petitioned the Court for modification of the child support order.

From the foregoing FINDINGS OF FACT, the Court adopts the following CONCLUSIONS OF LAW:

1) Paragraph 3.22 of the Order of Support dated February 28, 2008 was not an automatic escalator because it was not "automatic".

2) The priority of imputation of income set forth in RCW 26.19.071 applies in the absence of records of a parent's actual earnings.

(CP 87-88)

Thereafter, Mr. Bradley filed his Notice of Appeal. (CP 224-227)

IV. ARGUMENT

Mr. Bradley contends that the trial court erred when it failed to revise the commissioner's 2011 Order of Child Support and impute income according to the requirements set forth in RCW 26.19.071(6). Mr. Bradley filed, pursuant to RCW 2.24.050, a motion for revision of the commissioner's ruling. RCW 2.24.050 provides:

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.

"The superior court has the authority to review the records of the case and a commissioner's findings of fact and conclusions of law." *In re*

Marriage of Goodell, 130 Wn. App. 381, 385, 122 P.3d 929 (2005) (citing WASH. CONST., art. IV, § 23; RCW 2.24.050; *In re Marriage of Dodd*, 120 Wn. App. 638, 643, 86 P.3d 801 (2004)).

A. Standard of Review

As set forth by the Court of Appeals in *Dodd*:

“In cases such as this one, where the evidence before the commissioner did not include live testimony, then the superior court judge’s review of the record is de novo.” *In re Marriage of Moody*, 137 Wash.2d 979, 993, 976 P.2d 1240 (1999).

The revision court is in the same position as this court. *Lown*, 116 Wash.App. at 407, 66 P.3d 660. Accordingly, if a party challenges the commissioner’s findings of facts and conclusions of law, the revision court reviews the findings for substantial evidence and the conclusions of law de novo. *Id.* at 407-08, 66 P.3d 660. “The superior court has the authority to review the records of the case, and the findings of fact and conclusions of law entered by the court commissioner.” *In re Marriage of Balcom*, 101 Wash.App. 56, 59, 1 P.3d 1174 (2000) (citing RCW 2.24.050).

But the revision court’s scope of review is not limited merely to whether substantial evidence supports the commissioner’s findings. *In re Smith*, 8 Wash.App. 285, 288, 505 P.2d 1295 (1973). Instead, the revision court has full jurisdiction over the case and is authorized to determine its own facts based on the record before the commissioner. *In re Dependency of B.S.S.*, 56 Wash.App. 169, 171, 782 P.2d 1100 (1989); *In re Welfare of McGee*, 36 Wash.App. 660, 679 P.2d 933 (1984); *Smith*, 8 Wash.App. at 288-89, 505 P.2d 1295.

B. Modification of Child Support Order

“A trial court exercises broad discretion in its decision to modify the child support provisions of a divorce decree.” *In re Marriage of Blickenstaff*, 71 Wn. App. 489, 498, 859 P.2d 646 (1993) (citing *Lambert v. Lambert*, 66 Wn.2d 503, 508, 403 P.2d 664 (1965)). Under this standard, the reviewing court cannot substitute its judgment for that of the trial court unless the trial court’s decision rests on unreasonable or untenable grounds.” *In re Marriage of Leslie*, 90 Wn. App. 796, 802-03, 954 P.2d 330 (1998) (citing *In re Marriage of Griffin*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990)); *Pollock v. Pollock*, 7 Wn. App. 394, 399, 499 P.2d 231 (1972)).

In this case, the revision court had before it the record on the Petition for Modification of Child Support. The court heard the parties’ arguments and essentially agreed with the commissioner that Paragraph 3.22 of the original 2008 Order of Child Support was enforceable in spite of the 2009 amendment to RCW 26.19.071(6). (*See* RP, Vol. 4, pp.11-12) While there are some inconsistencies between the revision court’s oral ruling and its written order, the court ultimately determined that Paragraph 3.22 of the 2008 Order of Child Support “became the law of the case,” (RP, Vol. 4, pp.11-12), and that because Mr. Bradley supplied information as to his earnings, the “priority of imputation of income set forth in RCW

26.19.071” did not apply.⁵ (CP 88) Mr. Bradley asserts that the court erred by refusing to correctly apply the existing law at the time the petition was brought.

1. The law of the case doctrine does not apply

At the hearing held on July 29, 2011, on Mr. Bradley’s motion for revision, the court held: “The median income, using the median income was the law of the case. That was what I ordered.” (RP, Vol. 4, pp.11-12) The court responded in the affirmative when asked whether it was the court’s finding that “we do not apply the current law because of that paragraph [3.22].” (RP, Vol. 4, p.12) At the September 9, 2011 hearing, the court noted:

But I think there needs to be the additional language that says that basically my decision was because of the original -- the language in the original decree that we weren’t doing -- we weren’t going through those priorities, we were imputing as I said in my original decree.⁶

⁵ The revision court acknowledged that it actually agreed with Mr. Bradley’s interpretation of the statute but that Paragraph 3.22 was the law of the case. (“Well, the difference is that if we didn’t have this paragraph 3.22 in the decree, I would agree with you, Mr. Boehm. But that became the law of the case.”) (RP, Vol. 4, pp.11-12) However, in the court’s written order, it concluded that the priorities set forth in RCW 26.19.071 did not apply. (CP 88)

⁶ The superior court commissioner similarly applied Paragraph 3.22 of the 2008 Order of Child Support. (See RP, Vol. 2, p.13) (“I’m going to find that it is enforceable and I’m going to follow what Judge Lawler indicated. I have already made a finding that he’s underemployed. And The Court will use the median net income as the income imputed to Mr. Bradley. You can put that in the order.”)

(RP, Vol. 5, p.5) With respect to its written order, the revision court did not explicitly state that Paragraph 3.22 was the law of the case instead stating that it was not an automatic escalator clause. (CP 88) When pressed by Mr. Boehm regarding the court's comments at the hearing that it would not apply the priorities set forth in RCW 26.19.071(6) because of the language in Paragraph 3.22, the court responded, "I think there's enough of [Paragraph 3.22] there in paragraph one [of the order]." (RP, Vol. 5, pp.6-7; *see also* CP 88)

While the court's inclusion of Paragraph 3.22 of the 2008 Order of Child Support may have been objectionable, Mr. Bradley does not assert that it was an automatic escalation clause. Rather, on appeal Mr. Bradley avers, as he did below, that "[f]aced with a change in the law, a court now determining what level of income to impute must apply the existing law." (CP 44) It is evident that the revision court refused to apply the existing law due to its determination that the 2008 Order of Child Support, and specifically median income, was the law of the case. (*See* RP, Vol. 4, pp.11-12) Mr. Bradley contends that this was error.

In *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005), the Washington Supreme Court engaged in an extensive discussion of the law of the case doctrine, noting that it is a "doctrine that derives from both RAP 2.5(c)(2) and common law" and that it "means different things in

different circumstances, *Lutheran Day Care v. Snohomish County*, 119

Wn.2d 91, 113, 829 P.2d 746 (1992).” The Court stated:

In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. *Id.* (citing 15 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Judgments* § 380, at 55-56 (4th ed.1986)). In addition, law of the case also refers to the principle that jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal. *Hickman*, 135 Wash.2d at 101-02, 954 P.2d 900. In all of its various formulations the doctrine seeks to promote finality and efficiency in the judicial process. *See* 5 Am. Jur.2d Appellate Review § 605 (1995).

Perez, 156 Wn.2d at 41, 123 P.3d 844.

The law of the case doctrine is wholly inapplicable in this instance as the trial court’s 2008 Order of Child Support is clearly not an appellate holding and has nothing to do with jury instructions. As noted above, the doctrine also derives from RAP 2.5(c)(2), which does not apply to superior court proceedings.

Even assuming that the revision court could rely upon this doctrine, which Mr. Bradley argues it could not, there are exceptions to the law of the case doctrine. As noted in *Perez*:

First, application of the doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party. *See, e.g., First Small Bus. Inv. Co. of Cal. v.*

Intercapital Corp. of Or., 108 Wash.2d 324, 333, 738 P.2d 263 (1987). This common sense formulation of the doctrine assures that an appellate court is not obliged to perpetuate its own error.

Second, application of the doctrine may also be avoided where there has been an intervening change in controlling precedent between trial and appeal. *See* RAP 2.5(c)(2) (authorizing appellate courts to review prior decisions on the basis of the law “at the time of the later review.”).

156 Wn.2d at 42, 123 P.3d 844. Either one of these exceptions should apply to avoid application of the doctrine. In this instance, the court commissioner knew that the law had changed but elected to apply a provision that went contrary to that change in the law. The revision court faced with reviewing the commissioner’s conclusion of law erred when it too refused to apply the existing law.

2. Imputation of income as a result of being voluntarily underemployed must follow the priorities set forth in RCW 26.19.071(6)

At the time that the trial court entered the original 2008 Order of Child Support, RCW 26.19.071(6) stated, in relevant part:

(6) **Imputation of income.** The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. . . . In the absence of information to the contrary, a parent’s imputed income shall be based on the median income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.

In 2009, RCW 26.19.071(6) was amended, with an effective date of October 1, 2009. *See* 2009 Washington Session Laws Ch. 84, § 3, p.589; *see also* H.B.1794. The amended language provides, in relevant part:

(6) **Imputation of income.** The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. . . . In the absence of records of a parent's actual earnings, the court shall impute a parent's income in the following order of priority:

- (a) Full-time earnings at the current rate of pay;
- (b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;
- (c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;
- (d) Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is recently coming off public assistance, disability lifeline benefits, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;
- (e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.⁷

Mr. Bradley did not challenge the superior court commissioner's finding that he was voluntarily underemployed, nor does he attempt to challenge it on appeal. There was certainly evidence from which the

⁷ RCW 26.19.071 has since been amended twice more, but those amendments are not relevant to this appeal.

commissioner could have found, and in fact did find, that Mr. Bradley was voluntarily underemployed.⁸ (See CP 71)

However, once a finding of voluntarily underemployment is made, the court must make a determination as to how to impute income. In this case, the commissioner held:

Since the Court has found that the Respondent is voluntarily underemployed, the priorities of RCW 26.19.071(6) do not apply because there is no absence of records concerning the Respondent's actual earnings and the first sentence of RCW 26.19.071 states, "The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed."

....

The Court finds the earnings of the Respondent are known and therefore the priorities contained in RCW 26.19.071(6) do not apply. Standing alone the requirements of RCW 26.19.071 substantiate the conclusion that median net income be utilized and since the earnings of the Respondent are known that the priorities contained in RCW 26.19.071(6) do not apply.

(CP 71-72)

As noted above, the revision court agreed with Mr. Boehm's reading of the statute, as evidenced by the following exchange:

MR. BOEHM: But I think the real gist here is that you've got proof of what the guy's earning, we agree that he's voluntarily underemployed, you impute income at full time. That's what the law provides the court to do. That's what needs to be done.

⁸ RCW 26.19.071(6) provides that the determination of whether a parent is voluntarily underemployed is "based upon that parent's work history, education, health, and age, or any other relevant factors." However, these factors do not correspondingly apply in determining the *amount* of income to be imputed.

THE COURT: All right. Well, the difference is that if we didn't have this paragraph 3.22 in the decree, I would agree with you, Mr. Boehm. But that became the law of the case.

(RP, Vol. 4, p.11) However, the revision court subsequently stated: "So I guess we might be able to get there a different way whether we're using the current 26.19.071 to get there or we're using this one." (RP, Vol. 4, p.12) After argument on presentation of Mrs. Douay's proposed order, the court ultimately found that "[t]here was no absence of Mr. Bradley's earnings presented to the Court and Mr. Bradley's actual earnings were supplied to the Court when the matters were originally heard." (CP 87) The revision court concluded: "The priority of imputation of income set forth in RCW 26.19.071 applies in the absence of records of a parent's actual earnings." (CP 88)

Mr. Bradley maintains that the superior court commissioner, and subsequently the revision court, erred in the interpretation and application of RCW 26.19.071(6). Where the case turns on interpretation of child support statutes, the appellate court must determine whether the trial court erred as a matter of law. *In re Peterson*, 80 Wn.App. 148, 153, 906 P.2d 1009 (1995) (citing *In re Stern*, 68 Wn. App. 922, 929, 846 P.2d 1287 (1993)).

The interpretation and applicability of a statute presents questions of law reviewed de novo. *Grey v. Leach*, 158 Wn. App. 837, 844, 244 P.3d 970 (2010). “The court’s primary goal in construing a statute is to determine and give effect to the legislature’s intent.” *In re Marriage of McCausland*, 159 Wn.2d 607, 615, 152 P.3d 1013 (2007). The court generally begins its analysis with the text of the statute. *Id.* If the statute’s meaning is plain on its face, the inquiry ends. *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007). A statute is ambiguous, however, when it is susceptible to two or more reasonable interpretations. *Id.*

When statutory language is unclear, the appellate court may review legislative history to determine the scope and purpose of a statute. *Wash. Fed’n of State Employees v. State*, 98 Wash.2d 677, 684-85, 658 P.2d 634 (1983). Strained meanings and absurd results should be avoided. *State v. Neher*, 112 Wash.2d 347, 351, 771 P.2d 330 (1989). “The court will avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences.” *Tinget v. Haisch*, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007) (quotations omitted). “A reading that produces absurd results must be avoided because it will not be presumed that the legislature intended absurd results.” *Id.* (quotations omitted).

It is evident from the language of RCW 26.19.071(6) that the court is required to impute income to a parent who is voluntarily unemployed or voluntarily underemployed. It is unclear, however, what is meant by the phrase “[i]n the absence of records of a parent’s actual earnings” as set forth in the statute. There is no definition of the term “records,” and it is unclear whether the legislature is referring only to paystubs or some other records. Moreover, it is difficult to contemplate how the court can utilize the first priority, “[f]ull-time earnings at the current rate of pay,” without some record of the parent’s actual earnings.

The most reasonable reading of the statute is that income is imputed according to the priorities set forth in the statute when a parent is voluntarily unemployed, voluntarily underemployed, or when the court has no records at all of a parent’s earnings. Such a reading allows the court to utilize the list of priorities based upon the information before the court. Moreover, the language of the statute demonstrates the legislature’s intention that the court’s utilization of the list of priorities is mandatory. Reading the statute to allow a court to disregard a parent’s submission of information as to his or her actual earnings would lead to absurd results.

Indeed, RCW 26.19.071(1) provides that “[a]ll 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” (emphasis added). In addition, “[t]ax returns for the preceding two years and current paystubs *shall* be provided to verify income and deductions” (emphasis added). RCW 26.19.071(2). The legislature certainly did not intend for a court to blatantly disregard information that individuals are required to submit by statute, and impute income at a level of its own choosing.⁹

Mr. Bradley’s reading of the statute is supported by the instructions for the worksheets, which are included as an appendix to Ch. 26.19 RCW. As set forth in RCW 26.19.050(1), “[t]he administrative office of the courts shall develop and adopt worksheets and instructions to assist the parties *and courts* in establishing the appropriate child support level and apportionment of support” (emphasis added).

With respect to imputation of income, the instructions provide:

LINE 1f, Imputed Income: Enter the imputed gross monthly income for a parent who is voluntarily unemployed, underemployed or if you do not have records of a parent’s actual earnings. Refer to “INCOME STANDARD #6: Imputation of income.” (See page 2.) Impute income using the first method possible based on the information you have in the following order:

⁹ See *State ex rel. Stout v. Stout*, 89 Wn. App. 118, 124-25, 948 P.2d 851 (1997) (holding that where the parent presented extensive financial data to support a request for modification of child support, the trial court erred in ignoring that evidence) (“A court exercises its discretion in an untenable and manifestly unreasonable way when it essentially guesses at an income amount. Here there was ample reliable evidence for the court to set an accurate income estimate, but the court ignored it.”)

Calculate full-time earnings using either:

1. Current rate of pay;
2. Historical rate of pay based on reliable information;
3. Past rate of pay, if current information is incomplete or sporadic; or
4. Minimum wage where the parent lives when the parent has a history of minimum wage or government assistance is recently released from incarceration or is a high school student.

Ch. 26.19 RCW Appendix Instructions. The instructions further provide that if the court “cannot use any of the above methods, impute the parent’s net monthly income using [the approximate median net monthly income table].” *Id.*

These instructions make clear that there are three circumstances in which a court must impute income: 1) when a parent is voluntarily unemployed; 2) when a parent is voluntarily underemployed; and 3) when the court no records of a parent’s actual earnings. In each of these instances, the court then imputes income based upon the list of priorities set forth in RCW 26.19.071(6), using the first method possible.

It is interesting to note that the 2011 Order of Child Support entered by the superior court commissioner on July 6, 2011, actually includes language regarding the priorities referenced in the statute. As noted above, that order states:

For purposes of this Order of Child Support, the support obligation is based upon the following income:

- C. The net income of the obligor is imputed at \$3,448.00 because:
the obligor is voluntarily unemployed.¹⁰

The amount of imputed income is based on the following information in order of priority. The court has used the first option for which there is information:

Median Net Monthly Income
Table.

(CP 75)

Of course, it is abundantly clear from the record that the median net monthly income table was not the first option for which there was information. Mr. Bradley supplied information, but the court simply ignored it. The language used in the 2011 Order of Child Support was based upon the forms approved by the administrative office of the courts.¹¹

The “Order of Child Support” form provides:

- C. [] The net income of the obligor is imputed at \$ _____ because:

¹⁰ As noted above, this is a typo and should state “underemployed” to be consistent with the court commissioner’s oral and written findings.

¹¹ See RCW 26.18.220(1) (“The administrative office of the courts shall develop . . . standard court forms and format rules for mandatory use by litigants in all actions commenced under chapters 26.09, 26.10, and 26.26 RCW The administrative office of the courts has continuing responsibility to develop and revise mandatory forms and format rules as appropriate.”)

- the obligor's income is unknown.
- the obligor is voluntarily unemployed.
- the obligor is voluntarily underemployed.

The amount of imputed income is based on the following information in order of priority. The court has used the first option for which there is information:

- current rate of pay.
- reliable historical rate of pay information.
- Past earnings when there is incomplete or sporadic information of the parent's past earnings.
- minimum wage in the jurisdiction where the parent lives at full-time earnings because the parent:
 - has a recent history of minimum wage jobs,
 - recently came off public assistance, general assistance-unemployable, supplemental security income, or disability
 - was recently released from incarceration, or
 - is a high school student.
- Median Net Monthly Income Table.

WPF DR 01.0500. The language of the approved form order supports Mr. Bradley's reading of the statute. Moreover, this reading of RCW 26.19.071(6) assures that where there is evidence of income, the court cannot simply ignore that evidence and impute at the median net monthly income level because it thinks that is the appropriate level. Rather, the

court is required to impute income based upon the priorities set forth in the statute.

If this Court concludes that the language in RCW 26.19.071(6) is “susceptible to two or more reasonable interpretations,” *Armendariz*, 160 Wash.2d at 110, 156 P.3d 201, the statute is ambiguous. Therefore, this Court may “review legislative history to determine the scope and purpose of [the] statute.” *Wash. Fed’n of State Employees*, 98 Wash.2d at 684-85, 658 P.2d 634.

The final bill report to House Bill 1794, which was ultimately adopted by the legislature, is instructive. A summary regarding imputation of income under former RCW 26.19.071(6) is set forth in the report as follows:

Imputation of Income.

The court will impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. In the absence of information to the contrary, a parent’s imputed income will be based on the median income of year-round full-time workers as derived from reports from the U.S. Census Bureau.

See Final Bill Report, ESHB 1794, at 2, 61st Leg., Reg. Sess. (Wash. 2009). The report also includes a summary of how the changes to RCW 26.19.071(6), as set forth in House Bill 1794, would affect the court’s

determination in imputing income to a parent who is unemployed or underemployed:

Imputing Income When a Parent is Unemployed or Underemployed.

Before looking to information from the U.S. Census Bureau to determine the amount of income to impute, the court must impute a parent's income based on the following information in the following order:

- full-time earnings at the current rate of pay;
- full-time earnings at the historical rate of pay;
- full-time earnings at a past rate of pay where information is incomplete or sporadic; and
- full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is coming off public assistance or other programs, has recently been released from incarceration, or is a high school student.

Final Bill Report, ESHB 1794, at 3-4 (emphasis added).

While the final bill report is not a statement of legislative intent, it is indicative of how RCW 26.19.071(6) is meant to operate. The revision court erred in its interpretation and application of RCW 26.19.071(6) and, therefore, erred in denying Mr. Bradley's motion for revision. RCW 26.19.071(6) clearly sets forth a list of priorities that the court is required to utilize when imputing income to a parent who is voluntarily unemployed or underemployed. The court's failure to follow the mandatory language of the statute was error.

C. Attorney's Fees on Appeal

Mr. Bradley requests, pursuant to RCW 26.09.140 and RAP 18.1, that this Court award him attorney's fees on appeal. RCW 26.09.140 provides, in relevant part: "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs."

V. CONCLUSION

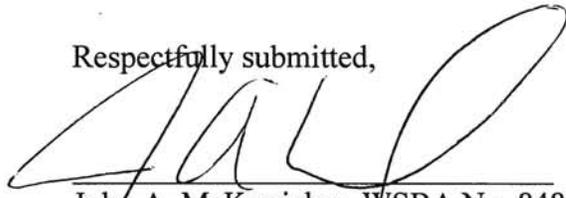
This Court should determine that the revision court erred in denying Mr. Bradley's motion for revision of the superior court commissioner's ruling. The revision court incorrectly relied upon the law of the case doctrine to impose a provision from the 2008 Order of Child Support that was contrary to the law as it existed at the time modification of the order was sought. The revision court, and the superior court commissioner, erred in the interpretation and application of RCW 26.19.071(6). The revision court, and the superior court commissioner, erred in using the median net monthly income table to impute income to Mr. Bradley, as Mr. Bradley provided sufficient information to impute his income based upon the first priority set forth in the statute.

For the reasons and based upon the authorities cited above, Mr. Bradley respectfully requests that this Court reverse the revision court and

remand the case for entry of an order granting his motion for revision of the commissioner's ruling and to correctly apply RCW 26.19.071(6) to impute income to Mr. Bradley based upon full-time earnings at his current rate of pay.

DATED: January 31, 2012

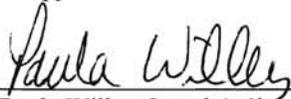
Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that on January 31, 2012, I deposited in the U.S. mail a properly stamped and addressed envelope directed to the attorneys of record for the respondent containing a copy of the document to which this certification is attached.



Paula Willey, Legal Assistant
Mano, McKerricher & Paroutaud, Inc., P.C.

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STATE OF WASHINGTON
BY _____